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A DIGEST  
OF  
RAILWAY DECISIONS.

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EMBRACING  
*ALL THE CASES FROM THE EARLIEST PERIOD OF RAILWAY  
LITIGATION TO THE PRESENT TIME*  
IN THE  
UNITED STATES, ENGLAND AND CANADA.

BY  
STEWART RAPALJE  
AND  
WILLIAM MACK.

VOLUME I.

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## PREFACE.

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THIS work has been prepared under the belief that an urgent need for it has existed for a considerable length of time.

During more than sixty years of railway litigation, increasing from year to year in a ratio so astonishing as to almost satisfy the rule of geometrical progression, only one special digest has appeared.\* That work, the second and final volume of which was published in 1884, contains about 20,000 points of law; this one, published ten years later, contains about 75,000, or nearly four times as many as its predecessor.

Assuming that the learned author of the earlier work collected all the cases then reported, which he claims to have done—and we have no intention to dispute his claim—it follows that the courts have furnished nearly three times as much railway law during the last ten years as they did during the fifty years of railway litigation which preceded that period. If this be true, surely the present work is needed; and if, on the other hand, the fact be that the former work did not cover all the cases, or approximately all of them, then, *a fortiori*, a thorough and exhaustive digest of the entire body of railway case law has become an urgent necessity, for it is undoubtedly true that a large majority of the cases which are here digested and which do not appear in the former work have hitherto been practically inaccessible to the brief-maker, because scattered through a multitude of digests, and not thoroughly digested in any.

In gathering the materials for this work nearly six thousand volumes of American, English, and Canadian reports have been carefully examined, page by page. We have not relied upon the labors of other digest-makers, but have done the work afresh, endeavoring to cull from the decisions every point of railway law to be found in them, whether decided in a distinctively railway case or not.

Fulness of statement has been preferred to a brevity that might mislead in view of the inaccessibility of some of the reports embraced. To secure accuracy every citation has been twice verified, once in the manuscript and again in the proof-sheets.

The classification adopted is minute, logical, and scientific, and the arrangement

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\* Mr. Lacey's, in two volumes, the first covering forty years and the second ten.

of the matter under divisions, subdivisions, and numbered "captions" or "catch-lines" is so simple that it is believed the reader will meet with less difficulty in finding what he wants in this than in any other digest extant.

The AMERICAN AND ENGLISH RAILROAD CASES, covering the years 1881 to 1894, including cases reported in full, cases abstracted, and annotations, are completely digested herein down to and including volume 58.

Following the principal case, references to all reports of which, official and unofficial, are given, will be found listed the authorities upon which it is based, or which it distinguishes, or reviews in any way; and following these is given a full reference to all subsequent decisions in which the principal case is itself passed upon, so far as the precise point in question is concerned. In this way the judicial history of every railway case is given, and its weight as authority upon each and every one of its holdings becomes a matter of easy ascertainment.

*The titles of the principal cases, i.e., the cases directly deciding the points of law given in the text, are printed in italics; those in Roman type are the cases passed upon in, or which pass upon, the principal cases. Where two or more principal cases are grouped, the citations which follow are to be referred to the principal case last cited, and not to the whole group.*

Full cross-references, specific in character, and sufficient in number to make the work its own index, will be found throughout the alphabet of titles. In addition to this a complete and thoroughly reliable index to the entire contents of the work will be given in the proper place.

The table of cases digested will refer to each place where any given case appears in the Digest; it will also give a complete list of all railway cases which approve, distinguish, follow, disapprove, or in any other way pass upon it, and also those which cite it, even though it be merely to back up an elementary principle of law laid down by the court.

Still another and, in our view, a very important and useful feature of the Digest is the very large number of references, in the foot-notes, to important annotations (many of them monographs in themselves) scattered through the AMERICAN AND ENGLISH RAILROAD CASES, AMERICAN DECISIONS, AMERICAN REPORTS, AMERICAN STATE REPORTS, and LAWYERS' REPORTS ANNOTATED. All that is of value to the railroad lawyer in the notes given in the above standard series is referred to in every appropriate place in the Digest.

In concluding we desire to express our thanks to a number of gentlemen, some of them the publishers, and others the reporters, of many of the most authoritative and most ably-edited sets of our reports, for their very kind permission to use their copyrighted *syllabi*, of which permission we have availed ourselves in very many instances, thus considerably lightening our labors and expediting the completion of the work. Our thanks for this courtesy are due to A. Moore Berry, Esq., St. Louis, Mo.; Hon. Henry N. Blake, Helena, Mont.; The Bowen-Merrill Co., Indianapolis, Ind.; Hon. Horace R. Buck, Helena, Mont.; Hon. Lorenzo Crounse, Lincoln, Neb.;

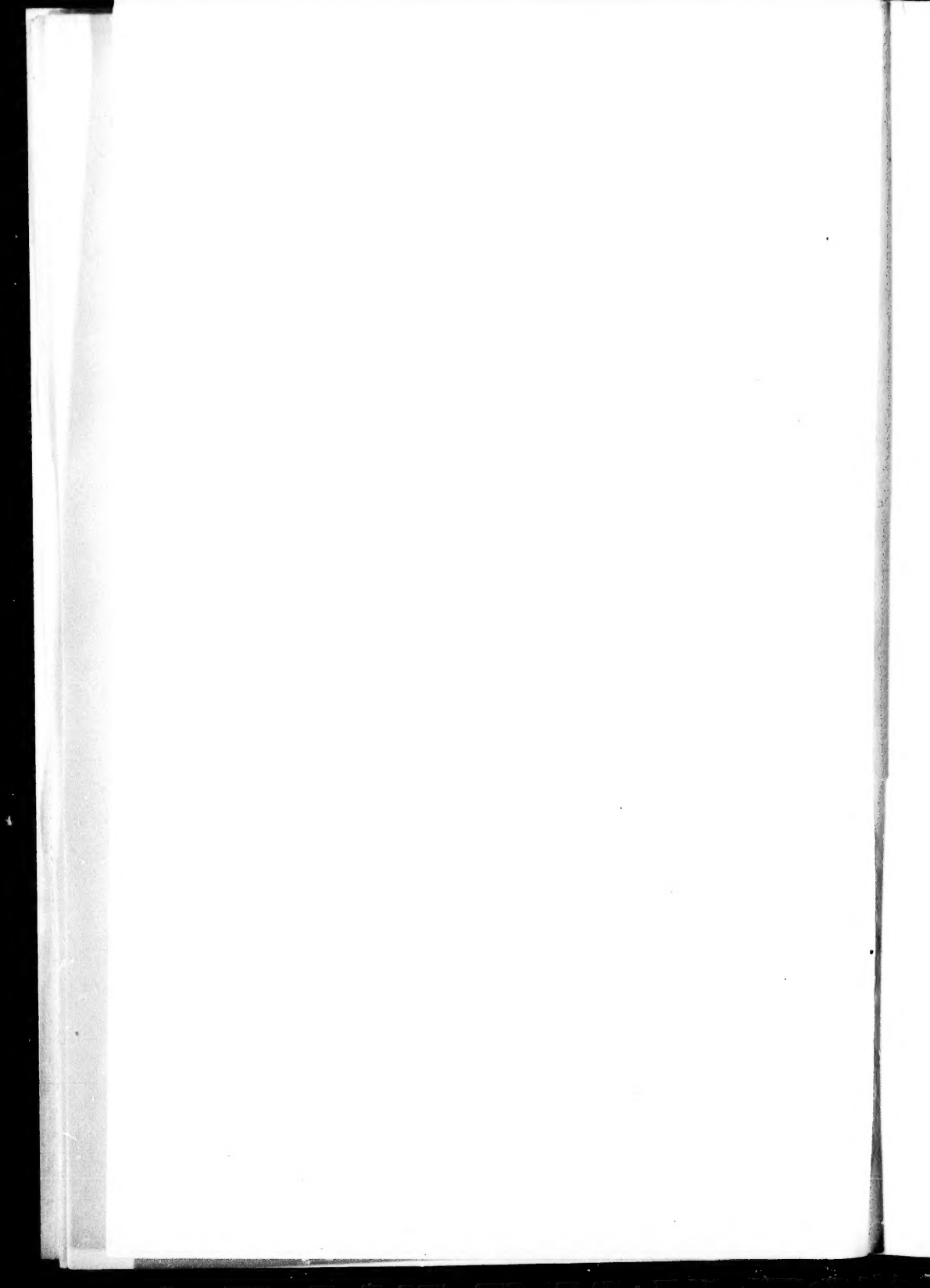
## PREFACE.

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S. Meredith Dickinson, Esq., Trenton, N. J.; L. B. France, Esq., Denver, Colo.; Norman L. Freeman, Esq., Springfield, Ill.; Hon. James Z. George, Washington, D. C.; John L. Griffiths, Esq., Indianapolis, Ind.; Moses Hallett, Esq., Denver, Colo.; Hon. N. J. Hammond, Atlanta, Ga.; G. W. Hansbrough, Esq., Salem, Va.; George E. Harris, Esq., Washington, D. C.; Hon. J. B. Heiskell, Memphis, Tenn.; J. B. H. Hemingway, Esq., Clayton, New Mex.; Messrs. Kay & Brother, Philadelphia, Pa.; Messrs. Loring, Short & Harmon, Portland, Me.; J. M. Moore, Esq., Little Rock, Ark.; Messrs. John P. Morton & Co., Louisville, Ky.; Charles E. Nash, Esq., Augusta, Me.; Joseph Poland, Esq., Montpelier, Vt.; Messrs. Rees, Welsh & Co., Philadelphia, Pa.; John W. Rowell, Esq., West Randolph, Vt.; J. B. Sanborn, Esq., Concord, N. H.; E. W. Stephens, Esq., Columbia, Mo.; J. Shaaff Stockett, Esq., Annapolis, Md.; W. G. Veazey, Esq., Rutland, Vt.; J. M. Woolworth, Esq., Omaha, Neb.; Hon. George B. Young, St. Paul, Minn.

S. R.  
W. M.

November, 1894.



# TABLE OF REPORTS EMBRACED

SHOWING THE ABBREVIATIONS USED.\*

REPORTS.	HOW CITED.
Abbott's New York Appeal Decisions, vols. 1-4.....	Abb. App. Dec. (N. Y.).
Abbott's New York New Cases, vols. 1-30.....	Abb. N. Cas. (N. Y.).
Abbott's New York Practice Reports, vols. 1-19.....	Abb. Pr. (N. Y.).
Abbott's New York Practice Reports, New Series, vols. 2-16.....	Abb. Pr. N. S. (N. Y.).
Abbott's U. S. Circuit and District Court Reports, vols. 1, 2.....	Abb. (U. S.).
Alabama Reports, vols. 2-98.....	Ala.
Allen's Massachusetts Reports, vols. 1-14.....	Allen (Mass.).
American and English Railroad Cases, vols. 1-58.....	Am. & Eng. R. Cas.
American Railway Reports, vols. 1-21.....	Am. Ry. Rep.
Appeal Cases, District of Columbia, vol. 1.....	App. Cas. (D. C.).
Arkansas Reports, vols. 9-57.....	Ark.
Atlantic Reporter, vols. 1-26.....	Atl. Rep.
Bailey's South Carolina Reports, vols. 1, 2.....	Bailey (So. Car.).
Baldwin's U. S. Circuit Court Reports, vol. 1.....	Baldw. (U. S.).
Barbour's New York Chancery Reports, vol. 2.....	Barb. Ch. (N. Y.).
Barbour's New York Supreme Court Reports, vols. 3-67.....	Barb. (N. Y.).
Baxter's Tennessee Supreme Court Reports, vols. 1-9.....	Baxt. (Tenn.).
Bay's South Carolina Superior Court Reports, vol. 1.....	Bay (So. Car.).
Benedict's U. S. District Court Reports, vols. 2-10.....	Ben. (U. S.).
Bissell's U. S. Circuit and District Court Reports, vols. 1-11.....	Biss. (U. S.).
Blackford's Indiana Supreme Court Reports, vols. 4, 5.....	Blackf. (Ind.).
Black's U. S. Supreme Court Reports, vols. 1-2.....	Black (U. S.).
Bland's Maryland Chancery Reports, vol. 3.....	Bland's Ch. (Md.).
Blatchford's U. S. Circuit Court Reports, vols. 2-24.....	Blatchf. (U. S.).
B. Monroe's Kentucky Court of Appeals, vols. 3-18.....	B. Mon. (Ky.).
Bond's U. S. Circuit and District Court Reports, vols. 1, 2.....	Bond (U. S.).
Bosworth's New York City Superior Court Reports, vols. 2-10.....	Bosw. (N. Y.).
Brewster's Pennsylvania Reports, vols. 1-4.....	Brews. (Pa.).
Brightly's Pennsylvania Nisi Prius Reports, vol. 1.....	Bright N. P. (Pa.).
British Columbia Reports, vol. 2.....	British Col.
Brunner's U. S. Circuit Court Collective Cases, vol. 1.....	Brun. Col. Cas.
Busbee's North Carolina Supreme Court Reports, vol. 1.....	Busb. (N. Car.).

\* The English reports prior to 1865, when the "Law Reports" began, though cited in the text are not referred to in this TABLE. The early volumes of many sets of reports are not included herein for the reason that they contain no railway decisions. They antedate the period of railway litigation.

REPORTS.	HOW CITED.
Bush's Kentucky Court of Appeals Reports, vols. 1-14.....	Bush (Ky.).
California Reports, vols. 1-100.....	Cal.
Canada Exchequer Reports, vols. 1-3.....	Can. Exch.
Canada Supreme Court Reports, vols. 1-20.....	Can. Sup. Ct.
Chase's U. S. Circuit Court Reports, vol. 1.....	Chase (U. S.).
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Flippin's U. S. Circuit and District Court Reports, vols. 1, 2.....	Flipp. (U. S.).
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Harrington's Delaware Reports, vols. 4, 5.....	Harr. (Del.).
Head's Tennessee Supreme Court Reports, vols. 1-3.....	Head (Tenn.).
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Howard's New York Appeal Cases, vol. 1.....	How. App. Cas. (N. Y.).

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Howard's New York Practice Reports, vols. 1-67.....	How. Pr. (N. Y.).
Howard's New York Practice Reports, New Series, vols. 1-3.....	How. Pr. N. S. (N. Y.).
Howard's U. S. Supreme Court Reports, vols. 2-24.....	How. (U. S.).
Hughes' U. S. Circuit and District Court Reports, vols. 1-4.....	Hughes (U. S.).
Humphrey's Tennessee Supreme Court Reports, vols. 4-11.....	Humph. (Tenn.).
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Idaho Reports, vols. 1, 2.....	Idaho.
Illinois Appellate Court Reports, vols. 1-49.....	Ill. App.
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Indiana Appellate Court Reports, vols. 1-5.....	Ind. App.
Indiana Reports, vols. 2-133.....	Ind.
Interstate Commerce Commission Reports, vols. 1-5.....	Int. Com. Com.
Interstate Commerce Reports, vols. 1-3.....	Int. Com. Rep.
Iowa Reports, vols. 1-85.....	Iowa.
Iredell's North Carolina Equity Reports, vol. 3.....	Ired. Eq. (N. Car.).
Iredell's North Carolina Law Reports, vols. 1-12.....	Ired. (N. Car.).
Johnson's New York Supreme Court Reports, vols. 6, 12.....	Johns. (N. Y.).
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Jones' North Carolina Equity Reports, vols. 1-5.....	Jones Eq. (N. Car.).
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Kansas Reports, vols. 2-52.....	Kan.
Kentucky Reports, vols. 78-92.....	Ky.
Keyes' New York Court of Appeals Reports, vol. 4.....	Keyes (N. Y.).
Lansing's New York Supreme Court Reports, vols. 1-7.....	Lans. (N. Y.).
Law Reports, Appeal Cases, vols. 1-15.....	App. Cas.
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Law Reports, Appeal Cases, vol. 1.....	[1892] A. C.
Law Reports, Appeal Cases, vol. 1.....	[1893] A. C.
Law Reports, Chancery Appeals, vols. 1-10.....	L. R. Ch. App.
Law Reports, Chancery Division, vols. 1-45.....	Ch. D.
Law Reports, Chancery Division, vols. 1-3.....	[1891] Ch.
Law Reports, Chancery Division, vols. 1-3.....	[1892] Ch.
Law Reports, Chancery Division, vols. 1-3.....	[1893] Ch.
Law Reports, Common Pleas, vols. 1-9.....	L. R. C. P.
Law Reports, Common Pleas Division, vols. 1-5.....	C. P. D.
Law Reports, English and Irish Appeals, vols. 1-7.....	L. R. E. & I. App.
Law Reports, Equity Cases, vols. 1-20.....	L. R. Eq.
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Law Reports, Exchequer Division, vols. 1-5.....	Ex. D.
Law Reports, Probate Division, vols. 1-15.....	P. D.
Law Reports, Probate Division, vol. 1.....	[1891] P.
Law Reports, Probate Division, vol. 1.....	[1892] P.
Law Reports, Probate Division, vol. 1.....	[1893] P.
Law Reports, Queen's Bench, vols. 1-10.....	L. R. Q. B.
Law Reports, Queen's Bench Division, vols. 1-25.....	Q. B. D.
Law Reports, Queen's Bench Division, vols. 1, 2.....	[1891] Q. B.
Law Reports, Queen's Bench Division, vols. 1, 2.....	[1892] Q. B.
Law Reports, Queen's Bench Division, vols. 1, 2.....	[1893] Q. B.
Railway and Canal Traffic Cases.....	Ry. & C. T. Cas.
Lea's Tennessee Supreme Court Reports, vols. 1-16.....	Lea (Tenn.).
Leigh's Virginia Appeal and General Court Reports, vols. 8-12.....	Leigh (Va.).
Louisiana Annual Reports, vols. 1-44.....	La. Ann.
Lowell's U. S. Circuit and District Court Reports, vols. 1, 2.....	Low. (U. S.).
Lower Canada Reports, vols. 2-17.....	Low. Can.
MacArthur and Mackey's D. C. Reports, vol. 1.....	MacArth. & M. (D. C.).
MacArthur's D. C. Reports, vols. 1-3.....	MacArth. (D. C.).



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Mackey's D. C. Reports, vols. 1-9.....	Mackey (D. C.).
Maine Reports, vols. 18-85.....	Me.
Manitoba Queen's Bench Reports, vols. 1-8.....	Man.
Manitoba Reports, temp. Wood, vol. 1.....	Man. (T. Wood).
Manning's Louisiana Unreported Cases, vol. 1.....	Man. (La.).
Maryland Chancery Reports, vol. 1.....	Md. Ch.
Maryland Reports, vols. 1-76.....	Md.
Massachusetts Reports, vols. 97-159.....	Mass.
McCrary's U. S. Circuit Court Reports, vols. 1-5....	McCrary (U. S.).
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Mississippi Reports, vols. 4-70.....	Miss.
Missouri Appeal Reports, vols. 1-54.....	Mo. App.
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Montana Reports, vols. 2-12.....	Mont.
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New Jersey Law Reports, vols. 14-54.....	N. J. L.
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New York Court of Appeals Reports, vols. 2-141.....	N. Y.
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Paige's New York Chancery Reports, vols. 3-10.....	Paige (N. Y.).
Parker's New York Criminal Reports, vols. 3, 5.....	Park. Cr. (N. Y.).
Pennsylvania District Court Reports, vols. 1, 2.....	Pa. Dist.
Pennsylvania State Reports, vols. 2-158.....	Pa. St.
Pennypacker's Pennsylvania Supreme Court Reports, vols. 1-3.....	Pennyp. (Pa.).
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Philadelphia Reports, vols. 1-20.....	Phila. (Pa.).

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Phillips' North Carolina Supreme Court Reports, vol. 1.....	Phil. (N. Car.).
Pickering's Massachusetts Supreme Court Reports, vols. 8-23.....	Pick. (Mass.).
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Porter's Alabama Supreme Court Reports, vols. 1, 4.....	Port. (Ala.).
Quebec Law Reports, vols. 4-15.....	Quebec L. R.
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Robertson's New York Superior Court Reports, vols. 1-7.....	Robt. (N. Y.).
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Sawyer's U. S. Circuit and District Court Reports, vols. 1-14.....	Saw. (U. S.).
Sheldon's New York Superior Court Reports, vol. 1.....	Sheld. (N. Y.).
Silvernail's New York Court of Appeals Reports, vols. 1-4.....	Silv. App. (N. Y.).
Silvernail's New York Supreme Court Reports, vols. 1-5.....	Silv. Sup. Ct. (N. Y.).
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Texas Appeals Civil Cases, vols. 1-4.....	Tex. App. (Civ. Cas.).
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Texas Unreported Cases, vols. 1, 2.....	Tex. Unrep. Cas.
Thompson & Cook's New York Supreme Court Reports, vols. 1-6.....	T. & C. (N. Y.).
United States Court of Claims, vols. 3-28.....	Ct. of Cl.
United States Supreme Court Reports, vols. 91-152.....	U. S.
Upper Canada Chancery Chambers Reports, vols. 1-3.....	Chan. Chamb. (U. C.).
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Utah Reports, vols. 1-9.....	Utah.
Vermont Reports, vols. 16-65.....	Vt.
Virginia Cases, General Court, vol. 2.....	Va. Cas.
Virginia Reports, vols. 75-89.....	Va.
Walker's Michigan Chancery Reports, vol. 1.....	Walk. (Mich.).
Wallace's U. S. Supreme Court Reports, vols. 1-23.....	Wall. (U. S.).
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Watts & Sargeant's Pennsylvania Supreme Court Reports, vols. 1-8....	Watts & S. (Pa.).
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# DIGEST

## OF

# RAILWAY DECISIONS.

## A

### ABANDONMENT.

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 — streets and highways, see STREETS AND HIGHWAYS, I, 3.

When a defence to suit on subscription to stock, see SUBSCRIPTIONS TO STOCK, III, 6.

1. **Generally — Intent.\*** — Abandonment consists in a great measure of intent, and is always voluntary, no matter whether the causes which induce it are within the control of a party or not. *Hart v. Boston, H. & E. R. Co.*, 40 Conn. 524.

2. **Of right of way.†** — The mere non-user of a right of way granted to a company will not extinguish the easement where there is no adverse possession or where there are no acts on the part of the company from which an abandonment can be clearly inferred. *Roanoke Inv. Co. v. Kansas City & S. E. R. Co. (Mo.)*, 51 Am. & Eng. R. Cas. 426, 17 S. W. Rep. 1000.

To constitute an abandonment of any part of the right of way, there must not only be non-user but an intention to abandon.

\* Abandonment by railroad companies generally, see note, 10 AM. & ENG. R. CAS. 143.

† Abandonment of location or right of way, see notes, 51 AM. & ENG. R. CAS. 436; 10 ID. 143.

Sale of right of way to another company not an abandonment. See note, 14 AM. & ENG. R. CAS. 51.

1 D. R. D.—1.

don. *Durfee v. Peoria, D. & E. R. Co.*, 140 Ill. 435, 30 N. E. Rep. 686.

Where a railway company entered into an agreement with another company, whereby the former acquired, by lease, the right to run its trains over the tracks of the latter for ten years, and then removed the ties and rails on its own road and failed to occupy the land over which its road passed for nine or ten years, but without an intention to permanently abandon the same, held, that such company, by its acts, did not lose its right of way. *Durfee v. Peoria, D. & E. R. Co.*, 140 Ill. 435, 30 N. E. Rep. 686.

The statute declaring that non-user for five years of any "turnpike, plank-road, canal, or slack-water navigation or public highway of any company or corporation" shall constitute an abandonment has no application to a railroad company, which will not by a mere lapse of five years' time be presumed to have abandoned its right of way for constructing branch lines. *Pittsburgh, V. & C. R. Co. v. Pittsburgh, C. & S. L. R. Co. (Pa.)*, 57 Am. & Eng. R. Cas. 46, 28 Atl. Rep. 155.

Where no statute requires a company, after making a location, to keep stakes in position along the proposed line, or any map to be recorded, the failure to keep its lines staked out will not imply abandonment of the location so as to estop the company from denying the right of another company to construct its road on such location. *Pittsburgh, V. & C. R. Co. v. Pittsburgh, C. & S. L. R. Co. (Pa.)*, 57 Am. & Eng. R. Cas. 46, 28 Atl. Rep. 155.

Where a company acquired the right of

way prior to 1856, but transferred to another company chartered subsequent to said date, such right of way is property, and it is not competent for the legislature to give it to another corporation without making compensation; but proof of non-user of ten years is sufficient proof that the company has abandoned the right of way, and being so abandoned it is within the constitutional power of the legislature to grant it to another company. *Henderson v. Central Pass. R. Co.*, 20 Am. & Eng. R. Cas. 542, 21 Fed. Rep. 358.—DISTINGUISHING *Hestonville R. Co. v. Philadelphia*, 89 Pa. St. 215.

Where a railroad company, more than twenty years before an action of ejectment was brought, had surveyed and located its line on land described in the complaint, and had constructed its road-bed by the building of embankments and cuts, but before any rails or cross-ties had been laid desisted from the work, and did not return to it until after the purchase by plaintiff of the land on which the right of way was located, when the timber which had meantime grown on the road-bed was removed, the road-bed refilled, and defendant's railway constructed, the question of abandonment of such right of way was for the jury. *Tennessee & C. R. Co. v. Taylor (Ala.)*, 57 Am. & Eng. R. Cas. 296, 14 So. Rep. 379.

The C. R. Co. procured a right of way to run from the track of the M. R. Co. through the streets of Columbus, toward S., and subsequently, under a running agreement with said M. R. Co., gave the control of its road to that company, and, by that company, and with the consent of the C. Co. (the track through the streets still remaining), the road superstructure of the C. Co. adjoining the city was removed for the distance of a mile beyond the city, and the remaining track to S. was connected with the road of the M. R. Co. around said city, through lands with the owner of which the latter company contracted to procure a release for him from the C. Co. of the right of way over the land where the superstructure was removed. Held, that this did not constitute an abandonment of the right of the C. R. Co. to maintain a track through the streets of Columbus. *Columbus v. Columbus & S. R. Co.*, 37 Ind. 294, 3 Am. Ry. Rep. 70.

**3. Of construction of road.**—The right to construct a railroad and the right of abandonment are not necessarily the

same; the right to abandon a right of way does not always result from the right not to construct. *People v. Albany & V. R. Co.* 37 Barb. (N. Y.) 216.

The abandonment of the construction of a railroad does not, of itself, constitute a defence to a suit to recover debts due the company; whilst the corporate organization remains, they may collect dues in their corporate name for the payment of debts. *Hardy v. Merriweather*, 14 Ind. 203.

A right of way is not forfeited by a failure to occupy it for thirteen years, growing out of delay in the construction of the road. Mere non-user of an easement of this character, acquired by deed, will not operate to defeat or impair the right. *Barlow v. Chicago, R. I. & P. R. Co.*, 29 Iowa 276.—DISTINGUISHED IN *Ball v. Keokuk & N. W. R. Co.*, 20 Am. & Eng. R. Cas. 375, 62 Iowa 751. FOLLOWED IN *Noll v. Dubuque, B. & M. R. Co.*, 32 Iowa 66.

A plea that parties had forfeited a right of way by voluntarily abandoning the construction of railroads in certain streets, and by failing to construct said roads within the time limited by contract, is not made out when proved that they were prohibited to do the work by an injunction from a third party; and because the injunction taken in September, 1866, was not dissolved before June, 1872, it is not to be inferred that it was kept so long in force by the wish and connivance of the relators, when the city was a party to the injunction suit, and having the same right to push the case that the relators had, did not do so. *State ex rel. v. Cockrem*, 25 La. Ann. 356.

**4. Of part of road.**—A railway company is bound to construct its road to and from the several points named in its charter, and, when built, to run its trains over its entire line, in such a manner as to afford reasonable facilities for the prompt and efficient transaction of such legitimate business as may be offered to it on any and every part of its road; and this obligation is equally binding on its successors. No part of the road can be abandoned without rendering its franchises liable to forfeiture. *People ex rel. v. Louisville & N. R. Co.*, 120 Ill. 48, 10 N. E. Rep. 657.—APPROVED IN *Illinois C. R. Co. v. People*, 143 Ill. 434.

A company has not the unrestricted right to abandon a part of a road which is necessary to preserve an unbroken line, but the government in a proper case may interfere

to prevent the abandonment or to control it. *People v. Albany & V. R. Co.*, 37 Barb. (N. Y.) 216; *affirming* 11 Abb. Pr. 136, 19 How. 523.—*APPROVING* *Rex v. Severn & W. Ry.*, 2 Barn. & Ald. 646.

A company chartered to build and operate a road between certain designated points cannot operate the road only from the point of beginning to an intermediate point and abandon the remainder of the line. If it does so, its corporate existence may be annulled or its charter declared vacated by a proper proceeding. *People v. Albany & V. R. Co.*, 24 N. Y. 261; *affirming* 16 Abb. Pr. 465.

Where a company fails to build its road over the entire line chartered, but builds a portion of the line and abandons the remainder, the proper remedy is an action in the name of the people to vacate the charter; a suit in equity to compel a specific performance of the obligation of the company to build the entire line will not lie. *People v. Albany & V. R. Co.*, 24 N. Y. 261; *affirming* 16 Abb. Pr. 465.—*REVIEWED IN* *Port Clinton R. Co. v. Cleveland & T. R. Co.*, 13 Ohio St. 544.

It is not the province of highway commissioners to seek to prevent, by injunction or otherwise, a railroad company from abandoning a portion of its route on a highway. *Moore v. Brooklyn City R. Co.*, 31 Hun (N. Y.) 90.

A company cannot question the constitutionality of Act No. 275, Laws of 1887 (3 How. Mich. Stat. §§ 3457a, 3457b), which makes it unlawful for any railroad company whose road has been constructed, wholly or in part, by public or local aid, to take up, abandon, or cease the operation of any portion of its road, etc., in a suit instituted by the company under the provisions of the act to obtain an order or decree authorizing such abandonment. *Flint & P. M. R. Co. v. Rich*, 91 Mich. 293, 51 N. W. Rep. 1001.

A railroad company cannot be permitted to abandon a portion of its road under Act No. 275, Laws of 1887, without reimbursing those individuals who contributed to its construction and advanced as a bonus either money, labor, or material. *Flint & P. M. R. Co. v. Rich*, 91 Mich. 293, 51 N. W. Rep. 1001.—*DISTINGUISHING* *Ayres v. Dutton*, 87 Mich. 528.

The provisions of section 1260, Code of Iowa, as amended by act of 1874, in relation

to the abandonment of a railroad line, clearly contemplate there may be an abandonment of a part of a constructed railway. Whether an abandonment exists depends upon the circumstances of each case. *Central Iowa R. Co. v. Moulton & A. R. Co.*, 10 Am. & Eng. R. Cas. 138, 57 Iowa 249, 10 N. W. Rep. 639.

**5. Of station.\***—A railway company which, in the interests of economy, has abandoned a station and established two others, thereby hoping to increase the business of the road, will not be compelled to re-establish the station abandoned where the evidence shows no patron of the road is inconvenienced by the change. *State v. Des Moines & K. C. R. Co. (Iowa)*, 54 N. W. Rep. 461.

The plaintiff agreed with the contractors for the building of a railway to convey to them in fee simple six acres, to be increased to ten if necessary, in consideration of their placing the station for the town of P. thereon. After the road had been surveyed and the station buildings erected on the property, the plaintiff executed a conveyance thereof to the contractors, which contained a covenant by them to continue and maintain the station on those lands from thenceforth, but the deed was never executed by the grantees. The company continued to use such station for about ten years, when they removed it to a distance of one and a half miles. *Held*, that the act of the company in thus placing and using the station was a substantial compliance with the agreement, and that they were not bound to continue that station there for all time. *Jessup v. Grand Trunk R. Co.*, 7 Ont. App. 128; *reversing* 28 Grant Ch. 583.

**6. Evidence on question of abandonment.**—An abandonment of a right of way is usually and properly shown by acts which do not appear of record; and it need not appear of record in order to be effectual. *Westcott v. New York & N. E. R. Co.*, 152 Mass. 465, 25 N. E. Rep. 840.

The failure of a company to complete its road, and permitting the owners to use the land upon which its line is located for the prescribed statutory period, and for pur-

\* Removal and abandonment of railroad stations, see note, 50 AM. & ENG. R. CAS. 14. See also STATIONS AND DEPOTS, III, 1.

What constitutes a station within the meaning of statutes relating to the abandonment of stations, see note, 21 AM. & ENG. R. CAS. 241.

poses inconsistent with its occupation and use as a railroad, is evidence of an intention to surrender the easement, and may constitute an abandonment of the right of way. *Beattie v. Carolina Cent. R. Co.*, 46 *Am. & Eng. R. Cas.* 524, 108 *N. Car.* 425, 12 *S. E. Rep.* 913.

Proof that a railway company has occupied a highway for 30 years for the purposes of its road and with the consent of the county commissioners is sufficient to show an abandonment of the highway. *Louisville, N. A. & C. R. Co. v. Shanklin*, 19 *Am. & Eng. R. Cas.* 555, 98 *Ind.* 573.—DISTINGUISHING *Louisville, N. A. & C. R. Co. v. Francis*, 58 *Ind.* 389; *Louisville, N. A. & C. R. Co. v. Wysong*, 58 *Ind.* 597; *Croy v. Louisville, N. A. & C. R. Co.*, 97 *Ind.* 126.

Where a company ceases to run cars over a portion of its road for 12 years, the question of abandonment is one to be determined from the facts, and not from testimony as to the intention of the officers of the railroad company either at the outset or during such period. *Hickox v. Chicago & C. S. R. Co.*, 94 *Mich.* 237, 53 *N. W. Rep.* 1105.

Proof that a street railway company fails for 11 years to exercise a chartered right, at its option, to use a portion of another road is sufficient to show an abandonment of the right, and to justify a court in declaring it forfeited as to other companies. *Girard College P. R. Co. v. 13th & 15th Sts. R. Co.*, 7 *Phila. (Pa.)* 620.—FOLLOWING *Commonwealth v. Erie & N. E. R. Co.*, 27 *Pa. St.* 339.

Where a question of the abandonment of part of a right of way is raised, a deed to trustees who were temporarily in possession of the strip of land, reciting that in their opinion increase of business required its purchase, is admissible in evidence. *Westcott v. New York & N. E. R. Co.*, 152 *Mass.* 465, 25 *N. E. Rep.* 840.

It appeared that a railroad was originally located on a right of way 5 rods wide, but soon after the road was located the directors passed an order providing for narrowing the right of way at certain places. At a particular place thereafter damages were awarded for the right of way for 4 rods instead of 5, and for 30 years thereafter the company maintained a fence which marked its right of way as 4 rods wide. Held, that the evidence was sufficient to warrant a verdict of abandonment of the extra rod. *Westcott v. New York & N. E. R. Co.*, 152 *Mass.* 465, 25 *N. E. Rep.* 840.

**7. Consequences of abandonment, generally.\***—Under the provisions of the Va. code of 1849, relating to railroads, no forfeiture of title to railroad property on the ground of abandonment can be enforced except by the state. *McConihay v. Wright*, 121 *U. S.* 201, 7 *Sup. Ct. Rep.* 940.

The question as to the abandonment or forfeiture of a location for branch railway lines is for the commonwealth alone, and third persons cannot assume the right to raise such a question. *Pittsburgh, V. & C. R. Co. v. Pittsburgh, C. & S. L. R. Co. (Pa.)*, 57 *Am. & Eng. R. Cas.* 46.

A landowner who retains the fee in the land over which a railroad has obtained a right of way cannot maintain a proceeding to recover possession of the land on the ground that the company has diverted it from its original purpose by leasing it to third parties for business not connected with railroading. A private party cannot take advantage of a mere misuser of the land by the company; his remedy would be by a proceeding to recover additional damages. *Proprietors, etc., v. Nashua & L. R. Co.*, 104 *Mass.* 1.—DISTINGUISHED IN *Illinois C. R. Co. v. Wathen*, 17 *Ill. App.* 582. QUOTED IN *Schulenburg v. Memphis, C. & N. W. R. Co.*, 67 *Mo.* 442. REVIEWED IN *Peirce v. Boston & Lowell R. Co.*, 27 *Am. & Eng. R. Cas.* 359, 141 *Mass.* 481; *Lyon v. McDonald*, 47 *Am. & Eng. R. Cas.* 217, 78 *Tex.* 71.

**8. — reversion to abutting owner †**  
Upon the abandonment by a railroad company of a portion of its road under the provisions of Mich. Act No. 275, Laws of 1887, the title to the land which was taken for right of way, and for the other purposes of the road, reverts to the original owners, and no reconveyance or order of the court is necessary. *Flint & P. M. R. Co. v. Rich*, 91 *Mich.* 293, 51 *N. W. Rep.* 1001.

It seems that upon the company ceasing to use the lands for the purpose for which alone they had been conveyed, the grantor would be at liberty to resume possession.

\* Abandonment of road as a defence to an action to recover subscriptions, see note, 30 *AM. & ENG. R. CAS.* 528.

Liability of company for loss to landowner, see note, 27 *AM. & ENG. R. CAS.* 440.

† Conveying a right of way with condition that it should revert if not used for railroad purposes at any time. Company may abandon, and action for specific performance will not lie, see 36 *AM. & ENG. R. CAS.* 428—abstr.

*Jessup v. Grand Trunk R. Co.*, 7 Ont. App. 128; reversing 28 Gr. Ch. 583.

A right of way was conveyed to a railroad company and its assigns forever, "so long as the said land hereby conveyed shall be used for railroad purposes." The roadbed was graded, but the successor of the grantee completed the road by a new route. The owner of the tract occupied the right of way for five years after the completion of the road by the new route, and put valuable improvements upon it without objection from the railroad company. *Held*, that the right of way was abandoned, and reverted to the owner of the tract of which it was originally a part. *Roanoke Inv. Co. v. Kansas City & S. R. Co. (Mo.)*, 51 Am. & Eng. R. Cas. 426, 17 S. W. Rep. 1000.

A conveyance made to the city of B., pursuant to acts of the legislature (ch. 220, N. Y. Laws 1853, and ch. 475, Laws 1855), of lands for the purpose of a street which had been acquired by the B. & J. R. Co. by proceedings under its charter (ch. 256, Laws 1832), was effectual only as a relinquishment of the right of the company to the use of the lands; and upon the abandonment of the use, the owners of the fee were entitled to re-enter and take possession. *Heard v. Brooklyn*, 60 N. Y. 242.—DISTINGUISHED IN *Beal v. New York C. & H. R. R. Co.*, 3 How. Pr. N. S. (N. Y.) 329.

Deeds by the owners of the fee of adjoining lands which bounded them by the railroad, executed while the lands were in the use of the corporation, in the absence of covenants that upon the termination of such use said lands should be thrown open as a public street, did not operate as a dedication thereof for that purpose, and in no way impaired or affected the owner's title. *Heard v. Brooklyn*, 60 N. Y. 242.

The law vested in the state a title "in perpetuity" to lands acquired for the state canal. A deed was made conveying the land for the canal, but "excepting therefrom ground for a basin." The canal and basin were built, but no damages assessed, and afterward the same were sold to a railroad and abandoned. *Held*, that the reservation in the deed was of no effect; that the state took an absolute estate in the basin, and the same did not revert on abandonment. The title could not be affected by the owner's failure to have damages assessed. *Robinson v. West Pennsylvania R. Co.*, 72 Pa. St. 316.

The Vermont C. R. Co. acquired title to certain land in Vermont by warranty deeds, in the usual form, which land they subsequently abandoned for railroad purposes, having changed the location of their roadbed. *Held*, that the land did not revert, by reason of such abandonment, but that the railroad company, by said deeds, acquired a title in fee to the same. *Page v. Heineberg*, 40 Vt. 81.

**9. Compelling rebuilding of abandoned line.**—Mandamus will lie to compel a railway company which has taken up its track to reinstate and lay it down again, where, by the act of parliament under which it was constructed, the public were given the beneficial enjoyment of such railway. *Rex v. Severn & W. R. Co.*, 2 B. & A. 646.

Where the facts show that the public will be as advantageously served by a train service of a railroad company over a leased line between two points as it would be by a service over a line of its own which the company has abandoned, the leased line being but a few feet from the old line, and it appearing that the expense of rebuilding and operating the old line would be very heavy and would be without practical advantage to any one, the court will refuse to enforce an order of the railroad commissioners compelling the company to rebuild and operate its abandoned line, since such an order is unreasonable and unjust within the meaning of the statute. *State v. Des Moines & Ft. D. R. Co. (Iowa)*, 49 Am. & Eng. R. Cas. 186.

It cannot be said that there is any legal obligation of a railroad company to operate its trains on its own line rather than on a leased one if the public are served equally well, although the company has received a land grant from the state in consideration of its completing the line which it has abandoned. The receipt of such aid from the state does not take away from the company its right to make such changes in its line as its interests might dictate, by placing its train service for some parts of the way on a leased line of another company, providing that such a service is maintained as was contemplated when its obligation to the public was assumed. *State v. Des Moines & Ft. D. R. Co. (Iowa)*, 49 Am. & Eng. R. Cas. 186.

The fact that the lease of the track operated will soon expire, and that it contains no provisions for a renewal, will not war-



rant the enforcement of the order to rebuild the abandoned track; nor can such an order be sustained on the ground that a further delay might cause the statute of limitations to run in favor of the company, since no cause of action has yet arisen against it. *State v. Des Moines & Ft. D. R. Co. (Iowa)*, 49 *Am. & Eng. R. Cas.* 186.

An order of the commissioners requiring the company to operate through trains over the leased line, pending the completion of the work of rebuilding the abandoned line, will not be enforced, since the court has decided that the order compelling the rebuilding of the abandoned line should not be enforced, and the matter of future train service is left to the further inquiry and direction of the commissioners. *State v. Des Moines & Ft. D. R. Co. (Iowa)*, 49 *Am. & Eng. R. Cas.* 186.

**10. Compensation of landowner out of deposit moneys.**—Where a railroad company has entered into a covenant to build a station at a designated point, being of such a nature that the abandonment of the railway necessarily implies a breach of the covenant to build the station, a failure to build the station may be taken into account in assessing damages to the land by the abandonment of the road; but a covenant to build fences on the land is not such an obligation as to form the basis of a claim for compensation out of the deposit. *In re Ruthin & C. D. R. Co.*, 27 *Am. & Eng. R. Cas.* 434, 32 *Ch. D.* 438.

Where the act incorporating an English railroad contains the usual clause that in case of abandonment of the road the parliamentary deposit shall be applicable towards compensating any landowners whose property may have been interfered with or rendered less valuable by the location, construction, or abandonment of the road, as a rule the landowner can only claim compensation for acts done or omitted by the company under its statutory powers, and not compensation on account of any collateral agreement that the company may have entered into. *In re Ruthin & C. D. R. Co.*, 27 *Am. & Eng. R. Cas.* 434, 32 *Ch. D.* 438.—**REVIEWING** *In re Potteries, S. & N. W. R. Co.*, 25 *Ch. D.* 251.

Where a railway has been abandoned under the Railways Abandonment Acts, the costs of a petition by the depositor for the transfer out to him of the bulk of the deposit moneys will be ordered to be paid out

of the company's general assets. *In re Laugharne R. Co.*, *L. R.* 12 *Eq.* 454, 19 *W. R.* 1108.

The solicitor and parliamentary agent of a company are not entitled to be paid their costs and charges out of moneys deposited in the court of chancery as security to be applied as part of the assets of a company abandoning its road. *In re Kensington Station Act, L. R.* 20 *Eq.* 197, 23 *W. R.* 463, 32 *L. T. N. S.* 183.

**11. — of creditors.**—All distinction between meritorious and non-meritorious creditors as to the right, upon the abandonment of an undertaking, to share in the deposit made by the promoters in order to obtain from the Board of Trade the provisional order authorizing the undertaking, has, since the passing of the Parliamentary Bonds and Deposits Act, 1892, ceased to exist. *Ex parte Bradford & Dist. T. Co.* [1893], 3 *Ch.* 463.

Persons who lent the money to the promoters of the undertaking to enable them to make the deposit are "creditors" entitled, under § 1, sub-sec. 2, of that act, upon the abandonment of the undertaking, to share in the deposit fund *pari passu* with the other creditors of the company. *Ex parte Bradford & Dist. T. Co.* [1893], 3 *Ch.* 463.

The word "creditors" in Parliamentary Deposits and Bonds Act, 1892 (55 & 56 Vict. c. 27), § 1, sub-sec. 2, is not limited to the creditors of the particular undertaking which has been abandoned, but includes the general creditors of the company. *Ex parte Bradford & Dist. T. Co.* [1893], 3 *Ch.* 463.

## ABATEMENT.

**Form and sufficiency of plea in, see PLEADING, 1, 3.**

I. GROUNDS.....	6
II. REVIVAL; CONTINUANCE.....	11

### I. GROUNDS.

**1. Incapacity to sue.**—Where a suit has been properly brought, the defendant cannot cause its abatement by afterwards creating a state of facts against the ability of the plaintiff to sue. *Board of Com'rs v. Lafayette, M. & B. R. Co.*, 50 *Ind.* 85, 8 *Am. Ry. Rep.* 324.

A suit by an abutting owner to restrain the operation of an elevated railway in the

street, and to recover damages, will not abate if the plaintiff conveys the premises pending the suit. *Moss v. New York El. R. Co.*, 27 *Abb. N. C. (N. Y.)* 318, 17 *N. Y. Supp.* 586.

**2. Another action pending.**—(1) *When Ground.*—Where two actions are brought by the same parties, involving the same state of facts, both praying the same relief, the suit last commenced should be stayed until the matters have been fully heard and decided in the first suit. *New York, L. E. & W. R. Co. v. Robinson*, 15 *N. Y. S. R.* 237, 48 *Hun* 614.

Under the practice in New York, for a former suit to be ground for abatement of a second suit it must appear that both suits are in the state and the first suit must have been pending when the second was commenced. *Hadden v. St. Louis, I. M. & S. R. Co.*, 57 *How. Pr. (N. Y.)* 390.

(2) *When not Ground.*—A creditor of a railroad who is not made a party to a general creditors' bill filed against the company in a state court is not prevented thereby from bringing a separate suit in a federal court on his demand. *Parsons v. Greenville & C. R. Co.*, 1 *Hughes (U. S.)* 279.

Regular proceedings to condemn land for the purpose of a railroad do not abate upon an agreement between the parties to arbitrate, but where no reference has been had; and especially is this so where the party raising the question has gone to trial in the eminent-domain proceeding without objection. *Laflin v. Chicago, W. & N. R. Co.*, 34 *Fed. Rep.* 859.

A suit in equity in a state court in Alabama by a holder of railroad bonds, endorsed by the state, on behalf of himself and all other holders of the same class of bonds, does not abate by reason of the fact that another suit relating to the same subject-matter is pending in a United States circuit court in Tennessee. *Forrest v. Luddington*, 12 *Am. & Eng. R. Cas.* 330, 68 *Ala.* 1.

An action for damages for an injury to the person of the plaintiff abates by his death, and the pendency thereof cannot be pleaded in bar of an action brought by his personal representative, for his death resulting from such injury, and caused by the wrongful act or omission of the defendant. *Indianapolis & St. L. R. Co. v. Stout*, 53 *Ind.* 143.

A railroad company cannot set up the pendency of a suit in a federal court, between

the same parties, for the same cause of action, and for the same relief, in abatement or in bar of a subsequent suit in a state court. The proper remedy is, to apply for a stay of the subsequent suit, or reserve final judgment pending the other suit. *Vail v. Central R. Co. (N. J. Eq.)*, 4 *Atl. Rep.* 663.

The pendency of another action in *personam* for the same cause in a court of the United States or of a sister-state is no defence to an action in a New York court against the trustees under a railroad mortgage. *Hollister v. Stewart*, 38 *Am. & Eng. R. Cas.* 599, 111 *N. Y.* 644, 19 *N. E. Rep.* 782.

A pending suit by a director to compel the officers of a railroad to account will not prevent the attorney-general from instituting a suit to remove the officers, and to compel an accounting by the officers, including the plaintiff in the first suit. *Keeler v. Brooklyn El. R. Co.*, 9 *Abb. N. C. (N. Y.)* 166; *People v. Bruff*, 9 *Abb. N. C. (N. Y.)* 153, 60 *How. Pr.* 1.

(3) *Illustrations.*—A foreclosure suit on part of a railroad was commenced in a U. S. court by the first-mortgage trustee. Another suit was begun against him and others in a state court to foreclose a subsequent mortgage, covering the entire road. *Held*, that the complainant in the suit foreclosing the first mortgage could not set up his suit in bar of the second suit, and especially where it appeared that, on account of citizenship, the first bill was dismissed as to complainants in the second bill. *Meyer v. Johnson*, 53 *Ala.* 237, 15 *Am. Ry. Rep.* 467.

The same person made two subscriptions to the stock of a railroad, the one in his individual name, the other as executor. Under the terms of the subscription, each subscriber was severally liable for the subscriptions. *Held*, that the pendency of a suit on one subscription was no ground for abating a suit to recover on the other. *Erie & N. Y. C. R. Co. v. Patrick*, 2 *Abb. App. Dec. (N. Y.)* 72, 2 *Keyes* 256.

To an action by a personal representative of a railroad company set up, as a defence and ground for abatement, that the same plaintiff had brought a former action for the same cause, which had been compromised and a release given. After the trial the company offered as evidence an unverified petition of the plaintiff addressed to the proper court, praying leave to settle the first suit; also an order of the court granting

such leave, and a release under seal. *Held*, that such evidence should have been admitted, and for a refusal to admit it a verdict in favor of the plaintiff should be set aside. *Murzynowski v. Delaware, L. & W. R. Co.*, 39 N. Y. S.R. 299, 15 N. Y. Supp. 841.

**3. Collusion—Champerty.**—Proof in an action against a railroad that certain officials of a rival corporation have assisted the plaintiff in preparing his case, and that plaintiff had close business relations with such rival corporation, is not sufficient to sustain a plea in abatement charging "collusion." *Dinsmore v. Central R. Co.*, 16 Am. & Eng. R. Cas. 450, 19 Fed. Rep. 153.

Under Iowa Code, § 2732, providing that matter in abatement may be stated in the answer or reply, either together with or without causes of defence in bar, it is not proper in an action against a railroad to recover damages to allow evidence that the attorney had an agreement with his client that was champertous, i.e., that he would prosecute the claim for a certain share of the damages, unless such agreement be pleaded. *Allison v. Chicago & N. W. R. Co.*, 42 Iowa 274.—QUOTED IN *Small v. Chicago, R. I. & P. R. Co.*, 55 Iowa 582.

**4. Death of plaintiff or co-plaintiff.**—(1) *Action abates.*—The right of action for a tort to the person dies with the person injured. *Chichester v. Union Transfer Co.*, 1 MacArth. (D. C.) 295.

If a plaintiff in an action for personal injuries dies before verdict, the action abates. *Baltimore & O. R. Co. v. Ritchie*, 31 Md. 191.

Under McClellan's Fla. Dig. 830, § 77, an action against a railroad company to recover for personal injuries abates on the death of the plaintiff. *Jacksonville Street R. Co. v. Chappell*, 22 Fla. 616, 1 So. Rep. 10; *Jacksonville Street R. Co. v. Chappell*, 28 Am. & Eng. R. Cas. 227, 21 Fla. 175.

A widow's suit for negligent killing of her husband cannot be revived and prosecuted in name of her personal representative where she dies during its pendency. *Loague v. Memphis & C. R. Co.*, 52 Am. & Eng. R. Cas. 635, 91 Tenn. 458, 19 S. W. Rep. 430.

An action by a husband to recover damages for the killing of his wife abates on the death of the husband; section 1 of article 2 of the Code of 1860, which provides for the survival of personal actions, expressly ex-

cepting from its operation actions for injuries to the person. *Harvey v. Baltimore & O. R. Co.*, 70 Md. 319, 17 Atl. Rep. 88.—FOLLOWING *Ott v. Kaufman*, 68 Md. 56. DISTINGUISHING *Cregin v. Brooklyn Cross-town R. Co.*, 83 N. Y. 596; *Potter v. Metropolitan Dist. R. Co.*, 30 L. T. N. S. 765.

The fact that the statute provides that the suit shall be brought in the name of the state, for the use of the person entitled to damages, creates no contractual relation between the state, the legal plaintiff, and the defendant, and on the death of the equitable plaintiff the suit cannot be carried on in the name of the state. *Harvey v. Baltimore & O. R. Co.*, 70 Md. 319, 17 Atl. Rep. 88.—DISTINGUISHING *State v. Dorsey*, 3 Gill & J. (Md.) 75; *Fridge v. State*, Id. 103; *Logan v. State*, 39 Md. 177.

Under the Tenn. act of 1851, ch. 17, as amended in 1871, ch. 78, providing that the right of action to a person who is wrongfully injured shall not abate by his death, but shall pass to his widow or children, or to his personal representative for the benefit of his widow or next of kin, free from the claims of creditors, if the deceased leaves no widow, child, or next of kin, the action abates, and cannot be prosecuted for the benefit of creditors or of the state. *East Tenn., V. & G. R. Co. v. Lilly (Tenn.)*, 18 S. W. Rep. 243.

(2) *Action does not abate.*—The general rule in Colorado is that actions at law do not die with the person; the exceptions are specified by statute. *Kelley v. Union Pac. R. Co.*, 16 Colo. 455, 27 Pac. Rep. 1058.

An action against a railroad company for personal injuries, pending when the Georgia act of November 12, 1889, amending section 2967 of the Code, was passed, was not abated by the death of the plaintiff; nor is that act, as applicable to actions pending at the time of its passage, unconstitutional. *Pritchard v. Savannah St. & R. R. Co.*, 87 Ga. 294, 13 S. E. Rep. 493.—DISTINGUISHING *Wilder v. Lumpkin*, 4 Ga. 208; *Chicago, St. L. & N. O. R. Co. v. Pounds*, 15 Am. & Eng. R. Cas. 510. FOLLOWING *Johnson v. Bradstreet Co.*, 87 Ga. 79. REVIEWING *Bailey v. State*, 20 Ga. 742.

An action brought to recover damages for personal injuries sustained by the plaintiff as a passenger on defendant's railroad does not abate by the death of plaintiff.—*Peeble v. North Carolina R. Co.*, 63 N. C.

238.—DISTINGUISHED IN *Hannah v. Richmond & D. R. Co.*, 87 N. C. 351.

**5. — after verdict or decision.**—

(1) *Action abates.*—The rule of the common law that an action to recover damages for a personal injury abates on the death of the plaintiff is not changed by N. Y. Code of Civ. Proc., except where "a verdict, report, or decision" has been rendered upon the issues (§ 764). *Corbett v. Twenty-third St. R. Co.*, 114 N. Y. 579, 21 N. E. Rep. 1033, 24 N. Y. S. R. 538.

A nonsuit on trial by jury is not a "decision" within the meaning of said Code, nor is an order of General Term reversing a judgment entered on the nonsuit; that word refers to a decision made by a court on trial without a jury. *Corbett v. Twenty-third St. R. Co.*, 114 N. Y. 579, 21 N. E. Rep. 1033, 24 N. Y. S. R. 538.

Actions for personal injuries abate upon the death of the plaintiff. A procurement of a verdict does not save it from the rule where such verdict is set aside on appeal. *Kelsey v. Jewett*, 34 Hun (N. Y.) 11.

Pending an appeal in an action against a railroad to recover for personal injuries, the plaintiff therein died and his personal representative was made a party. *Held*, that the action should abate upon being remanded to the lower court. *Thompson v. Central R. Co.*, 60 Ga. 120.

P. brought an action against a conductor of the I. C. R. for injuries received in attempting to board a train alleged to be caused by the negligence of the conductor in not bringing the train to a standstill. On the trial P. was nonsuited, and on motion to the full court the nonsuit was set aside and a new trial ordered. Between the verdict and the judgment ordering a new trial P. died and a suggestion of his death was entered on the record. On appeal to the Supreme Court under Lord Campbell's Act or the equivalent statute in New Brunswick (C. S. N. B. ch. 86), an entirely new cause of action arose on the death of P. and the original action was entirely gone and could not be revived. *White v. Parker*, 16 Can. Sup. Ct. 699.

(2) *Action does not abate.*—After a decree for the partition and sale of lands, the action does not abate by reason of the death of two of the complainants, but survives to their co-complainants, it appearing that all the parties to be affected by the decree are before the court. *Speck v. Pullman Palace*

*Car Co.*, 121 Ill. 33, 12 N. E. Rep. 213, 9 West. Rep. 771.

A claim for damages for a personal injury is merged in a judgment, and a reversal by the appellate court does not destroy but merely suspends it until acted upon by the supreme court; hence the action will not abate where the plaintiff dies pending an appeal. *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 495, 18 Am. Ry. Rep. 450.

Under N. Y. Code of Proc., § 121, enacting that after a verdict shall be rendered in any action for a wrong, such action shall not abate by the death of any party, a verdict in favor of a plaintiff against a railroad to recover for a personal injury is within the rule, and the action will not abate upon the death of the plaintiff. *Lyons v. Third Avenue R. Co.*, 7 Robt. (N. Y.) 605.

**6. Death of real party in interest.**

—A Wisconsin statute provided that the representative of a person killed by the negligence of another might recover damages for the benefit of the husband or wife, or if neither, for the lineal descendants, or if none, for the lineal ancestors. *Held*, that an action commenced under the statute by the representative for the benefit of a husband or wife abates upon the death of either. The personal representative, though willing to prosecute for the person next in order, cannot do so. *Woodward v. Chicago & N. W. R. Co.*, 23 Wis. 400.

**7. Dissolution of corporate defendant.**—A corporation becoming consolidated with another and changing its name pending a suit against it is not so dissolved, nor its original liability so extinguished, as that the pending suit abates. And if the rule were different, the question could not be raised by motion in arrest of judgment. Prosecuting an appeal and giving bond in the name of the original corporation estops it from denying its corporate existence. *East Tenn. & G. R. Co. v. Evans*, 6 Heisk. (Tenn.) 607.—APPLIED IN *Louisville, N. & G. S. R. Co. v. Reidmond*, 11 Lea (Tenn.) 205. QUOTED IN *Kelley v. Mississippi C. R. Co.*, 2 Flip. (U. S.) 581, 1 Fed. Rep. 564.

**8. Appointment of receiver.**—A suit against a railway corporation will not be abated upon its plea averring that the suit had been brought after the road had passed into the hands of a receiver, and that process had been served upon a station agent of the receiver, where it appears that such

agent had been originally employed by the company and continued in same service under the receivership. *Simpson v. East Tenn., V. & G. R. Co.*, 89 *Tenn.* 304, 15 *S. W. Rep.* 735.

**9. Expiration of charter.**—A person desiring to buy a ticket for his passage became involved in a quarrel with the ticket agent and was assaulted by him. While an action was pending against the corporation to recover damages for the assault, the charter of the corporation expired. *Held*, that it was proper, under the New York statute, to make an order continuing the action against the directors of the corporation. *Hepworth v. Union Ferry Co.*, 62 *Hun* (N. Y.) 257, 41 *N. Y. S. R.* 783, 16 *N. Y. Supp.* 692; *appeal dismissed*, 131 *N. Y.* 645, 43 *N. Y. S. R.* 962.

After an action for calls has been set down for trial it is too late for the defendant to apply to set aside the proceedings on the ground that the company was virtually extinct, it appearing that he had known the facts for a long time. *Thames H. D. & R. Co. v. Hall*, 5 *M. & G.* 274, 6 *Scott N. R.* 342, 3 *Railw. Cas.* 441, 7 *Jur.* 238.

**10. Change of remedy by statute.**—Pending an action against a railroad to recover a statutory penalty for not stopping its trains at the intersection of its railroad with another, the statute giving the penalty was changed, prescribing a different form of action, the second statute being declared retroactive. *Held*, that the action must abate. *Mix v. Illinois C. R. Co.*, 116 *Ill.* 502, 6 *N. E. Rep.* 42.

**11. Necessity of application to court.**—Actions for personal injuries abate upon the death of the plaintiff, and this without any formal plea on the part of the defendant, it being sufficient for the defendant to ask the instruction of the court. *Baltimore & O. R. Co. v. Ritchie*, 31 *Md.* 191.

Where a cause of action survives, the action does not abate by the death of the plaintiff *ipso facto*, but only upon the application of the party aggrieved; and then only in the discretion of the court, and in a time to be fixed, not less than six months, nor more than one year from the granting of the order. *Moore v. North Carolina R. Co.*, 74 *N. C.* 528.

**12. Stipulation to prevent abatement.**—Though an action for personal injuries, under the New York law, abates with

the death of the plaintiff, yet it is lawful for a defendant or its attorney to enter into an agreement, for the purpose of obtaining a continuance, to the effect that the cause of action shall not abate by the death of the plaintiff at any time before verdict, and the courts will enforce such an agreement by prosecuting the action in the name of the personal representative of the plaintiff. *McGuire v. New York C. & H. R. R. Co.*, 6 *Daly* (N. Y.) 70.

In an action against a railroad company to recover damages for injuries sustained by a passenger in consequence of being unlawfully ejected from its cars, defendant's counsel, as a condition for putting the cause over a circuit, stipulated that, in case of the death of plaintiff before final judgment and determination of the action, the alleged cause of action should survive, and any verdict and judgment be regarded as if rendered in plaintiff's lifetime; and also that, in case of such death, plaintiff's representative might be substituted as plaintiff. *Held*, that the stipulation continued in force until final judgment, although meanwhile a verdict and judgment in plaintiff's favor had been set aside. *Cox v. New York C. & H. R. R. Co.*, 63 *N. Y.* 414; *reversing* 4 *Hun* 176, 6 *T. & C.* 405.

A verdict and judgment obtained in plaintiff's lifetime having been set aside, plaintiff died before a second trial, and his executors were substituted. Upon the second trial, the objection that the action did not survive was taken and overruled. *Held*, no error; that plaintiff's representatives might have proceeded with the action in the name of the original plaintiff, but their becoming parties to the record was no insuperable objection to a judgment in their favor; and that the stipulation was a sufficient answer to the objection. *Cox v. New York C. & H. R. R. Co.*, 63 *N. Y.* 414; *reversing* 4 *Hun* 176, 6 *T. & C.* 405.

Where a passenger has brought suit to recover damages for being unlawfully put off a train, and an agreement is entered into to the effect that the suit shall not abate in case the plaintiff dies, and he dies pending the suit, his executors may recover a sum which would have compensated him had he lived, and this though his earning capacity was not diminished by the injury, and his estate had not suffered loss. *Cox v. New York C. & H. R. R. Co.*, 11 *Hun* (N. Y.) 621.

**13. Non-residence of defendant.**

A defendant in a federal court who resides in another state from where suit is brought, where he is served with process in the latter state, may plead the matter in abatement; but if he does not so plead it, he cannot afterward take advantage of it. *Seales v. Jacksonville, P. & M. R. Co.*, 2 Woods (U. S.) 621.

**II. REVIVAL: CONTINUANCE.**

**14. What actions survive.\***—The right to sustain a personal action for damages to a person did not survive to his representatives at common law, but exists in Delaware by force of the statute. *Parvis v. Philadelphia, W. & B. R. Co. (Del.)*, 17 Atl. Rep. 702.

Where the plaintiff, pending an action brought by him to recover for a personal injury resulting from negligence, dies from some other cause than such injury, the action will survive, and may be prosecuted in the name of his administrator. *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586, 9 N. E. Rep. 263; *affirming* 19 Ill. App. 591.

By the New Hampshire act of July 18, 1879, rights of action for tortious personal injuries were made to survive, and an action for an injury arising from a defective or insufficiently guarded highway, and resulting in death, can be maintained against the town or city where the highway is, under that statute; and in such case the notice required by G. L., c. 75, ss. 7 and 8, is not necessary. *Clark v. Manchester*, 62 N. H. 577.—**DISTINGUISHING** *Sawyer v. Concord R. Co.*, 58 N. H. 517. **NOT FOLLOWING** *Kearney v. Boston & W. R. Co.*, 9 Cush. (Mass.) 108; *Louisville & N. R. Co. v. Burke*, 6 Cold. (Tenn.) 45.

Upon the death of the plaintiff, in an action by a husband for a wrongful injury to the person of his wife, the right to damages for loss of the wife's services and the expenses necessarily incurred by reason of the injury survive to his personal representatives, as they are a pecuniary loss diminishing his estate; but the right of action for the loss of the society of his wife and the comforts of that society dies with him. Upon revival of the action, only the damages that so survive are recoverable. *Cregin*

*v. Brooklyn Cross-town R. Co.*, 83 N. Y. 595, 38 Am. Rep. 474; *reversing* 19 Hun 341; *see also* s. c., 18 Hun 368.—**DISTINGUISHING** *Moore v. Hamilton*, 44 N. Y. 666; *Harvey v. Baltimore & O. R. Co.*, 70 Md. 319; *Maxson v. Delaware, L. & W. R. Co.*, 112 N. Y. 559, 20 N. E. Rep. 544, 21 N. Y. S. R. 767.

Such an action is an action "for wrongs" within the meaning of 2 N. Y. Rev. St. 457, § 1, and does not abate on the death of the plaintiff. Such action is not within the exception to § 2 of such statute, providing for actions upon the case for injuries to the person of the plaintiff. *Cregin v. Brooklyn Cross-town R. Co.*, 75 N. Y. 192, 31 Am. Rep. 459; *affirming* 56 How. Pr. 32.—**REVIEWED IN** *Galveston, H. & S. A. R. Co. v. Roemer*, 1 Tex. Civ. App. 191; *Foels v. Town of Tonawanda*, 20 N. Y. Supp. 447.

An action by an abutting owner to restrain the operation of an elevated railway in the street, and to recover damages, is not an action of trespass, but one in equity which will survive to the executor and devisee on the plaintiff's death. *Sanders v. New York El. R. Co.*, 15 Daly (N. Y.) 388, 7 N. Y. Supp. 641, 27 N. Y. S. R. 795.—**REVIEWING** *Shepard v. Manhattan R. Co.*, 5 N. Y. Supp. 189. **APPLYING** *McCrea v. New York El. R. Co.*, 13 Daly (N. Y.) 302. **APPROVING** *Henderson v. New York C. R. Co.*, 78 N. Y. 423.—**REVIEWED IN** *Werfelmen v. Manhattan R. Co.*, 16 Daly (N. Y.) 355.

**15. What do not survive.**—An executor cannot maintain an action for a trespass to realty done in the lifetime of the testator, as such actions do not survive. *Reed v. Peoria & O. R. Co.*, 18 Ill. 403.

A right of action for a personal injury does not survive or pass to the personal representative. *Sawyer v. Concord R. Co.*, 58 N. H. 517.—**DISTINGUISHED IN** *Clark v. Manchester*, 62 N. H. 577.

A right of action against a railroad company for ejecting a passenger does not survive and cannot be prosecuted by the personal representative. *Hannah v. Richmond & D. R. Co.*, 10 Am. & Eng. R. Cas. 737, 87 N. C. 351.—**DISTINGUISHING** *Peebles v. North Carolina R. Co.*, 63 N. C. 238; *Purcell v. Richmond & D. R. Co.*, 108 N. Car. 414.

Only actions which do not die with the person come within the Md. acts of 1785, ch. 80, and 1798, ch. 101, authorizing personal representatives to prosecute certain ac-

\*Survival of statutory liability for corporate debts against stockholders' personal representative, *see note*, 3 AM. ST. REP. 869.

tions after the death of the person to whom they occurred, and causes of action which previously died with the person are not saved by the operation of said statutes. *Baltimore & O. R. Co. v. Ritchie*, 31 Md. 191.

**16. Who may revive—heir or administrator.**—Where a widow dies pending a suit by her against a railroad company for negligently causing the death of her husband, the suit may be revived in the name of her personal representative, and prosecuted to final judgment the same as she might have done. *Brown v. Philadelphia & R. R. Co.*, 19 Phila. (Pa.) 372.

Where pending an action for damages to realty the plaintiff dies, the suit should be continued in the name of the administrator and not in the name of the heir. *Nashville & C. R. Co. v. Tyne* (Tenn.), 7 Am. & Eng. R. Cas. 515.

Where a landowner dies pending a proceeding to condemn land for railroad purposes, or pending a proceeding to reverse a judgment therein, the proceeding must be revived in the name of the landowner's heirs or devisees, and not in the name of his personal representative. *Valley R. Co. v. Bohm*, 29 Ohio St. 633.

**17. Substitution of new party.**—Under the California practice, on a suggestion made to the court of the death of a plaintiff and on satisfactory proof, it is proper to substitute the personal representative of the plaintiff in his stead. If this practice should lead to a substitution of one who had not qualified as such personal representative, the court could make the proper correction. *Taylor v. Western Pac. R. Co.*, 45 Cal. 323.

Under Conn. Gen. St. 1888, § 1005, providing that upon the death of a plaintiff the personal representative may appear and prosecute the suit, the appearance must be at the next term after plaintiff's death. So where a suit was brought against a railroad for a personal injury, and pending which the plaintiff died, and the administratrix was not appointed for 20 months, and did not apply for leave to prosecute the suit for 17 days after her appointment, the action was barred, no good or sufficient reason for the delay appearing. *Johnson v. New York & N. E. R. Co.*, 56 Conn. 172, 14 Atl. Rep. 773.

In Tennessee a new plaintiff can be substituted without a new process upon the death of the one bringing the action, under §§ 2291 and 2292 of the code, allowing actions for

personal injuries to proceed in the name of a personal representative on the death of the plaintiff. *Flatley v. Memphis & C. R. Co.*, 9 Heisk. (Tenn.) 230.—**DISTINGUISHED IN** *Webb v. East Tennessee, V. & G. R. Co.*, 42 Am. & Eng. R. Cas. 44, 88 Tenn. 119, 12 S. W. Rep. 428; *Nashville, C. & St. L. R. Co. v. Foster*, 10 Lea (Tenn.) 351.

### ABUTTING OWNERS.

**Consent of, to construction of underground railroad**, see UNDERGROUND RAILWAYS, 2.

— to occupation of street, see ELEVATED RAILWAYS, I, 3 (c); STREET RAILWAYS III, 3.

— under Rapid Transit Act, see RAPID TRANSIT ACTS, 6.

**Relative rights of company and**, see RIGHT OF WAY, II.

**Release by**, see RELEASE, IV.

**Remedies of, against steam railways in streets**, see STREETS AND HIGHWAYS, IV.

**Reversion to, of land taken**, see EMINENT DOMAIN, XIII, 3.

— on abandonment of railway, see ABANDONMENT, 8.

**Right of, to build fence where company fails to do so**, see FENCES, II, 4.

— to tunnel under railway, see MINES AND MINING, 1.

**Rights and remedies of, generally**, see ELEVATED RAILWAYS, III; EMINENT DOMAIN.

**Rights of, as against street railways**, see STREET RAILWAYS, V.

— as respects construction of telegraph lines, see TELEGRAPH LINES, 1.

— as respects embankments, see EMBANKMENTS, 1, 2.

— as respects steam railroads in streets, see STREETS AND HIGHWAYS, III.

See also RIPARIAN RIGHTS.

### ACCEPTANCE.

**Of charter**, see CHARTER, I, 2.

— debentures tendered before suit, see DEBENTURES, 14.

— dedication, see DEDICATION, 4.

— negotiable paper, see BILLS AND NOTES, I, 3.

— road substituted for that taken, see TURNPIKES, 3.

### ACCESS.

**To property, covenant to provide**, see COVENANTS, 7.



**ACCIDENT.**

- By cars leaving track, see DERAILMENT.  
 — collision, see COLLISIONS.  
 Involving loss of property, see CARRIAGE OF MERCHANDISE, IV.  
 Notice of, to Insurance Company, see ACCIDENT INSURANCE, 8.  
 On tramways, see TRAMWAYS, 6, 7.  
 — Sunday, see SUNDAY, 6, 8.  
 To children, see CHILDREN, INJURIES TO.  
 — employés, see EMPLOYÉS, INJURIES TO.  
 — passengers, see CARRIAGE OF PASSENGERS, III.  
 To trespassers, see TRESPASSERS, INJURIES TO.  
 When within terms of insurance policy, see ACCIDENT INSURANCE, 2.  
 See also ELECTRIC RAILWAYS, II; ELEVATED RAILWAYS, IV; EXPLOSIONS; FIRES; FLYING SWITCH; FRIGHTENED TEAMS.

**ACCIDENT INSURANCE.**

See also RELIEF ASSOCIATIONS.

**1. Construction of policy, generally.**—An agent of a transfer company whose duties require him to get on trains before they reach the station, for the purpose of changing baggage-checks and arranging for its transfer, is "a railroad employé" within the meaning of a provision in an accident policy excepting such employés from a provision against entering moving trains. *Cotten v. Fidelity & C. Co.*, 41 *Fed. Rep.* 506.

The effect of "from" in a policy "for twelve calendar months from November 24, 1887," is to exclude November 24, 1887, and to include November 24, 1888, in the period covered by the insurance. *South Staffordshire T. Co. v. Sickness & A. A. Assoc.* [1891], 1 *Q. B.* 402.

An accident policy contained a provision limiting the liability of the company to accidents received by the insured while actually travelling in a public conveyance provided by common carriers, and in compliance with all rules and regulations of such carriers. *Held*, that under this provision the insured might recover for an accident happening while getting on or off a train; but could not recover for an accident while attempting to get on a train after it has reached its destination. *Tooley v. Railway Pass. A. Co.*, 3 *Biss. (U. S.)* 399.

**2. What accidents are within the policy.\*—(1) In general.**—Where an accident policy covers only risks while actually travelling, a recovery may be had for an injury while getting into a public conveyance while in motion. *Champlin v. Railway Pass. A. Co.*, 6 *Lans. (N. Y.)* 71.

A provision in an accident policy against standing or walking on a railroad track or bridge does not include crossing a track at a public crossing. *Duncan v. Preferred Mut. Ac. A. of N. Y.*, 36 *N. Y. S. R.* 928, 27 *J. & S.* 145, 13 *N. Y. Supp.* 620.

An injury to a passenger owing to a slippery car-step is an accident within the meaning of an insurance policy agreeing to pay a certain sum on account of injuries happening to the assured from railway accidents. *Theobald v. Railway Pass. A. Co.*, 10 *Exch.* 45, 2 *C. L. R.* 1034, 12 *Jur.* 583, 23 *L. J. Exch.* 249.

**(2) Illustrations.**—A contract of life and accident insurance excepted from the risks covered by it injuries resulting from being upon the platform of moving cars, or from attempting to enter or leave such cars in motion, this exception not being applicable, however, to the exposure of railway employés in the performance of their duty. The assured, a shop-hand of a railway company, while being carried homeward from the shop at the close of the day's work, upon one of the company's trains, went out upon the platform while the train was in motion, intending to get off when it should stop, for the purpose of crossing over, by a switch, to another track. He was thrown off and killed. *Held*, that the case was within the specific exceptions in the contract, and the insurer was not liable. *Hull v. Equitable Acc. Assoc. (Minn.)*, 42 *N. W. Rep.* 936.

An engineer who was killed had a ticket issued by a passenger assurance company, insuring him against death "caused by accident while travelling by public or private conveyance provided for the transportation of passengers." The proof showed that defendants were selling two classes of tickets, one known as the "travellers' risk," the other as the "general accident," the latter being

\* What is injury caused by "accident" within the meaning of insurance laws, see notes, 8 *AM. REP.* 219, 54 *Id.* 302.

What is an injury caused by "outward and visible means" within meaning of insurance laws, see note, 7 *AM. REP.* 414.



sold for the highest price; that deceased purchased the latter; that at the time of the purchase defendant's agent knew him to be an engineer, and had no instructions not to sell to railroad employes. *Held*, that deceased was insured against all accidents, without regard to the capacity in which he was acting; that the ticket was intended to cover the accident by which he met his death; and that defendant was liable. *Brown v. Railway Pass. A. Co.*, 45 Mo. 221.

**3. Proximate and remote cause.**—The death of one assured was due to the "effects of an injury caused by accident," where the death, though due to pneumonia, would not have occurred but for the pain, worry, and weakness resulting from the accident. *Isitt v. Railway Pass. A. Co.*, 22 Q. B. D. 504.

**4. Somnambulism of traveller.**—In an action to recover from an insurance company an averment in the complaint sufficiently negatives a provision in the policy exempting from liability for injuries self-inflicted, or those that result from design or voluntary exposure to unnecessary danger, where it charges that the insured fell asleep from weariness and the motion of the cars, in the night-time, and while he was in a dazed and unconscious condition, and not knowing or realizing what he was doing, involuntarily arose from his seat in the car, and walked unconsciously to the platform of the car, and without fault on his part fell to the ground and was injured. *Scheiderer v. Travellers' Ins. Co.*, 12 Am. & Eng. R. Cas. 160, 58 Wis. 13, 16 N. W. Rep. 47.

**5. "Public or private conveyance."**—A holder of an accident policy was insured to a certain amount against death caused by accident while travelling by public or private conveyances, provided for the transportation of passengers. In passing from a steamboat to a connecting railway the insured fell upon the slippery sidewalk which it was usual for travellers to use in passing from one line to the other, and was so injured as to die. *Held*, that the death was within the terms of the policy, and a recovery could be had. *Northrup v. Railway Pass. A. Co.*, 43 N. Y. 516.

**6. Total or partial disability.**—Where an accident policy provides for an indemnity while the insured is totally disabled, there can be no recovery for a partial disability; neither can there be a recovery where the insured is so disabled as to

prevent him from following his ordinary avocation, but where he is still able to engage in some other employment. *Lyon v. Railway Pass. A. Co.*, 46 Iowa 631.

**7. Payment of premium.**—A brakeman who had taken an accident policy gave the insurance company a written order on the railroad company that employed him to pay the insurance company out of his wages the instalments of the premium as they fell due. This was delivered by the insurance company to the railway company, according to custom. The policy provided that so long as an instalment remained unpaid there could be no claim for any injury received meanwhile. The railway company neglected to pay one of the instalments, and within the period which it should have covered the brakeman was killed. *Held*, that notwithstanding the non-payment, the beneficiary in the policy was entitled to recover; the arrangement between the insured and the companies amounted to an assignment to the insurance company of enough of his wages to pay the premium when the instalments fell due, and must be regarded as a payment so long as the insurance company did not notify the insured that it was not paid. *Lyon v. Travellers' Ins. Co.*, 55 Mich. 141, 20 N. W. Rep. 829.

**8. Notice of accident to company.** Where a policy contains a provision that in case of accident immediate notice shall be given the company the giving of such notice is essential to a recovery, but what is a sufficient notice is a question for the jury. *Lyon v. Railway Pass. A. Co.*, 46 Iowa 631.

A policy stipulating that failure to notify the company of any injury for the space of ten days after it is received shall bar all claim under the policy, is valid; and when such stipulation has neither been complied with nor waived, the assured cannot recover upon the policy. *Heywood v. Maine Mut. Acc. Assoc.*, 85 Me. 289, 27 Atl. Rep. 154.

Where a policy requires immediate notice in case of accident, a complaint to recover the amount of the insurance is good that states generally that the insured has performed all the conditions of the policy on his part. *Scheiderer v. Travelers' Ins. Co.*, 12 Am. & Eng. R. Cas. 160, 58 Wis. 13, 16 N. W. Rep. 47.

A policy contained a provision that if an injury should occur during the term covered by the policy, the insured should forthwith give the company notice, stating the nature

and extent of the injury. An injury occurred, but the policy-holder failed to give notice. The company proceeded to examine the proofs of the injury, and based a refusal to pay on other grounds. *Held*, that this was a waiver of the condition requiring notice, and if other necessary facts were proven the insured might recover. *Unthank v. Travelers' Ins. Co.*, 4 Biss. (U. S.) 357.

A policy required immediate notice to be given to the company of an injury to the insured, and also contained this provision: "Provided, always, that no claim shall be made under this policy by the said insured in respect to any injury, unless the same shall be caused by some outward or visible means, of which proof satisfactory can be furnished." *Held*: 1. That a notice given six days after the alleged injury, which happened in the city where the policy was issued, and where the company had a resident agent, was too late, where no excuse was shown for the delay; that the word "immediate" in such case is not to be literally construed, but the notice must be given within a reasonable time, according to the circumstances of the particular case. 2. That this did not require the insured to furnish proofs of the character and extent of the injury before bringing suit. *Railway Pass. A. Co. v. Burwell*, 44 Ind. 460.

A provision in a policy contained the condition that in case of fatal accident within the United Kingdom, notice must be given within seven days. The insured was drowned in Jersey, where it was impossible to give notice within that time. *Held*, that such notice was not a condition precedent to the right to recover, and that the accident happened within the United Kingdom, and the insurers were liable. *Stoneham v. Ocean R. & G. A. I. Co.*, 19 Q. B. D. 237.

**9. Defences—Neglect of personal safety.**—The general rule of law is that a party is not entitled to compensation for an injury of which his own negligence or want of due care has been the primary cause; but the contract of insurance forms an exception to this rule, as has been repeatedly held in England and in the United States. *Champion v. Railway Pass. A. Co.*, 6 Lans. (N. Y.) 71.

Where a policy of insurance against accidental injuries or death contains a condition that the insured shall at all times "use

due care and diligence for his personal safety and protection," and a plea to an action on it avers that he failed to do so, "but contributed directly and proximately to his own injury and death by getting off an engine in motion in the night-time, with his back in the direction in which said engine was going, which was an unsafe and dangerous way of alighting from it,"—*held*, that a replication alleging "that said insured was a railroad switchman, was insured as such, and met the accident which caused his death while in the discharge of his customary duties as such switchman," was demurrable and insufficient, because, though the policy covered injuries resulting from the dangers incident to the service, it did not cover injuries resulting from negligence or want of due care in the performance of customary duties. *Standard Life & A. Ins. Co. v. Jones*, 94 Ala. 434, 10 So. Rep. 530.—**DISTINGUISHING** National Benefit Assoc. v. Jackson, 114 Ill. 533.

A railway-passenger policy provided that the insurers should not be liable for an injury which was the result of the negligence of the insured. In a suit to recover the amount of the policy the only proof offered was to the effect that the insured died from falling from a car platform in the night-time, when the train was in full motion; that he was either passing from one car to another, or was riding on the platform. *Held*, sufficient to show that the accident was the result of the negligence of the insured, and to justify the court in directing a verdict for the company. *Sawtelle v. Railway Pass. A. Co.*, 15 Blatchf. (U. S.) 216.

A policy contained the provision that there should be no recovery for an accident which was the result of the exposure to an obvious or unnecessary danger, and required the insured to use all due diligence for his personal safety and protection. It appeared that he was killed in the night-time while running along the track to get on a train, by being struck by a train moving in the opposite direction, on a parallel track. *Held*, there could be no recovery. *Tuttle v. Travelers' Ins. Co.*, 15 Am. & Eng. R. Cas. 488, 134 Mass. 175.

A policy contained the provision that the insured should use all due diligence for personal protection. While crossing certain railroad tracks several persons from different directions called to him "to look out for the express," whereupon he hastily attempted

to cross to the platform, but was struck by the train and killed. *Held*, that the question of his negligence was for the jury. *Duncan v. Preferred Mut. Ac. A. of N. Y.*, 36 N. Y. S. R. 928, 27 J. & S. 145, 13 N. Y. Supp. 620.

**10. Voluntary exposure.**—(1) *General*.—Where a policy provides that the company shall not be liable where the insured voluntarily exposes himself to unnecessary danger, and it appears that the insured was a railroad employé, and was injured in trying to get on a train moving at the rate of four or five miles an hour, it is a question for the jury to say whether such conduct was within the meaning of the condition in the policy. *Cotten v. Fidelity & C. Co.*, 41 Fed. Rep. 506.

A passenger on a railroad train who goes upon the platform of the train while moving, because he is sick and overcome with heat, does not violate a provision in a policy, providing that he "shall not voluntarily expose himself to or unnecessarily incur danger." *Marx v. Travelers' Ins. Co.*, 39 Fed. Rep. 321.

Where a policy insures against accidents causing death while "travelling by public or private conveyances provided for the transportation of passengers," and the insured falls on a slippery sidewalk and is killed while attempting to walk a short distance, from a steamboat landing to a railroad station, the right to recover is not affected by the fact that she might have procured a hack to carry her, where it appears that she pursued the same course that the great majority of passengers did. *Northrup v. Railway Pass. A. Co.*, 43 N. Y. 516.—**FOLLOWING** *Theobald v. Railway Pass. A. Co.*, 26 Eng. L. & Eq. 432.

In an action to recover on an accident policy which exempted the company from liability where the insured might meet his death "by voluntary exposure to unnecessary danger," it was proper for the court to charge that in order to establish death by voluntary exposure to unnecessary danger the jury must find that the act of the insured in exposing himself was known, or ought to have been known to him, and it was proper to refuse to charge that the insured was bound to exercise more than ordinary care, the insured only being bound to exercise the care that a prudent man would have exercised under the same circumstances. *Duncan v. Preferred Mut.*

*Ac. A. of N. Y.*, 36 N. Y. S. R. 928, 27 J. & S. 145, 13 N. Y. Supp. 620.

A condition in a policy exempting the company from liability where the insured exposes himself "to obvious risks of injury," is violated where it appears that the insured was injured by a risk which was obvious to him, or would have been so if he had been paying reasonable attention to what he was doing. *Cornish v. Accident Ins. Co.*, 23 Q. B. D. 453.

(2) *Illustrations*.—A person insured against death or injury "by violent and accidental means, within the terms of the policy," jumped from a moving train of cars to effect an important business which required haste, and received certain internal injuries. *Held*, that the insurers were not liable. *Southward v. Railway Pass. A. Co.*, 34 Conn. 574.

A policy held by an engineer contained the provision that he "should not wilfully expose himself to unnecessary peril." While backing his train at a moderate rate of speed on a down grade, he slipped and fell in attempting to pass from the tender to the cars attached to apply the brakes. *Held*, that he did not violate the terms of the policy. *Providence L. Ins. & I. Co. v. Martin*, 32 Md. 310.

A person insured against accidents was crossing railroad tracks, and was warned while upon the tracks by persons on both sides of the track "to look out for the express," whereupon, in his confusion, he ran toward the station platform, but was struck by the train and killed. *Held*, that it was a question for the jury to determine as to how far he was influenced by such warnings, and if they believed from the evidence that his conduct was such as a man of ordinary prudence would have done under like circumstances, then they were bound to find that his act was not voluntary. *Duncan v. Preferred Mut. Ac. A. of N. Y.*, 36 N. Y. S. R. 928, 27 J. & S. 145, 13 N. Y. Supp. 620.

A policy upon the life of W. provided that it should not "extend to or cover \* \* \* suicide, sane or insane, \* \* \* voluntary exposure to unnecessary danger," etc. It appeared that W., after crossing a railroad track in the village in which he lived, in the evening, met two men going toward the crossing, to whom he said: "Boys, look out for the engine;" and one of them replied: "I'm not afraid; my life is insured." A train was at that time approaching. The

men passed on over the track. W. turned and retraced his steps, and when within a few feet of the crossing stood still. The train was moving at about four miles an hour, the whistle blowing and bell ringing. When it was within about twenty-five feet of the crossing W. moved forward, and when upon the track "squatted down." He was struck by the engine and killed. The locality was lighted by an electric light. It did not appear that the men W. met were inebriated, or that there was any reason for him to incur danger on their behalf. *Held*, that the evidence disclosed that the danger was voluntarily and unnecessarily incurred, and that defendant was not liable; also, that evidence given, negating the idea of a motive on the part of W. to destroy his life, did not justify the submission of the case to the jury. *Williams v. U. S. Mut. Acc. Assoc.*, 133 N. Y. 366, 31 N. E. Rep. 222, 45 N. Y. S. R. 238.

**11. Violation of carrier's rules.**—An accident policy held by a railroad employé contained the provision that the company should not be liable in case of death resulting from a violation of the rules of the corporation. *Held*, in order to be a violation within the meaning of the policy, such rule must be in full force at the time of its violation and must be known to the policyholder. *Marx v. Travelers' Ins. Co.*, 39 Fed. Rep. 321.

A rule of a railroad company prohibiting persons from riding on the car platforms, but which is not at the time in force, and which is generally disregarded by both employés and passengers, is not a rule of the company within the meaning of such a provision in a policy. *Marx v. Travelers' Ins. Co.* 39 Fed. Rep. 321.

If the policy contains an exception as to injuries resulting from a violation of the employer's rules, the insured being presumed to have knowledge of them, it is not necessary for the defendant to prove his knowledge of them; but evidence as to the rules is not admissible, unless the exception is especially pleaded. *Standard Life & A. Ins. Co. v. Jones*, 94 Ala. 434, 10 So. Rep. 530.

Proof that people were accustomed to cross the track at the point in question is admissible on the question whether deceased was killed while violating the rules of the company within the meaning of the policy. *Duncan v. Preferred Mut. Ac. A.*

*of N. Y.*, 36 N. Y. S. R. 928, 27 J. & S. 145, 13 N. Y. Supp. 620.

Under the provisions of a policy insuring the holder against accidents while travelling on the conveyances of any common carrier, provided he complied with the rules and regulations of such carrier, and exercised due diligence for self-protection—*held*, that a passenger on a railway car, who was injured by being thrown from the steps of the car, where he stood while the train was approaching a station, in violation of a known rule of the company, was not entitled to recover. *Bon v. Railway Pass. A. Co.*, 56 Iowa 664, 10 N. W. Rep. 225.—QUOTING *Hickney v. Boston & L. R. Co.*, 14 Allen 429; *Damout v. New Orleans & C. R. Co.*, 9 La. Ann. 441.—COMPARED IN *Lindsey v. Chicago, R. I. & P. R. Co.*, 18 Am. & Eng. R. Cas. 179, 64 Iowa 407.

**12. —intoxication.**—The accidental shooting of an insured person while intoxicated, by a drunken companion, is within the meaning of a condition in a policy providing that "no claim shall be made under the policy where the death or injury may have happened while the insured was, or in consequence of his having been, under the influence of intoxicating drinks." The policy was violated if the accident happened while the insured was in a state of intoxication, whether it was the direct agent causing the accident or not. *Shader v. Railway Pass. A. Co.*, 3 Hun (N. Y.) 424, 5 T. & C. 643.

If there is an inconsistency between the terms of the application for the policy and the policy itself, excepting injuries resulting from intoxication, or received while under the influence of intoxicants, the policy must control; but where the application uses the words, "any accidental injury which may happen to me while under the influence of intoxicating drinks, or in consequence of having been under their influence," and the policy excepts injuries "happening to the insured while intoxicated, or in consequence of having been under the influence of any intoxicating drink," there is no material difference between the two, and it is not necessary, in order to make out the defence, that the intoxication should have contributed to the injury. *Standard Life & A. Ins. Co. v. Jones*, 94 Ala. 434, 10 So. Rep. 530.

**13. Amount recoverable.**— Plaintiffs, a tramcar company, were insured by defendants against "claims for personal in-

jury in respect of accidents \* \* \* to the amount of £250 in respect of any one accident." A tramcar was overturned and many persons injured, the company being compelled to pay £833 indemnity. *Held*, that the word "accident" in the policy meant injury in respect of which a person claimed compensation from the plaintiffs, and that the liability of the defendants was consequently not limited to £250, but the plaintiffs were entitled to recover the whole £833 on the policy. *South Staffordshire T. Co. v. Sickness & A. Assoc.* [1891], 1 Q. B. 402.

**14. Recovery over by insurer against railway company.**—Where a railroad company has negligently burned insured property, the insurance company cannot sue the railroad after paying the insurance; but the owner of the property may sue for the use and benefit of the insurance company. *Holcombe v. Richmond & D. R. Co.*, 78 Ga. 776, 3 S. E. Rep. 755.

### ACCORD AND SATISFACTION.

As regards public contracts, see CLAIMS AGAINST UNITED STATES, 6.

**1. What amounts to.**—If one having a cause of action, unliquidated in respect to amount, for a personal injury caused by the negligence of another, and, knowing all the facts, demands and receives from the wrongdoer a stated sum of money on account of the injury, there being no express agreement that it shall be in satisfaction, either in whole or in part, of the cause of action, the presumption is that it was intended by the parties as a full recompense for the injury, and operates as an accord and satisfaction, barring a subsequent action to recover damages for the same injury. *Hinkle v. Minneapolis & St. L. R. Co.*, 15 Am. & Eng. R. Cas. 391, 31 Minn. 434, 18 N. W. Rep. 275.—DISTINGUISHED IN *Sobieski v. St. Paul & D. R. Co.*, 41 Minn. 169, 42 N. W. Rep. 863. QUOTED IN *Gulf, C. & S. F. R. Co. v. Gordon*, 70 Tex. 80.

The plaintiff had a claim against the defendant, which the defendant disputed and refused to pay. The defendant had a claim against the plaintiff for freight charges which the plaintiff insisted were illegal, and which he refused to pay for that reason. The defendant brought suit for its freight. Thereupon all matters in dispute between the parties were settled by offsetting the

claims of the parties, and the payment of a small balance by the plaintiff. *Held*, that this was an accord and satisfaction, and that the plaintiff could not recover the amount of the illegal freight charges, provided the defendant made its above claims in good faith. *Wilder v. St. Johnsbury & L. C. R. Co.*, 65 Vt. 43, 25 Atl. Rep. 896.

**2. What does not.**—A voluntary payment of money to an employé injured by the negligence of the employer, merely as "wages" during the period of disability, does not constitute a satisfaction of the cause of action. *Sobieski v. St. Paul & D. R. Co.*, 41 Minn. 169, 42 N. W. Rep. 863.—DISTINGUISHING *Hinkle v. Minneapolis & St. L. R. Co.*, 31 Minn. 434, 18 N. W. Rep. 275.

**3. Necessity of performance.**—Where the plaintiff agrees to accept the defendant's promise in satisfaction, if the promise be not performed, plaintiff's remedy is by action for breach of the promise, and he cannot proceed on the original agreement or demand; but if he has agreed to accept the performance of such promise in satisfaction, then there can be no satisfaction without performance. *Gulf, C. & S. F. R. Co. v. Harriett*, 80 Tex. 73, 15 S. W. Rep. 556.

**4. With whom made.**—A railway company cannot satisfy the estate of an employé, killed through its negligence, by settlement with and payment to his widow, she not being the administratrix of his estate. *Dowell v. Burlington, C. R. & N. R. Co.*, 15 Am. & Eng. R. Cas. 153, 62 Iowa 629, 17 N. W. Rep. 907.—REVIEWED IN *Yelton v. Evansville & I. R. Co. (Ind.)*, 54 Am. & Eng. R. Cas. 69, 33 N. E. Rep. 629.

**5. Effect.**—Accord and satisfaction with a person injured is a defence to proceedings, under Lord Campbell's Act, by his representatives after his death. *Read v. Great Eastern R. Co.*, 37 L. J. Q. B. 278, L. R. 3 Q. B. 555, 16 W. R. 1040, 18 L. T., N. S. 82; 9 B. & S. 714.

Where the vendor of land for a railroad depot accepts the amount raised by subscription when collected in full satisfaction of the contract of purchase, the exact amount agreed to be paid will be a matter of no importance, especially when the vendor has the land surveyed and staked off, and removes his fences from the land, and gives possession. *Hall v. Peoria & E. R. Co.*, 143 Ill. 163, 32 N. E. Rep. 598.

A lot owner accepted a certain sum "in full payment and satisfaction" of any claim that he might have for damages to his lots against a railroad "by reason of the construction of such railroad." Afterward he claimed damages by reason of the track being raised above the street grade in front of his property, insisting that his release covered only damages resulting from constructing the track at grade. *Held*, that it covered all damages, and he could not recover. *Kansas City & O. R. Co. v. Hicks*, 14 *Am. & Eng. R. Cas.* 100, 30 *Kan.* 288, 1 *Pac. Rep.* 396.

An agreement by a railway company with a landowner under the Lands Clauses Act, 1845, § 6, to purchase part of his land, with the understanding that the purchase money should be taken in full compensation for all damage by severance and injury to the adjoining lands, covers injury to houses on the adjoining land owing to the subsidence of the land, consequent upon excavations for which the landowner obtained an assessment of damages by inquisition under the Lands Clauses Act, § 68, and afterwards brought an action to recover the amount of the assessment and the costs of the inquisition. *Todd v. Metropolitan District R. Co.*, 24 *L. T.*, *N. S.* 435.

**6. Impeachment for fraud.**—The plaintiff, in an action for personal injuries, where the company pleads receipt in full, may file a bill in equity alleging the receipt to have been obtained by fraud, and praying that the company might be restrained from setting it up as a defense. The prayer of the bill in such case is rightly limited to the relief asked. *Stewart v. Great Western R. Co.*, 2 *De G., J. & S.* 319, 11 *Jur. N. S.* 627, 13 *W. R.* 907, 13 *L. T. N. S.* 79.—**DISTINGUISHED** IN *Lee v. Lancashire & Y. R. Co.*, *L. R.* 6 *Ch.* 527, 25 *L. T. N. S.* 77, 19 *W. R.* 729.

Where a person injured is paid money, and gives a receipt acknowledging the payment to be in full discharge of his claims, and afterwards brings suit on account of such injuries, a bill in equity filed by him to restrain the company from setting up such receipt as a complete defence to the action, not charging fraud, but alleging that he signed the receipt on the express condition that he should not be excluded from further compensation if his injuries prove to be more serious than was first supposed, will be dismissed, since the whole case can be better tried at law. *Lee v. Lancashire &*

*Y. R. Co.*, *L. R.* 6 *Ch.* 527, 19 *W. R.* 729, 25 *L. T. N. S.* 77.

**7. Refunding amount received.**—If, after the injury, the plaintiff receives money from the defendant, its return is not a condition precedent to a recovery, unless it be shown that it was paid under an agreement of settlement of the damages. *Vau-train v. St. Louis, I. M. & S. R. Co.*, 8 *Mo. App.* 538.

Where accord and satisfaction are embodied in a written instrument which the plaintiff has signed with his mark, and he denies that he ever entered into such a contract, or that the same was read over to him, and claims that the amount paid him was not paid upon such contract, but upon his claim for wages, and that in signing he thought he was subscribing to an ordinary pay-roll only, it is not necessary for him to refund the amount received to entitle him to make the question of fraud in imposing upon him the written contract into which he did not enter in lieu of the actual contract under which the money was paid to him. *Butler v. Richmond & D. R. Co.*, 88 *Ga.* 594, 15 *S. E. Rep.* 668.

## ACCOUNTING.

**Between land-grant railways and the government**, see **LAND-GRANT RAILROADS**, 8.

**Bondholder, when entitled to**, see **REORGANIZATION**, 8.

**By receivers**, see **RECEIVERS**, X.

### 1. Who may be called to account.

—Persons appointed to receive and disburse subscriptions for the purpose of consolidating and extending certain railroads may be required to account to the persons paying in the subscriptions for amounts so received, and the questions of the legality of their appointment, or whether they were originally trustees, are immaterial. *Gould v. Seney*, 5 *N. Y. Supp.* 928.

An account will be ordered as of course where defendant admits he is an accounting party. But if the liability to account is denied (as here by former settlement) no order of reference or other issue can be had until the alleged bar is passed upon. Therefore, in an action on the bond of a railway treasurer where the defendant's accounting character is admitted in the answer, but a settlement with the company pleaded in bar of an account, the court did not err in submitting an issue to the jury in relation to the settle-

ment, as a preliminary matter. *Atlantic, T. & O. R. Co. v. Morrison*, 82 N. Car. 141.

On the trial of such issue the proof was that defendant had turned over the assets enumerated in a certain receipt and had had other moneys not embraced therein, and that the party giving the receipt refused to execute it in full. Upon this proof the judge properly told the jury there was no evidence of a final settlement. *Atlantic, T. & O. R. Co. v. Morrison*, 82 N. Car. 141.

**2. And at whose instance.**—A creditor and stockholder of a railroad company may bring an action to compel its officers to account for their management of the property and the disposition of its funds, and, if need be, to obtain a removal of the officers. *Ramsey v. Gould*, 39 How. Pr. (N. Y.) 62, 8 Abb. Pr. N. S. 174, 57 Barb. 398; affirmed in 3 Lans. 181.

A court of equity will not order an accounting between a railroad company and its contractor at the suit of the contractor where he does not himself offer to render an account, showing the balance due; neither will the court enjoin the company from making a contract with other parties for the completion of the work. *Wood v. Boney* (N. J. Eq.), 21 Atl. Rep. 574.

Where a party has a legal right to bring an action, the court has no right to look into his motives for doing so. So held where a motion was made to dismiss a bill, filed by a creditor and stockholder, to compel officers of a railroad to account for their management of the property and the disposition of its funds, the motion being based upon the ground that the action was brought in bad faith and was but an attempt to pervert and abuse the process of court to purposes of retaliation and revenge, and to compel the defendants to cease a certain litigation which was adverse to the complaint. *Ramsey v. Gould*, 39 How. Pr. (N. Y.) 62, 8 Abb. Pr. N. S. 174, 57 Barb. 398; affirmed in 3 Lans. 181.

Where a creditor and stockholder files a bill to compel officers of a railroad company to account, and the defendants move to dismiss on the ground that the action was brought in bad faith, the prosecution of the suit will not be deemed an abuse or perversion of the process of the court, unless it plainly appears that plaintiff has no meritorious cause of action, or that he was estopped from prosecuting it; and this is true in a court of equity, regardless of the rule

that a plaintiff must come into court with "clean hands." *Ramsey v. Gould*, 39 How. Pr. (N. Y.) 62, 8 Abb. Pr. N. S. 174, 57 Barb. 398; affirmed in 3 Lans. 181.

A railroad company having purchased a majority of the shares of stock in a canal company, elected for the latter a board of directors who were in the interest of the railroad company, and then, with the assent of said board, appropriated the entire canal and property of the canal company as a railroad track, paying therefor a price or compensation which was agreed upon by the directors of the two companies, but which was far below the actual value of the property. Held, that, although the stockholders and creditors of the canal company could not, after the road had been completed, reclaim the property or enjoin its use, yet they were not concluded by such agreement, so far as regarded the price of the property, but could, by action, compel the railroad company to account for its additional value, which was what the interest of the canal company was worth generally for any and all uses, and not for canal purposes merely, or for any particular use. *Goodin v. Cincinnati & W. Canal Co.*, 18 Ohio St. 169.—QUOTING *Chapman v. Mad River & L. E. R. Co.*, 6 Ohio St. 120. REVIEWING *Hatch v. Cincinnati & I. R. Co.*, 18 Ohio St. 92.—FOLLOWED IN *Doud v. Mason City & Ft. D. R. Co.*, 36 Am. & Eng. R. Cas. 633, 76 Iowa 438, 41 N. W. 120, p. 65.

In a proceeding to compel a company to pay for land appropriated, the measure of damages is the value of the land at the time it is assessed in the proceeding. *Goodin v. Cincinnati & W. Canal Co.*, 18 Ohio St. 169.—REVIEWED IN *Railroad Co. v. Perkin*, 49 Ohio St. 326.

**3. Procedure—Proper charges.**—Township aid bonds were delivered by a railroad company to one of its directors to pay for depot buildings which he had put up and agreed to convey, but did not do so. Held, on a bill for accounting, that he should be charged with the bonds. *Michigan Air Line R. Co. v. Mellen*, 5 Am. & Eng. R. Cas. 245, 44 Mich. 321, 6 N. W. Rep. 845.

## ACCOUNTS.

Of agents, jurisdiction of equity over, see EQUITY, 8.

**1. In general.**—Plaintiff sued to recover for services rendered the company by



him as section foreman, and also to recover for board of laborers employed by the company. His claim was in the form of an account verified by affidavit. *Held*, that the claim, being for items based on different transactions, was not an account within the meaning of Tex. Rev. St. art. 2266, and it was error to admit it in evidence. *Galveston, H. & S. A. R. Co. v. Schwartz*, 2 Tex. App. (Civ. Cas.) 664.

**2. Accounts stated.**—An account stated cannot be based on an appraisal where it does not appear that both parties mutually agreed on the appraisers, or recognized them as authorized to bind them by their action. *Chicago & C. S. R. Co. v. Peters*, 45 Mich. 636, 8 N. W. Rep. 584.

A roadmaster of a railroad, in the line of his duty, audited accounts of an employé of the company, and reported it to the paymaster of the company, and certified therewith the balance that was due the employé. *Held*, that this certificate, accepted by the employé, constituted an account stated between him and the company on which a suit could be maintained, without reference to the items making up the accounts. *St. Louis, I. M. & S. R. Co. v. Camden Bank (Ark.)*, 1 S. W. Rep. 704.

A railway company brought an action against A., formerly its agent, on an account stated. A. filed an answer containing a general denial. On the trial the plaintiff read in evidence a letter of A. to the auditor of the company, dated February 12, 1874, proposing to pay every dollar of the defalcation of one B., to the amount of \$7582.11, if he had time, and stating therein that his January report was short \$5042.07, and that the balance of \$2540.04 would have to be reported in his February account, and then produced the auditor as a witness, who testified the account sued on was furnished by him to A. on March 21, 1874; that A. went out of office on February 14, 1874; that he met A. in regard to the account three or four times; that the account included the whole of February, 1874; that he saw the account in his possession, and that he made no objection to it; that several other statements of account were sent A. before and after March 21, 1874; that they were not all like the one sued on; that those after March 21 were different; that these statements were given A. as matters of information. *Held*, that the stated account was not conclusively established by the testimony, and therefore it was not error for

the district court to submit the question in the case to the jury. *Kansas Pac. R. Co. v. Anderson*, 23 Kan. 44.

**3. Reopening and restating accounts.**—Although parties may have agreed upon a statement of account, they may, by mutual consent, waive this, and agree to a reopening and restatement of the account; and if, after such statement, the creditor accepts the amount thus stated as full payment of the account, without exception or reservation, this will constitute a full settlement of his whole claim, although the amount received is less than the sum agreed on as his due at the first settlement. *Horn v. St. Paul & N. P. R. Co.*, 37 Minn. 375, 34 N. W. Rep. 593.

Equity has jurisdiction to hear and determine the matters under a bill filed by shippers of live stock, charging that during the past year complainants had made some 250 shipments of stock over defendant railroad, upon which the freight amounted to about \$350,000; that the freight had been paid monthly, and, by reason of fraud and concealment on the part of the company, that an excess of freights had been paid; the prayer of the bill being that the settlements might be opened, that plaintiffs might recover back whatever sum should be found due upon a proper settlement. *Kirby v. Lake Shore & M. S. R. Co.*, 120 U. S. 130, 7 Sup. Ct. Rep. 430.

**4. Recovery for items not included.**—A railroad company may recover from another company for use of a house furnished by authority of the latter to a joint traffic agent as part of his compensation, by accident not included in the accounts of their traffic contract upon which a division of profits was made. *Boston & L. R. Co. v. Nashua & L. R. Co.*, 157 Mass. 258, 31 N. E. Rep. 1067.

### ACCOUNTS STATED.

What are, effect, etc., see ACCOUNTS, 2.

### ACCRETION.

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**ACQUIESCENCE.**

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**Ratification of president's act by,** see **PRESIDENT**, 9.

**When a bar to suit,** see **EQUITY**, 7.

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**ACTIONS.**

**Against carriers of live stock,** see **CARRIAGE OF LIVE STOCK**, X.

— **carriers of passengers,** see **CARRIAGE OF PASSENGERS**, VII.

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— **and against railway commissioners,** see **RAILWAY COMMISSIONERS**, III, 8.

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— **personal representatives,** see **EXECUTORS AND ADMINISTRATORS**, 11-13.

— **stockholders against company or its officers,** see **STOCKHOLDERS**, III.

**For breach of contract,** see **CONTRACTS**, IX.

— **breach of duty to build cattle-guards,** see **CATTLE-GUARDS**, II.

— **causing death,** see **DEATH BY WRONGFUL ACT**.

— **causing fires, costs in,** see **COSTS**, 8.

— **damage caused by fire,** see **FIRES**, IV.

— **dividends,** see **DIVIDENDS**, 11-14.

— **ejection of passenger,** see **EJECTION OF PASSENGERS**, III.

— **ejection of passengers, costs in,** see **COSTS**, 6.

— **failure to construct culverts,** see **CULVERTS**, 5.

— **flooding lands,** see **FLOODING LANDS**, II.

— **illegal removal of corpse,** see **CORONERS**, 2.

— **injuries caused by fellow-servants,** see **FELLOW-SERVANTS**, VII.

— **injuries caused by steam-railways in streets,** see **STREETS AND HIGHWAYS**, VI.

— **for injuries received at stations,** see **STATIONS AND DEPOTS**, V.

— **injuries to children,** see **CHILDREN, INJURIES TO**, V.

— **injuries to employés,** see **EMPLOYÉS, INJURIES TO**, VI.

— **injuries to persons at crossings,** see **CROSSINGS, INJURIES TO PERSONS AT**, VII.

— **interference with easements,** see **EASEMENTS**, 14, 15.

— **interference with or disturbance of franchises,** see **FRANCHISES**, 9.

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— **killing or injuring animals,** see **ANIMALS, INJURIES TO**.

— **loss of baggage,** see **BAGGAGE**, VIII.

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— **negligence,** see **NEGLIGENCE**, III.

— **negligent injuries caused by street railways,** see **STREET RAILWAYS**, IX, 2.

— **overcharges, costs in,** see **COSTS**, 10.

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— **refusal to transfer stock,** see **STOCK**, V, 7.

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— **unlawful taxation,** see **TAXATION**, X.

— **wrongful interference with property under color of eminent domain,** see **EMINENT DOMAIN**, XIV.

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— **construction contracts,** see **CONSTRUCTION OF RAILWAYS**, II, 6.

— **coupons,** see **COUPONS**, II.

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**To enforce claims of creditors,** see **CREDITOR'S BILL**.

— **enforce penalties,** see **PENALTIES**, II.

— **enforce subscriptions to stock,** see **SUBSCRIPTIONS TO STOCK**, III.

— **foreclose deeds of trust,** see **DEEDS OF TRUST**, 14-20.

— **foreclose laborers' lien,** see **LIENS**, III, 5.

— **foreclose mechanics' lien,** see **LIENS**, II, 6.

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What may be compromised, see COMPROMISE, 6.

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See also ASSAULT; ASSUMPSIT; ATTACHMENT; EJECTMENT; EQUITY; FORCIBLE ENTRY AND DETAINER; INJUNCTION; LIBEL; MALICIOUS PROSECUTION; REPLEVIN; TROVER.

**1. When an action will lie.**—The right to bring an action based upon a wrong or negligence depends upon the law of the state where the injury is inflicted. *Hanna v. Grand Trunk R. Co.*, 41 Ill. App. 116.

The fact that a state is the sole proprietor of a corporation does not prevent it from being sued.\* *Hutchinson v. Western & A. R. Co.*, 6 Heisk. (Tenn.) 634, 12 Am. Ry. Rep. 16.

One corporation cannot maintain an action against another for refusing to perform a duty or to render a service unless it affirmatively appears that the duty or service exists by force of a statute or contract, or a usage having the force of law. *Dela-ware, L. & W. R. Co. v. Central S. Y. & T. Co.*, 37 Am. & Eng. R. Cas. 607, 45 N. J. Eq. 50, 17 Atl. Rep. 146; affirmed, 46 N. J. Eq. 280.—REVIEWING ATCHISON, T. & S. F. R. Co. v. Denver & N. O. R. Co., 110 U. S. 667.

A railroad company is not liable for negligently running over and mutilating a dead body, but it may be liable for damages to apparel in which the body was shrouded. *Griffith v. Charlotte, C. & A. R. Co.*, 23 S. C. 25, 55 Am. Rep. 1.

It is no ground for damages against a company that a drayman was discharged by his employer because an agent of the company informed the employer that the drayman would not be allowed to violate proper regulations of the company. *Donovan v. Texas & P. R. Co.*, 29 Am. & Eng. R. Cas. 320, 64 Tex. 519.

A woman cannot recover damages for a fright received in seeing a horse running away, which came toward her but did not come in physical contact with her, nor cause her to come in physical contact with any other object. *Lehman v. Brooklyn City R. Co.*, 14 N. Y. S. R. 575, 47 Hun 355.†

8 & 9 Vict. c. 20 takes away the common-law right of action for an interference with a road under the powers of a railway company, with a private right of way, except when

special damage has been sustained. *Watkins v. Great Northern R. Co.*, 16 Q. B. 961, 20 L. J. Q. B. 391.

**2. When case will lie.**—An action on the case lies against a party who has a public employment—as, for example, a common carrier or other bailee—for a breach of duty, which the law implies from his employment or general relation. *Southern Exp. Co. v. McVeigh*, 20 Gratt. (Va.) 264.

A corporation is liable in an action on the case for the want of skill, negligence or carelessness of its employés, but not for wilful and intentional acts not committed in the course of their employment. *Illinois C. R. Co. v. Downey*, 18 Ill. 259.—NOT FOLLOWED IN *Gilliam v. South & N. Ala. R. Co.*, 15 Am. & Eng. R. Cas. 138, 70 Ala. 268.

Where the command of the company is to do only a lawful act, and the servant does it in an unlawful way, so as to injure another, an action on the case is the remedy; but where the act is unlawful in and of itself, and not from the mode of doing it, trespass is the proper action. *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 353.—FOLLOWED IN *Chicago & N. W. R. Co. v. Peacock*, 48 Ill. 253.

Trespass on the case will lie by a passenger, where he has been wrongfully ejected from a train by the company's employés, after the company has agreed to carry him. *Emigh v. Pittsburgh, Ft. W. & C. R. Co.*, 4 Biss. (U. S.) 114.

Trespass on the case may be maintained, under the Va. Code, 1860, ch. 148, § 7, in any case in which trespass will lie; but the converse of the proposition is not provided for by statute; trespass therefore remains as at common law. So where a party is ejected forcibly from a car and brings an action of trespass, and in his declaration alleges secondary or consequential damages, a demurrer is properly sustained, as the declaration shows a case in which trespass at common law will not lie, that action being always for immediate and direct injury. *Barnum v. Baltimore & O. R. Co.*, 5 W. Va. 10.

A company using the cars of another company for hire can maintain an action on the case for an injury to such cars. *Montgomery*

\*Sovereignty cannot be sued, see note, 16 AM. & ENG. R. CAS. 309.

†Fright as a basis for an action for damages, see note, 14 L. R. A. 666.

\*Proper form of action against carriers, see note, 11 A. & ENG. R. CAS. 101.

Form of action where passenger is injured, see notes, 16 AM. & ENG. R. CAS. 309, 11 Id. 101.

*Gastlight Co. v. Montgomery & E. R. Co.*, 86 Ala. 372, 5 So. Rep. 735.

An action for damages for running a train at a prohibited rate of speed in a town or city, when in the circuit court, may be a case, though the statute prescribe debt or assumpsit before a justice of the peace. *Chicago, R. I. & P. R. Co. v. Reidy*, 66 Ill. 43.

An action to recover damages for the diminution of the value of adjacent property, occasioned by the location and use of railway tracks in a public street, is not an action of trespass *qu. cl. fr.*, but, at the common law, would have been an action on the case. *Jeffersonville, M. & I. R. Co. v. Esterle*, 13 Bush (Ky.) 667, 17 Am. Ry. Rep. 111.

Case and not trespass is the proper remedy for an injury to land caused by the neglect of a corporation to remove stones thrown upon it in the course of constructing a railroad. *Sabin v. Vermont C. R. Co.*, 25 Vt. 363.

**3. Who may sue.**—(1) *In general.*—The true owner of personal property may enforce his right to it, as against the consignor or consignee or carrier, or other bailor or bailee, whenever he sees fit to do so, before its delivery to the bailee, as directed by the bailor. *Wells v. American Exp. Co.*, 6 Am. & Eng. R. Cas. 298, 55 Wis. 23, 11 N. W. Rep. 537, 12 N. W. Rep. 441, 42 Am. Rep. 695.

A master whose servant is injured by the negligence of a railway company whose train comes into collision with the train of another company, in which the servant was riding, may maintain an action for such injuries. *Berringer v. Great Eastern R. Co.*, L. R. 4 C. P. Div. 163, 48 L. J. C. P. Div. 400, 27 W. R. 681.

An action to recover assets of a railroad company claimed to have been fraudulently disposed of or converted to the use of directors or trustees of the company, should be in the name of the corporation. *Allen v. New Jersey S. R. Co.*, 49 How. Pr. (N. Y.) 14.

Where the articles and by-laws of a railroad company do not recognize any such officer as a general solicitor or attorney, such person has no authority to institute and carry on suits without the sanction or permission of the board of directors. *Des Moines & M. R. Co. v. Chicago & N. W. R. Co.*, 2 McCrary (U. S.) 531, 7 Fed. Rep. 748.

A widow cannot maintain an action, be-

fore her interest in her deceased husband's realty has been set apart, to compel a railway company to purchase her alleged dower interest in a right of way granted by him. *Tuttle v. Burlington & M. R. Co.*, 49 Iowa, 134.

(2) *Injuries to land.*—A subsequent purchaser of lands cannot maintain an action for damages against a railroad company for injuries resulting from surveying trial lines over the land for the location of its road. *Galveston, H. & S. A. R. Co. v. Pfeuffer*, 11 Am. & Eng. R. Cas. 373, 56 Tex. 66.

The owner of land adjoining a railroad who sold the same, reserving no rent and no rent having been assigned to him, and who afterwards receives back a deed for the same, cannot recover damages from injury done to the property when the title was outstanding, even though while out of ownership he was permitted by the owner to collect the rents for his own use. *Thompson v. Pennsylvania R. Co.*, 51 N. J. L. 42, 15 Atl. Rep. 833.

(3) *Injuries to personal property.*—A person in possession of goods belonging to another may maintain an action against a railroad company for negligently injuring them. *Moran v. Portland Steam Packet Co.*, 35 Me. 55.

Either the owner or the consignee of goods shipped by rail may maintain an action against the company for damage or loss. *Western & A. R. Co. v. Kelly*, 1 Head (Tenn.), 158.

Where a family picture kept as an heirloom is loaned by the real owner temporarily to his sister, and is injured while being carried on the railroad, the right of action for the injury is in the owner, and not in the one to whom it is loaned. *Lockhart v. Western & A. R. Co.*, 73 Ga. 472, 54 Am. Rep. 883.

Where a horse is injured by a street-car company while in the possession of an auctioneer for sale, who has the privilege of using it until sold, but who was under no liability to the owner for an injury to the same, the auctioneer cannot maintain an action against the street-car company for the injury. *Claridge v. South Staffordshire T. Co.*, [1892], 1 Q. B. 422.

Plaintiff shipped goods from Canada to England "to be delivered to — order or his assigns, he or they paying the freight." The shipper indorsed the bills of lading to various purchasers who paid drafts on them

for the price; the goods having been damaged in transit, they made claim upon the shipper for the amount thereof. *Held*, that the shipper had such an interest as would enable him to recover against the carriers for the damage. *Hately v. Merchants' Despatch Co.*, 2 Ont. 385.

**4. Demand before suit.**—Where it is claimed that a railroad company does not furnish a certain town with necessary railroad facilities, it is not necessary to make a demand on the company before instituting suit to compel the company to furnish such facilities. *Northern Pac. R. Co. v. Territory ex rel.*, 29 Am. & Eng. R. Cas. 82, 3 Wash. Ty. 303, 13 Pac. Rep. 604.

**5. Notice before suit.**—The New Hampshire statute of 1847, requiring notice before suit, applies to all railroads, and is not restricted to public corporations. *Lamphier v. Worcester & N. R. Co.* 33 N. H. 495.

A provision in a private railway act that no action shall be commenced against any person for any act done in pursuance of the statute unless twenty days' previous notice in writing shall have been given, applies to the company for whose benefit the act was passed, as well as to a single individual. *Boyd v. London & C. R. Co.*, 6 D. P. C. 721, 4 Bing. N. C. 669, 6 Scott, 461.

Where a company, by its act, is entitled to notice before any action can be brought against it for any thing done or omitted in pursuance of its act, and an action is commenced against it for money received to the plaintiff's use, a plea that no notice of action was given, without alleging that the money was received in pursuance of its act, is bad. *Garlon v. Great Western R. Co.*, El., Bl. & El. 837, 5 Jur. N. S. 1244, 28 L. J. Q. B. 321.

An action against a railway company for liquidated damages incurred by obstructing a canal is an action for something done under the company's act, providing that no action shall be brought for anything done or omitted to be done in pursuance thereof without twenty days' notice, and the limitation clause applies. *Kennet & A. Canal Navigation v. Great Western R. Co.*, 7 Q. B. 824, 4 Railw. Cas. 90, 9 Jur. 788, 14 L. J. Q. B. 325.

A provision in a railway company's act, that no action shall be brought for anything done in pursuance thereof unless notice in writing is given, does not apply to an action for overcharges. *Garlon v. Great Western*

*R. Co.*, El., Bl. & El. 837, 5 Jur. N. S. 1244, 28 L. J. Q. B. 321.

Under its special act the defendant company was entitled to notice of an action to recover excessive charges for the carriage of goods. *Kent v. Great Western R. Co.*, 3 C. B. 714, 16 L. J. C. P. 72.

A notice of action for extortion in carrying goods need not contain a demand of interest in order that the arbitrator to whom the matter is submitted may award interest. *Edwards v. Great Western R. Co.*, 11 C. B. 588, 21 L. J. C. P. 72.

Where a company is sued as a carrier no notice of action is necessary, although the act incorporating the company provides that no action should be brought for "anything done or omitted to be done," in pursuance of the act, unless fourteen days' previous notice was given. *Palmer v. Grand Junction R. Co.*, 4 M. & W. 749, 7 D. P. C. 232.

So held, although the loss was caused in consequence of the fences on its line having broken down, whereby the train was upset. *Palmer v. Grand Junction R. Co.*, 4 M. & W. 749, 7 D. P. C. 232.

Where an action is brought against a railway company for negligence in carrying a passenger, it is not entitled to the notice provided by its act, where an action is brought for anything done or omitted to be done in pursuance of the act, since in such case the company is sued as a carrier and not for anything done or omitted under the act. *Carpue v. London & B. R. Co.*, 5 Q. B. 747, D. & M. 608, 3 Railw. Cas. 692, 8 Jur. 464, 13 L. J. Q. B. 138.—**QUESTIONED** IN *Hammack v. White*, 8 Jur. N. S. 796, 11 C. B. N. S. 588.

**6. What actions are local.\***—A bill filed by creditors of a railroad company for the appointment of a receiver is of a "local nature," within the meaning of U. S. Rev. Stat. §§ 740-742, relating to the districts in which suit may be brought. *East Tenn., V. & G. R. Co. v. Atlanta & F. R. Co.*, 49 Fed. Rep. 608.

A suit to restrain defendant from removing earth from plaintiff's land is an action for "an injury to real property," within sec. 4994 of Mansf. Dig., and must be brought within the county where the land lies. *Cox*

\* Where venue may be laid in suits against corporations in state courts, see note, 57 AM. & ENG. R. CAS. 96.

v. *St. Louis, I. M. & S. R. Co.*, 55 Ark. 454, 18 S. W. Rep. 630.

Actions for the flooding of particular lands are local.—*Morris v. Missouri Pac. R. Co.*, 78 Tex. 17, 14 S. W. Rep. 228. *REVIEWING* *Livingston v. Jefferson*, 1 Brock-enbrough (U. S.), 203. *DISTINGUISHED IN* *Western Union Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608.

An action against a railroad to recover damages for the flooding of lands need not be brought in the county where the land is situated. Such action is not of a local nature within the meaning of the Mississippi code. *Archibald v. Mississippi & T. R. Co.*, 66 Miss. 424, 6 So. Rep. 238.

An action against a town to recover the amount of bonds issued by it in aid of a railroad is not an action to establish a lien on the real estate of the town, and is therefore not within the provisions of N. Y. Code of Civ. Proc. § 892, which requires actions to establish liens on real property to be tried in the county where such property is situated. *Becker v. Cherry Creek*, 70 Hun (N. Y.) 6.

**7. What are transitory.**—(1) *In general.*—Actions are deemed transitory when the transactions on which they were founded might have taken place anywhere, but are local where their cause is in its nature necessarily local. *Nonce v. Richmond & D. R. Co.*, 33 Fed. Rep. 429.

Actions based upon the negligence of the defendant are personal and transitory. *Home Ins. Co. v. Pennsylvania R. Co.*, 11 Hun (N. Y.) 182.

Under Ind. Rev. Sts. § 796, an action against a corporation may be instituted in any county where the corporation has an office or an agent upon whom process can be served, and said section is not in conflict with § 30 of the act. *New Albany & S. R. Co. v. Haskell*, 11 Ind. 301.

An action to recover for an injury resulting from the negligence of the defendant may be brought in any county where the defendant is found and served with process, such action being transitory and personal. *Barney v. Burnstenbinder*, 64 Barb. (N. Y.) 212, 7 Lans. 210.

Actions against railroad companies may be brought in any county in which any part of their lines may be. *Louisville & N. R. C. v. Saucier*, (Miss.) 1 So. Rep. 511.

An action may be brought against a railroad corporation for services rendered it in

any county where it has an office for the transaction of business, or any person resides upon whom process may be served. Section 796 of the Indiana Code of 1852 is still in force. *Evansville & I. R. Co. v. Spellbring*, 1 Ind. App. 167, 27 N. E. Rep. 239.

(2) *Actions for personal injuries.*—By the common law, actions *ex delicto* for injuries to personal property, or to the person, are transitory, and suit may be brought wherever plaintiff or defendant resides when suit is instituted. *Hanna v. Grand Trunk R. Co.*, 41 Ill. App. 116.

Actions for personal injuries are transitory in their character, and, notwithstanding the death of the person injured, may be brought in a state other than that in which the accident occurred, provided the right accrued in the latter state under a statute similar in import and character to the one in force in the jurisdiction in which the suit is brought. *Cincinnati, H. & D. R. Co. v. McMullen*, 38 Am. & Eng. R. Cas. 165, 117 Ind. 439, 20 N. E. Rep. 287.—*FOLLOWING* *Burns v. Grand Rapids & I. R. Co.*, 115 Ind. 169.

A passenger being injured by the negligence of a railroad company in another state may maintain an action for such injury in New Jersey. Such action is transitory, and the venue may be laid in the county in which the defendants were served with process. *Ackerson v. Erie R. Co.*, 31 N. J. L. 309.

A tort to the person, although alleged in the formal and technical language of pleading as *contra pacem*, is only a civil injury in contemplation of law; and the right of redress, like any other personal right, accompanies the party injured wherever he may go and have an opportunity to enforce his remedy. *Nonce v. Richmond & D. R. Co.*, 33 Fed. Rep. 429.

Actions, whether allowed by statute or common law, brought to recover for personal injuries, are transitory; thus, on demurrer, it appeared that the defendant company existed under the laws of this state, and was operating a certain railroad in the province of Quebec, and it was held that the plaintiff could sustain an action against the defendant for personal injuries alleged to have been sustained by him in said province through the neglect of the defendant to comply with the statute law of that province. *McLeod v. Connecticut & P.*

*R. R. Co.*, 28 *Am. & Eng. R. Cas.* 644, 58 *Vt.* 727, 6 *All. Rep.* 648.—QUOTING *Dennick v. Central R. Co. of N. J.*, 103 *U. S.* 11.

Actions for injuries to the person caused by a railroad company are transitory in their nature, and may be brought in any county throughout which such road runs. *South Florida R. Co. v. Weese*, 32 *Fla.* 212, 13 *So. Rep.* 436.

Where a railroad is chartered both in Tennessee and Mississippi, and has but one set of officers, and a passenger is injured in Mississippi while travelling on a single ticket, and sues for damages in Tennessee, it is immaterial whether the corporation be sued as a Tennessee or a Mississippi corporation. *Mississippi & T. R. Co. v. Ayres*, 16 *Lea (Tenn.)*, 725.

**8. What actions are founded on contract.**—An action against a carrier for a breach of contract of transportation is one arising on the implied contract, and is not an action *ex delicto*. *Evansville & R. R. Co. v. Kyte*, 6 *Ind. App.* 52, 32 *N. E. Rep.* 1134.

An action for failure to safely carry goods is one growing out of contract, and is therefore not included in L. Code, art. 165, making an exception as to trespass, etc., to the rule requiring actions to be brought at the place of domicile. *Gossin v. Williams & M. L. & T. R. & S. Co.*, 36 *La. Ann.* 186.—QUOTED IN *Caldwell v. Vicksburg, S. & P. R. Co.*, 39 *Am. & Eng. R. Cas.* 239, 40 *La. Ann.* 753; *St. Julien v. Morgan's L. & T. R. & S. Co.*, 33 *Am. & Eng. R. Cas.* 92, 39 *La. Ann.* 1063, 3 *So. Rep.* 280.

Where the controlling facts in a complaint show that the cause of action is based upon a contract, other less important averments of negligence or fraud do not make the cause of action one of tort. *Rothchild v. Grand Trunk R. Co.*, 30 *N. Y. S. R. 67*, 19 *Civ. Pro. Rep.* 53, 10 *N. Y. Supp.* 30.

In an action for damages, the complaint alleged that, in consideration of the promise of the defendant to keep stock out of the crops of the plaintiff, the latter had granted the former leave to enter upon his farm and construct its line of road across such farm, but that the defendant had permitted stock to enter upon and destroy such crops. *Held*, that the action is one upon contract, and not for a tort. *Cincinnati, W. & M. R. Co. v. Harris*, 61 *Ind.* 290.

#### 9. What actions sound in tort.\*—

An action to recover for injuries to a passenger caused by the upsetting of a coach is an action for tort, though it involves the violation of a contract between the carrier and the passenger to safely carry; yet the plaintiff may waive the tort and sue in assumpsit. *Saltonstall v. Stockton, & Taney (U. S.)* 11.

An action by a passenger to recover both actual and exemplary damages for being carried beyond his station is an action of tort, though the complaint alleges the purchase of a ticket which would raise the obligation of the railroad company to safely carry. *Galveston, H. & S. A. R. Co. v. Roemer*, 1 *Tex. Civ. App.* 191, 20 *S. W. Rep.* 843.—QUOTING *New Orleans, J. & G. N. R. Co. v. Hurst*, 36 *Miss.* 665. REVIEWING *Cregin v. Brooklyn City R. Co.*, 75 *N. Y.* 192.

While the owner of live stock killed by a railroad company may waive the tort and sue in assumpsit, yet the action is one sounding in damages, and does not come within the Mississippi statute authorizing final judgment by default in actions founded on contract. *Mississippi C. R. Co. v. Fort*, 44 *Miss.* 423.

In an action against a railroad company by a shipper of grain, the complaint alleged that the defendant, while operating a certain line of railroad running from a certain place, through the plaintiff's place of business, to another point, publicly held herself out as a common carrier for hire along such railroad; that it was the duty of the defendant to provide the usual and necessary means for transporting grain along such line from plaintiff's place of business, which was a station on such railroad; that the plaintiff, at a certain time, had purchased a certain quantity of grain for shipment on defendant's railroad, but that the defendant, though often requested so to do, failed to furnish the means necessary for transportation, and refused to receive and transport such grain. *Held*, on demurrer, that the complaint states a cause of action arising *ex delicto*, and not *ex contractu*. *Pittsburgh, C. & St. L. R. Co. v. Morton*, 61 *Ind.* 539.

*In the following cases the action was held to sound in tort, and not to be founded on contract:*

An action against a carrier for the breach

\*Action for tort not maintainable unless defendant owes a duty to plaintiff. See note, 36 *AM. ST. REP.* 813.

of his duty to carry safely goods, whereby the goods are lost. *Tattan v. Great Western R. Co.*, 2 *El. & El.* 844, 6 *Jur. N. S.* 800, 29 *L. J. Q. B.* 184, 8 *W. R.* 606.—DISCUSSED IN *Baylis v. Lintott*, *L. R.* 7 *C. P.* 345, 42 *L. J. C. P.* 119, 28 *L. T. N. S.* 666.

An action against a carrier for wrongful delivery after a notice of stoppage in transit. *Pontifex v. Midland R. Co.*, 25 *W. R.* 215, 35 *L. T. N. S.* 706, 37 *L. T. N. S.* 403, *L. R.* 3 *Q. B. D.* 23, 47 *L. J. Q. B.* 28, 26 *W. R.* 209.—DISTINGUISHED IN *Fleming v. Manchester, S. & L. R. Co.*, *L. R.* 4 *Q. B. D.* 81, 39 *L. T.* 555, 27 *W. R.* 481.

An action to recover damages for illegally obstructing a navigable river. *Doughty v. Atlantic & N. C. R. Co.* 78 *N. C.* 22. *Mehrhof Bros. Brick Mfg. Co. v. Delaware, L. & W. R. Co. (N. J.)*, 16 *Atl. Rep.* 12.

An action against a carrier for a failure to stop at a particular place and take on board the plaintiff as a passenger, according to previous notice advertised to the public. *Heirn v. M'Caughan*, 32 *Miss.* 17.—DISTINGUISHED IN *Thompson v. New Orleans, J. & G. N. R. Co.*, 50 *Miss.* 315.

An action to recover the penalty of \$10, provided by Mass. St. of 1854, ch. 23, growing out of the refusal to check a passenger's baggage. *Commonwealth v. Connecticut River R. Co.*, 15 *Gray (Mass.)* 447.

An action for an assault by a conductor upon a passenger. *Feeney v. Brooklyn City R. Co.*, 36 *Hun. (N. Y.)* 197.

**10. Election between forms of action.**—Where the law imposes a duty and the party enters into a contract for the performance of it, suit may be brought either for the non-performance of the legal duty or upon the contract; but if the law imposes no duty, or if the party is relieved from performance of it, but contracts to do what he is not required under the law to do, then the only remedy is a suit upon the contract. *Illinois C. R. Co. v. Phelps*, 4 *Ill. App.* 238.

Where a railroad company agrees, for a consideration, to carry a passenger over its road, and by its negligence an injury results to the passenger, he may, at his election, sue upon the contract or in tort. *Pennsylvania R. Co. v. People*, 31 *Ohio St.* 537. *McMurty v. Kentucky C. R. Co.*, 84 *Ky.* 462, 1 *S. W. Rep.* 815. *Baltimore City Pass. R. Co. v. Kemp*, 18 *Am. & Eng. R. Cas.* 220, 61 *Md.* 74. *Baltimore City Pass. R. Co. v. Kemp*, 61 *Md.* 619, 48 *Am. Rep.* 134.

—QUOTING *Marshall v. York, N. & B. R. Co.*, 11 *C. B.* 655.

A passenger may declare for a breach of contract where there is one; but it is at his election to proceed as for a tort where there has been personal injury suffered by the negligence or wrongful act of the carrier or the agents of the company, and in such action the plaintiff is entitled to recover, according to the principles pertaining to that class of actions as distinguished from actions on contract. *Baltimore City Pass. R. Co. v. Kemp*, 61 *Md.* 619, 48 *Am. Rep.* 134.

A person who has sustained injuries by reason of the failure of a railroad company to provide proper means of transportation or operate its trains as required by the statute (the Code, § 1963) may bring an action on contract, or in tort, independent of the statute. *Purcell v. Richmond & D. R. Co.* 47 *Am. & Eng. R. Cas.* 457, 108 *N. C.* 414, 12 *S. E. Rep.* 954, 956.—QUOTING *Heirn v. M'Caughan*, 32 *Miss.* 1; *Bowers v. Richmond & D. R. Co.*, 107 *N. C.* 721. RECONCILING *Hannah v. Richmond & D. R. Co.*, 87 *N. C.* 351.

Under the Tennessee Code abolishing the distinction between actions in tort and on contract, the plaintiff may recover whatever damages he is entitled to, whether his action sounds in tort or on contract. *Hall v. Memphis & C. R. Co.*, 9 *Am. & Eng. R. Cas.* 348, 15 *Fed. Rep.* 57.

An action against a common carrier for failure to carry safely goods delivered to it is an action of tort; but an action may also be maintained in respect of the contract entered into between the parties. *Tattan v. Great Western R. Co.*, 2 *El. & Bl.* 844, 6 *Jur. N. S.* 800, 29 *L. J. Q. B.* 184, 8 *W. R.* 606.—DISCUSSED IN *Baylis v. Lintott*, *L. R.* 7 *C. P.* 345, 42 *L. J. C. P.* 119, 28 *L. T.* 66.

One having a right of action for negligence in failing to safely carry, may sue either in tort or on contract, and in determining the form of action the nature of the remedy will be determined both by the form of the pleading and the circumstances of the case; but as tort is the natural foundation of the action a declaration will be construed to be in tort unless it clearly appears that the suit is on contract. *Whitenton Mfg. Co. v. Memphis & O. R. P. Co.*, 21 *Fed. Rep.* 856.

### 11. Joinder of causes of action.—

(1) *What may be joined.*—Under the Indiana Code abolishing the distinction between ac-



tions growing out of contract and actions in tort, causes of action growing out of the two may be united in the same action. *Cincinnati, W. & M. R. Co. v. Harris*, 61 *Ind.* 290.

Under the Mo. Practice act, art. 6, § 2, several causes of action founded on injuries, with or without force to person or property, may be joined in the same petition; and this would seem to include all injuries whatever to person or property, whether real or personal, direct or consequential, and whether the damages are given by common law or by statute, single or double, and does include all actions of trespass or case. *Clark v. Hannibal & St. J. R. Co.*, 36 *Mo.* 202.

Under the New York practice a cause of action growing out of a failure of a railroad company to purchase another road at a foreclosure sale and to reorganize it, and a cause of action for damages for breach of the contract, may be united in a bill filed seeking a specific performance of the contract. *Stanton v. Missouri Pac. R. Co.*, 15 *Civ. Pro. Rep. (N. Y.)* 296, 2 *N. Y. Supp.* 298.

In Ohio, several causes of action for penalties, under 71 Ohio Laws, 146, against railroads demanding excessive fares may be united in the same petition, and where such action stands for judgment on the petition, it is not error to refuse to empanel a jury to assess damages. *Cincinnati, S. & C. R. Co. v. Cook*, 6 *Am. & Eng. R. Cas.* 317, 37 *Ohio St.* 265.

In Pennsylvania, a cause of action for causing the death of plaintiff's child may be joined with one for killing plaintiff's horse, the latter being part of the same transaction. *Pennsylvania R. Co. v. Bock*, 6 *Am. & Eng. R. Cas.* 20, 93 *Pa. St.* 427.

In Texas, a suit against a railroad company to recover for various items for overcharge of freights, excess of freight charges, loss and damage to goods, though growing out of different shipments, is an action upon an account, and all the items may be joined in a single suit. *International & G. N. R. Co. v. Donalson*, 2 *Tex. App. (Civ. Cas.)* 183.

(2) *What may not be joined.*—Where a railroad company and its employee are both injured by the same negligence of another railroad company, the first company has no right, in an action for its own damages against the second, to sue also for the use

of its employee to recover the damages sustained by him in excess of those already paid to him by the plaintiff in the action. *Central R. & B. Co. v. Brunswick & W. R. Co.*, 87 *Ga.* 386, 13 *S. E. Rep.* 520.

Where a member of a partnership is injured personally and the firm property is also injured by a railroad, both claims cannot be united in the same action. *Taylor v. Manhattan R. Co.*, 25 *N. Y. S. R.* 226, 53 *Hun.* 305, 6 *N. Y. Supp.* 488.

A complaint was in three counts, the first for killing cattle, the second for killing swine, and the third set up an agreement to carry cattle, and damages for a breach of such contract, being an injury to the cattle by reason of weak and insufficient cars. *Held*, that there was a misjoinder of causes of action, the first two counts being in tort, and the third on contract. *Cohwell v. New York & E. R. Co.* 9 *How. Pr. (N. Y.)* 311.

Plaintiff's complaint contained two causes of action, one to recover damages alleged to have been caused by the roadbed erected by defendant ponding water back on plaintiff's land; the other to recover damages for an alleged breach of duty on the part of defendant in not putting up sufficient cattle-guards, as required by the Code, § 1975, whereby cattle trespassed upon plaintiff's enclosed lands and crops. On demurrer *held* an improper joinder of causes of action, the first being for injury to property, a tort, while the second arose "upon contract," for the breach of an implied contract to perform a statutory duty, and the action should be divided. *Hodges v. Wilmington & W. R. Co.*, 105 *N. Car.* 170, 10 *S. E. Rep.* 917.—APPROVING *Thomas v. Utica & B. R. R. Co.* 20 *Am. & Eng. R. Cas.* 93, 97 *N. Y.* 245. QUOTING *New York & N. H. R. Co. v. Schuyler*, 34 *N. Y.* 30.

*The following causes of action cannot be joined:*

A common law action for negligence and one for statutory negligence. *Kendrick v. Chicago & A. R. Co.*, 81 *Mo.* 521.

A cause of action for a personal injury and a separate cause of action for a subsequent injury to property. *Thelin v. Stewart*, 100 *Cal.* 372.

A claim by a father against a railroad company for a personal injury to himself and an item for killing his minor child at the same time. *Cincinnati, H. & D. R. Co. v. Chester*, 57 *Ind.* 297.

A claim for equitable relief against a rail-



road company, and a claim for damages against individual defendants. *Stanton v. Missouri Pac. R. Co.*, 15 *Civ. Pro. Rep.* (N. Y.) 296, 2 *N. Y. Supp.* 298.

A cause of action due plaintiff in his individual right on contract with a railroad company, and a cause of action due him as a stockholder of another railroad company, where the two causes of action did not arise out of the same transaction, or transactions connected with the same subject-matter. *Stanton v. Missouri Pac. R. Co.*, 15 *Civ. Pro. Rep.* (N. Y.) 296, 2 *N. Y. Supp.* 298.

A claim for damages for charging a passenger an excessive fare, and another for being unlawfully ejected from the train at another time; but where it appears that the demand for one of the claims is illy pleaded the court should strike it out and overrule a demurrer for a misjoinder of the two causes of action. *Sullivan v. New York, N. H. & H. R. Co.*, 61 *How. Pr.* (N. Y.) 490, 1 *Civ. Pro. Rep.* 285.

An action for assault committed in putting a passenger off a train and an action *ex contractu* for breach of the contract to carry the passenger. Such misjoinder of actions is demurrable, although the defect may be cured by trial and verdict where no demurrer has been filed. *Norfolk & W. R. Co. v. Wysor*, 26 *Am. & Eng. R. Cas.* 234, 82 *Va.* 250.

A cause of action against a railroad company for raising an embankment so as to flood lands, and a cause of action growing out of a breach of a contract to maintain a farm crossing. *Thomas v. Utica & B. R. R. Co.*, 20 *Am. & Eng. R. Cas.* 93, 97 *N. Y.* 245; reversing 24 *Hun*, 488.\*—FOLLOWING *New York & N. H. R. Co. v. Schuyler*, 34 *N. Y.* 30.—APPROVED IN *Hodges v. Wilmington & W. R. Co.*, 105 *N. Car.* 170, 10 *S. E. Rep.* 917. REVIEWED IN *Leggett v. Rome, W. & O. R. Co.*, 41 *Hun* (N. Y.) 80, 2 *N. Y. S. R.* 312.

**12. Statutory and common law actions.**—Where the remedy is a statutory one, and a new right is given and specific relief prescribed, the remedy is confined to that which the statute gives; but this rule does not apply where no new remedy is given by the statute which, while enjoining a new duty upon the company, leaves the right,

which corresponds with that duty, to be enforced by old remedies. *Graham v. Delaware & H. C. Co.*, 46 *Hun* (N. Y.), 386, 12 *N. Y. S. R.* 390.—DISTINGUISHING *Crandall v. Eldridge*, 46 *Hun*, 411.

The extraordinary remedy provided by *Wagn. Mo. Stat.* 310, 311, § 43, for a failure of a railroad company to fence is only cumulative, and does not prevent an action to enforce a common-law remedy for such failure. *Iba v. Hannibal & St. J. R. Co.*, 45 *Mo.* 469.—REVIEWING *Riddle v. Proprietors, etc.*, 7 *Mass.* 186; *Morris v. Androscoggin R. Co.*, 39 *Me.* 273; *Calvert v. Hannibal & St. J. R. Co.*, 34 *Mo.* 242.—FOLLOWED IN *Creason v. Wabash, St. L. & P. R. Co.*, 17 *Mo. App.* 111. QUOTED IN *Hill v. Missouri Pac. R. Co.*, 49 *Mo. App.* 520.

Where plaintiff sues for negligence as at common law, he cannot abandon the cause of action as thus stated in his complaint, and recover under the statute. *Davis v. Utah Southern R. Co.*, 3 *Utah*, 218, 2 *Pac. Rep.* 521.—DISTINGUISHING *Anderson v. Wasatch & J. V. R. Co.*, 2 *Utah*, 518. REVIEWING *Sioux City & P. R. Co. v. Stout*, 17 *Wall* (U. S.) 657.

A provision in a railway act, that any penalty imposed thereby, the recovery of which is not otherwise provided for, may be recovered by summary proceedings upon complaint before two or more justices, does not bar the party entitled to his remedy by action. *Collinson v. Newcastle & D. R. Co.*, 1 *C. & K.* 546.

The C. V. Railroad had, in the process of its construction, the legal right to pass over and destroy a portion of a certain highway in the town of H., and a general statute of the state provided a specific remedy for the injury so done. *Held*, that to recover for the acts, which were done according to law, the declaration should be specially founded upon the statute, and that an action for such acts could not be maintained upon a declaration at common law. *Henniker v. Contoocook R. Co.*, 29 *N. H.* 146.—DISTINGUISHED IN *Eaton v. Boston, C. & M. R. Co.*, 51 *N. H.* 504.

**13. Splitting or severance.**—Claims for damages growing out of a single wrong must be united in a single action, and where there are various items of damage growing out of the wrong they must all be united. *Wichita & W. R. Co. v. Beebe*, 39 *Kan.* 465, 18 *Pac. Rep.* 502.

\* Cause of action for failure to erect cattle-guards cannot be joined with cause of action for flooding lands, see 44 *Am. & Eng. R. Cas.* 494, *abstr.*

A claim for damage for killing several cattle at the same time constitutes but one cause of action, but if they are killed at different times each killing constitutes a separate cause of action, and may be sued on separately. *Pucket v. St. Louis, I. M. & S. R. Co.*, 25 Mo. App. 650. *Brannenburg v. Indianapolis, P. & C. R. Co.*, 13 Ind. 103.

A company cannot enjoin separate actions by partners in their individual name before a justice of the peace for killing live stock, on the ground that by splitting the action the company is deprived of an appeal on account of the small amount involved. The company has a right to consolidate the actions and appeal, if the judgment is adverse. *Gulf, C. & S. F. R. Co. v. Bacon*, 3 Tex. Civ. App. 55, 21 S. W. Rep. 783.

Where the defendant during the years 1885, 1886 and 1887 failed to fence its road, whereby stock came upon and damaged plaintiff's adjoining pasture in each of said years, and in 1887 plaintiff instituted suit and recovered for damages thereby inflicted in 1886, he cannot afterwards maintain an action to recover damages inflicted in 1885, so splitting his demand and vexing defendant with different actions for separate items of damage, known to have been inflicted at the time of the former suit, as all such items of damage flow from the one violation of the statute. *Steiglider v. Missouri Pac. R. Co.*, 38 Mo. App. 511.

A change in the grade of an alley done under color of legal right is presumptively permanent in character, and a lot-owner whose property is injured thereby cannot split his cause of action, but must recover all damages, past and prospective, in one action. *Lafayette v. Nagle*, 113 Ind. 425, 15 N. E. Rep. 1, 12 West. Rep. 637.

When a person answerable in contract to two jointly, settles with one of them, so that this one has no longer any real interest in the matter, there is a severance of the cause of action, and the debtor is liable in an action at law to the other alone. *Boston & M. R. Co. v. Portland, S. & P. R. Co.*, 115 Mass. 498.

Where a shipper sues a railroad company to recover a loss for damage to goods while being shipped, and states in his petition that he has transferred one-half of his right of action to an insurance company, and that his suit for one-half of the damages sustained is for the use of the insurance company, the averment does not make the in-

surance company a plaintiff, and it is not necessary to show how the insurance company acquired its interest. If plaintiff had not averred that he was suing as well for himself as for the insurance company, the defendant might have defeated his action by showing a transfer of the cause of action. *East Line & R. R. R. Co. v. Hall*, 64 Tex. 615.

**14. Consolidation.**—A company cannot complain of the consolidation of three actions against it for injuries to as many members of the same family at the same time, where it has theretofore moved for such consolidation, although the court at the time overruled the motion and held that there should be a separate verdict in each action. *Union Pac. R. Co. v. Jones*, 49 Fed. Rep. 343, 4 U. S. App. 115, 1 C. C. A. 282.

Under the New York statute a right of action for an injury to property, and one for an injury to the person, each being simultaneous, may be consolidated. *Rosenberg v. Staten Island R. Co.*, 38 N. Y. S. R. 106, 14 N. Y. Supp. 476.

Where two actions are brought against a company, both based on negligence and growing out of the same accident, one for injuries to personal property and the other for injuries to the person, the company may set up in each action the pendency of the other, or may have a consolidation of the two actions; but if it fails to do so after a recovery in one action, it is not entitled, under the N. Y. Code of Civ. Proc. § 544, to an order permitting it to serve a supplemental answer in the untried action setting up such recovery as a bar. *McAndrew v. Lake Shore & M. S. R. Co.*, 70 Hun (N. Y.) 46.

A motion to consolidate three pending suits for foreclosures of different mortgages given by a railroad company will not be granted when the whole of the suits are not ripe for decree and nothing can be gained for the purpose of a hearing. *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 43 Am. & Eng. R. Cas. 469, 41 Fed. Rep. 8.

A proceeding by a company to condemn land, and a proceeding against the company for taking the land without condemnation, cannot be consolidated under Wis. Rev. Stat. 1858, ch. 125, § 42, providing for the consolidation of actions which might have been joined. *Blesch v. Chicago & N. W. R. Co.*, 44 Wis. 593.

Where several actions against a railroad are consolidated, and some of the causes of action are discontinued, the costs in the discontinued suits cannot be embraced in those not discontinued. *Blake v. Michigan S. & N. I. R. Co.*, 17 *How. Pr. (N. Y.)* 228.

Plaintiff brought two suits against a railroad company—one to recover damages for a failure to receive and ship lumber, the other to recover for a failure to receive and ship cross-ties at a different time. The company moved to consolidate the two suits and to dismiss on the ground that the amounts when combined would exceed the jurisdiction of the court, which the court refused. *Held*, that the causes of action were separate and that the two actions could be maintained, and the discretion of the trial court in consolidating or refusing to consolidate suits will not be reversed, unless there is a clear abuse of such discretion. *Texas & P. R. Co. v. Hays*, 2 *Tex. App. (Civ. Cas.)* 341.

**15. Discontinuance.**—Where several suits have been commenced upon independent causes of action, but of a like nature, and the suits have been consolidated by order of the court, the plaintiff may discontinue without prejudice as to any one or more of the original actions. *Young v. Grand Trunk R. Co.*, 10 *Biss. (U. S.)* 550, 9 *Fed. Rep.* 348.

A common-law agreement to arbitrate the subject-matter of a suit and enter judgment upon the award in the court where suit is pending, when rendered, does not operate as a discontinuance of such suit, nor as a stay of proceedings, but may be used as the basis for an application for a stay; neither can it be pleaded in bar. *Callanan v. Port Huron & N. W. R. Co.*, 61 *Mich.* 15, 27 *N. W. Rep.* 718.

The amendment found in Minnesota Gen. Laws, 1881 (Ex. Sess. ch. 26, § 1), to Gen. Stat. 1878, ch. 66, § 262, relating to voluntary dismissals of actions by plaintiffs, is simply prohibitory, and a dismissal forbidden thereby does not in itself operate as a determination of the action on the merits. *Walker v. St. Paul City R. Co.*, 52 *Minn.* 127, 53 *N. W. Rep.* 1068.

The mortgagees of a railroad filed a bill for a foreclosure, and had a receiver appointed, and the company appealed. Pending the appeal the mortgagees gave notice of a discontinuance of the suit, and con-

sented to a setting aside of the order appointing the receiver, and to payment of costs. *Held*, that the appeal fell as a matter of course, and that the company could not continue it for the purpose of enjoining certain parties who had obtained possession of the road under proceedings in a federal court. *Spaulding v. Milwaukee & H. R. Co.*, 12 *Wis.* 607.

**16. Dismissal as to a joint defendant.**—Where a joint action is begun against two railroads, based upon negligence, one cannot complain because plaintiff discontinues as to the other. *Popham v. Twenty-third St. R. Co.*, 16 *J. & S. (N. Y.)* 229. See 97 *N. Y.* 652, *Mem.*

When a cause of action exists against two companies for an act or omission for which they are severally liable, and suit is brought against both, the plaintiff may at his option dismiss as to either, and prosecute his suit against one of them alone. *Central & M. R. Co. v. Morris*, 28 *Am. & Eng. R. Cas.* 50, 68 *Tex.* 49, 3 *S. W. Rep.* 457.

## ACTS OF BANKRUPTCY.

See BANKRUPTCY, 4.

## ADMINISTRATION.

In general, see EXECUTORS AND ADMINISTRATORS.

Of assets in equity, see EQUITY, 9.

## ADMIRALTY.

Jurisdiction of courts of, generally, see JURISDICTION, 11.

**1. Jurisdiction over ferry-boats.**—Under U. S. Rev. St. § 5258, authorizing railroad companies to carry over their "roads, boats, bridges and ferries" passengers and freight "on their way from any state to another state and to connect with roads of other states, so as to have continuous lines of the same to the place of destination," a steam ferry-boat, owned by an interstate railway company and used exclusively in crossing a river which is the boundary between two states, is not part of a railway so as to exclude admiralty jurisdiction over it. The same may be liable for wages, as provided by statute. *The St. Louis*, 48 *Fed. Rep.* 312.

**2. Who are "seamen."**—Under U. S.

Rev. St. § 4612, providing that the word "ship" shall be taken to comprehend "every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this title are applicable," and that all persons engaged in navigating the same should be deemed "seamen," a person serving on board a railway ferry-boat, crossing the Willamette river, Oregon, in tide-water, is a seaman, and may claim the benefit of § 4536, providing that the "wages due any seaman or apprentice" shall not be subject to attachment or arrestment." *The St. Louis*, 48 *Fed. Rep.* 312.

**3. Libel for death of passenger.**—

A passenger was drowned from a railway ferry-boat crossing a river in tide-water. It was shown that the drowning was due to the negligence of the company. *Held*, that this was a maritime tort for which the administrator of the deceased might maintain a libel in admiralty under the *Oreg. Civ. Code*, § 367, giving the personal representative the right to institute such suits. *Holmes v. Oregon & C. R. Co.*, 6 *Sawyer*, (U. S.) 262.

**4. Salvage service.**—A company starting its trains from the New Jersey shore, opposite New York city, received freights in the city and contracted with a person to carry them across East river to its trains, who was to assume the risks of transportation. While certain barges belonging to the company loaded with freights were being towed across they got caught in the ice and became helpless, and were drifting with the ice, being in imminent danger of being crushed against a pier. Upon those aboard calling for help, a steam-tug rescued them and got them safely into a slip. The value of the tug was about \$10,000 and the barges and cargo from \$30,000 to \$45,000. The services in rescuing occupied about half an hour. *Held*, that the service was a salvage service for which the railroad company was liable, and that \$500. was a reasonable allowance therefor, with an additional \$50 for an injury to a hawser. *Seaman v. Erie R. Co.*, 2 *Ben.* (U. S.) 128.

**ADMISSIONS.**

As evidence, see EVIDENCE, VIII, 1.

In actions for injury to animals, see ANIMALS, V, 7 (d).

Of agent, when bind principal, see AGENCY, 37, 38.

1 D. R. D.—3.

**ADVERSE POSSESSION.**

Acquirement of easement by, see EASEMENTS, 8.

— private way by, see PRIVATE WAYS, 2.

**1. What may be held adversely.\***—

Though a railroad company has once obtained title to lands, yet a title by adverse possession may be acquired against it. *Erie & N. R. Co. v. Rousseau*, 46 *Am. & Eng. R. Cas.* 539, 17 *Ont. App.* 483.—APPROVING *Bobbett v. South Eastern R. Co.*, 9 *Q. B. D.* 424.

The land of a railway company may be acquired by adverse possession, although such land is required for the purposes of the railway and is not superfluous land. *Bobbett v. South Eastern R. Co.*, *L. R.* 9 *Q. B. Div.* 424, 51 *L. J. Q. B. Div.* 161, 46 *L. T. N. S.* 31; *affirmed on evidence*, *Weekly Notes*, [1882] p. 92. See also *Norton v. London & N. W. R. Co.*, *L. R.* 13 *Ch. Div.* 268, 41 *L. T. N. S.* 429, 28 *W. R.* 173.

The equitable right of a railroad company to land outside of its location will not prevent the acquisition of title by adverse possession. *Littlefield v. Boston & A. R. Co.* 146 *Mass.* 268, 5 *N. Eng. Rep.* 833, 15 *N. E. Rep.* 648.

A private right of way being an easement may be acquired by prescription, and may be acquired in the property of infants in the hands of a trustee, where he fails to bring an action within the time prescribed in the Statute of Limitations. *Patchett v. Pacific Coast R. Co.*, 100 *Cal.* 505.

No prescription runs against the state, and this is true of the state's title to the Western and Atlantic railroad as well as the balance of the public domain, and it does not matter whether the road was for the time being in the hands of the state's own officers or of her tenants or lessees. *Glaze v. Western & A. R. Co.*, 67 *Ga.* 761.—FOLLOWED IN *Kirschner v. Western & A. R. Co.*, 67 *Ga.* 760.

**2. What possession is adverse, generally.**—A party may obtain title by

\* Acquiring an easement by prescription, see note, 35 *AM. & ENG. R. CAS.* 320.

Acquisition of right to flood lands by prescription, see note, 48 *AM. & ENG. R. CAS.* 80.

Right of way by prescription over land acquired by a railroad company from a state, see 46 *AM. & ENG. R. CAS.* 542, abstr.

When a homestead claim may be held adversely to a claim under a railroad land grant, see 24 *AM. & ENG. R. CAS.* 110, abstr.

adverse possession to lands as against an individual, though he holds it in subordination to the title of the general government. *Francoeur v. Newhouse*, 14 *Sawy. (U.S.)* 600.

Possession of a company and its successors, under a grant of the right of way, for construction and operation, dates from the commencement of construction, and not merely from completion and the running of trains. *Georgia Pac. R. Co. v. Strickland*, 80 *Ga.* 776, 6 *S. E. Rep.* 27, 12 *Am. St. Rep.* 282.

Where a company enters into possession of land under a parol license and promises to pay, twenty years' occupancy will bar an action to recover the land. *Evansville & T. H. R. Co. v. Nye*, 113 *Ind.* 223, 15 *N. E. Rep.* 261, 12 *West. Rep.* 727.

An adjoining landowner cannot build a fence on a strip of land that has been in the exclusive adverse possession of a company for twenty years, neither can he recover damages against the company for the removal of such fence. *Sherlock v. Louisville, N. A. & C. R. Co.*, 115 *Ind.* 22, 14 *West. Rep.* 843, 17 *N. E. Rep.* 171.

Actual, open and continuous possession by a company of a right of way for fourteen years is sufficient to establish adverse possession as against one with whom the company had no contractual relations. *Turner v. Union Pac. R. Co.*, 112 *Mo.* 542, 20 *S. W. Rep.* 673.

Mere provisions in a corporate charter for compensation to the owner of property taken *in invitum* for corporate purposes do not necessarily make an entry by the corporation upon private property in subordination to the private right; such an entry may, notwithstanding the provisions, be adverse and such as may ripen into a prescriptive title. *American Bank Note Co. v. New York El. R. Co.*, 50 *Am. & Eng. R. Cas.* 292, 129 *N. Y.* 252.

In a proceeding to condemn land for the purpose of a railway, consisting of beach and upland, there was evidence offered to the effect that the railroad company in its location and plans had described the beach as belonging to the landowner; that it had always been treated as a part of his estate, and that no one else had ever claimed the beach or damages for the taking of it by the company. There was no dispute but that the adverse occupation of the upland had been in the landowner for twenty years, there being no evidence to distinguish title

between the beach and upland. *Held*, sufficient evidence to warrant a finding of adverse possession of the beach for twenty years. *Andrew v. Nantasket Beach R. Co.*, 152 *Mass.* 506, 25 *N. E. Rep.* 966.

**3. What is not.**—An adverse possession cannot be based upon a mere permission to occupy lands. *Borden v. South Side R. Co.*, 5 *Hun (N. Y.)* 184; *affirmed in* 67 *N. Y.* 588, *mem.*

Possession held under a license cannot be adverse. *Blaisdell v. Portsmouth, G. F. & C. R. Co.*, 51 *N. H.* 483.

Where abutting or adjoining landowners cultivate and occupy a part of a right of way granted by Congress as an easement to a railway company, such possession is permissive only, and not hostile or adverse so as to confer title. *Union Pac. R. Co. v. Kindred*, 43 *Kan.* 134, 23 *Pac. Rep.* 112.—**FOLLOWING** *Smith v. Smith*, 34 *Kan.* 293.

While a company may have a prescriptive right to maintain an embankment at a certain height, it cannot acquire a prescriptive right to increase its height, unless such increase is acquiesced in by persons interested during the time necessary to create a prescriptive right. *Ohio & M. R. Co. v. Elliott*, 34 *Ill. App.* 589.

The constant and exclusive use by a company of a part of a street, as and for a right of way, cannot by the lapse of any time ripen into an absolute ownership of said part. *Indianapolis, P. & C. R. Co. v. Ross*, 47 *Ind.* 25.

In a suit to recover from a company the statutory penalty for failure to construct a suitable crossing of its track at a public highway, possession of the right of way for seven years is not a bar where it is such only as is ordinarily taken by railways for the purpose of enabling them to construct their tracks and operate their trains thereon. *State v. Kansas City, Ft. S. & M. R. Co.*, 54 *Ark.* 608, 16 *S. W. Rep.* 657.

Where the owner of a tract of land conveys the same to a company, by which only a portion thereof is used, and the said owner remains in possession of the residue, farming and improving the same, such possession will be deemed to be by permission of the company and not adverse to it. Hence it cannot be made available by a grantee of said owner in order to set up a title under the statute of limitations. *Jeffersonville, M. & I. R. Co. v. Oyler*, 5 *Am. & Eng. R. Cas.* 397, 82 *Ind.* 394.

Where it is complained that the "drilling" of cars on a certain track is a nuisance, a company cannot justify such acts on the ground of adverse user, where it appears that the particular track used for that purpose has not been laid twenty years, although adjoining tracks have been laid and used for more than twenty years. *Pennsylvania R. Co. v. Thompson*, 45 N. J. Eq. 870, 19 Atl. Rep. 622.—FOLLOWING *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316. NOT FOLLOWING *Beseman v. Pennsylvania R. Co.*, 50 N. J. L. 235.

Where a company surveys the line of its road and stakes it, and sets up posts for fencing, it cannot hold against a purchaser on the ground that such acts constitute such possession as amounted to notice to the purchaser. *Merritt v. Northern R. Co.*, 12 Barb. (N. Y.) 605.

At the time plaintiff took a deed for lands "subject to any right of way said railroad may own over the same," the company held by parol an easement in a strip thirty-five feet wide from the centre of its track across the land, but a fence had been erected and stood only fourteen feet from the centre of the road. After the purchase plaintiff made improvements on the part of the strip outside of the fence. Held, that the deed was sufficient notice of the easement of the company to prevent plaintiff from acquiring title by adverse possession. *Slocumb v. Chicago, B. & Q. R. Co.*, 57 Iowa 675, 11 N. W. Rep. 641.—DISTINGUISHING *Davies v. Heubner*, 45 Iowa 574.

**4. The hostile claim of title.**—To overcome the presumption that land is occupied under a legal title possession must be under a claim of title, and must be open, notorious and continuous, and only such as would be consistent with the claim of adverse holding. *Buttery v. Rome, W. & O. R. Co.*, 14 N. Y. S. R. 131.

To acquire a public prescriptive right to cross a railroad in a carriage or on foot at what was originally a private farm crossing, established by agreement, it is necessary for the plaintiff to show that there was a public use continued uninterruptedly for more than twenty years, which was adverse and under a claim of right, and not merely a use which was tolerated or permitted by the railroad company. *McCreary v. Boston & M. R. Co.*, 153 Mass. 300, 26 N. E. Rep. 864.

Where a company constructs its track under a claim of right to the land, and has

daily used the track without the consent of the owner of the land for more than 7 years before bringing an action of ejectment, such possession is adverse, and the company is entitled to hold the land. Under the Florida Statute, where one claims title not founded upon a written instrument or a judgment, the question of adverse possession is not affected by the fact that the owner of the land is ignorant of the adverse possession. *Florida Southern R. Co. v. Loring*, 51 Fed. Rep. 932, 2 U. S. App. 310, 2 C. C. A. 546.

Under the New York Statute of Limitations an actual adverse title is not necessary to an adverse possession; a general assertion of ownership will suffice if there be color of title, however groundless in fact. *American Bank Note Co. v. New York El. R. Co.*, 50 Am. & Eng. R. Cas. 292, 129 N. Y. 252.—DISTINGUISHING *Broiestedt v. South Side R. Co.*, 55 N. Y. 220.

When a trespasser defends by setting up a prescriptive right, if he fails to show such a right to the extent of the user claimed and proved, his defence fails. *American Bank Note Co. v. New York El. R. Co.*, 50 Am. & Eng. R. Cas. 292, 129 N. Y. 252.—DISTINGUISHING *Davenport v. Lamson*, 21 Pick. (Mass.) 74.

**5. Color of Title.**—The occupation of premises on the line of a highway for a period of twenty years or more without any paper title affords no presumption, as matter of law, that the possessor's title extends beyond the limits of his actual possession or to the centre of the highway. *Hatch v. Vermont Cent. R. Co.*, 28 Vt. 142.—APPROVING *Hatch v. Vermont Cent. R. Co.*, 25 Vt. 49.

The condemnation of a right of way by statutory proceedings may constitute color of title when possession has been taken and held under it, notwithstanding irregularities which might render it invalid, and although the owner had no notice, or the assessed value of the property was not paid. *Cogsbill v. Mobile & G. R. Co.*, 92 Ala. 252, 9 So. Rep. 512. *Mobile & G. R. Co. v. Cogsbill*, 85 Ala. 456, 5 So. Rep. 188.

A deed is color of title only of that which is shown upon its face, or otherwise, to be within the description of the grant. When it purports to convey all the right of way, etc., which before belonged to a certain company named, it is not color of title to any tract of land not shown to have been the right of way of the company therein

named. *Ohio & M. R. Co. v. Barker*, 125 Ill. 303, 15 West. Rep. 139, 17 N. E. Rep. 797; further appeal, 134 Ill. 470.

A conveyance of railroad lands executed by the general superintendent and attorney in fact, without written authority from the board of directors, passed no legal title or estate as against the corporation or the trustees who succeeded to its rights; but it would constitute color of title, under which a title might be acquired by possession held long enough to effect a statutory bar. *Swann v. Gaston*, 87 Ala. 569, 6 So. Rep. 386.

A deed "of the right of way" of a railroad, with nothing to define its width, where the charter does not define the extent of the right of way, is too indefinite to constitute claim and color under the seven years' limitation law of Illinois for 100 feet, where actual possession was not had to that extent for seven years. *Wray v. Chicago, B. & Q. R. Co.*, 86 Ill. 424.

A deed describing premises as the road of a railway company "west of the Illinois river, and all branches thereof which had been constructed before, etc., and which have since been constructed and built, including the right of way and the lands occupied thereby," where there was no occupancy to the extent of 100 feet for seven years before suit brought, is not sufficient as color of title. *Wray v. Chicago, B. & Q. R. Co.*, 86 Ill. 424.

Where a landowner orally agreed to give to a company the usual right of way, and the company entered thereon and exercised actual and exclusive possession of part of a strip of one hundred feet under color and claim of title to the entire strip, such possession for the necessary length of time will afford the company a title, under the Statute of Limitations, to such entire strip. *Hargis v. Kansas City, C. & S. R. Co.*, 43 Am. & Eng. R. Cas. 599, 100 Mo. 210, 13 S. W. Rep. 680.

Even if there was no specification of the width of the right of way, so given, the entry and occupation by the company will, in the absence of anything to the contrary, be regarded as including the entire width of land authorized by law to be taken for railroad purposes. *Hargis v. Kansas City, C. & S. R. Co.*, 43 Am. & Eng. R. Cas. 599, 100 Mo. 210, 13 S. W. Rep. 680.—QUOTING *Campbell v. Indianapolis & V. R. Co.*, 110 Ind. 490.

**6. Necessity of occupation, fencing, etc.**—Where a company constructs its track over the land of another, and erects buildings thereon, without any written evidence of title, and does not inclose the same, its possession will be limited to the ground actually occupied. *Illinois C. R. Co. v. Indiana & I. C. R. Co.*, 85 Ill. 211.

**7. Possession of part, claiming whole.**—A landowner quit-claimed a right of way to a railroad company upon which it built its track and continued to operate its trains for more than 20 years, but a part only of the right of way was in actual use. A subsequent purchaser claimed the part of the right of way that was not so used. *Held*, that such possession by the railroad company was sufficient to put the purchaser on notice, regardless of whether the quit-claim deed had been recorded or not, such adverse possession by the railroad company of a part of the right of way, claiming title to the whole of it, was notice to all the world. *Jeffersonville, M. & I. R. Co. v. Oyler*, 60 Ind. 383.

A landowner made a plat of ground which was recorded, showing a donation to a railroad company of a strip 250 feet wide. It appeared that the plat was made under the impression that it would not pass title, but as a mere declaration of his intention to make the company a title when certain round-houses were built, which the company failed to build. The company claimed possession of the strip of land, and in various ways exercised control of it and improved a portion of it, both by itself and by lessees. *Held*, not sufficient evidence of adverse possession to make out a title by limitation in favor of the railroad company for the whole of the strip. *Missouri Pac. R. Co. v. Maffit*, 94 Mo. 56, 12 West. Rep. 412, 6 S. W. Rep. 600.

**8. Necessary continuity of possession.**—Where the occupant of land entered without color of title, there must be actual occupancy to constitute adverse possession, and the adverse possession in such a case is only co-extensive with such occupancy. *Coleman v. Northern Pac. R. Co.*, 36 Minn. 525, 32 N. W. Rep. 859.

Where one has been in continuous and uninterrupted possession for 10 years, continuing to the time of bringing suit, he has such title as will enable him to maintain an action for damages caused by the improper



construction of a railroad adjacent thereto. *Svenson v. Lexington*, 69 Mo. 157.

A continuous exclusive possession for 10 years, under claim of ownership, is not necessary to support a title by adverse possession. *Brown v. Chicago, B. & N. W. R. Co.*, 101 Mo. 484, 14 S. W. Rep. 719.

The continued occupation and use of a part of a lot by a railroad company and its grantors as a right of way for its road for over twenty years, the company exercising control over it and using it during that period, will constitute a bar to a recovery by the true owner. *East St. Louis & C. R. Co. v. Nugent*, 147 Ill. 254, 35 N. E. Rep. 464.—FOLLOWING *James v. Indianapolis & St. L. R. Co.*, 91 Ill. 554.

A company will acquire a right by prescription to overflow adjacent lands, if for the full period of twenty years prior to the particular injury complained of the company had continuously maintained a negligently constructed embankment, claiming the right to do so, without interruption from the landowner or recognition of his rights. In such case the landowner cannot maintain suit. *Louisville & N. R. Co. v. Mossman*, 90 Tenn. 157, 16 S. W. Rep. 64.—DISTINGUISHING *Louisville & N. R. Co. v. Hays*, 11 Lea (Tenn.) 382.

Under a sealed agreement with the owner of lands subject to a mortgage, a railroad company, for the benefit of the owner's business, constructed a Y upon the property in consideration of a sum certain and the unrestricted right to turn its trains thereon whenever necessary. Afterward the land was sold upon a judgment obtained on the mortgage, and the purchaser and those acquiring his title recognized the continued use of the Y by the railroad company, under the agreement, for a period of twenty years after its construction. A master so finding, on a bill filed by the landowner to compel the company to remove the Y, after such an acquiescence in its joint use for the period stated, it was not error to decree that the plaintiff's bill should be dismissed. *Chambers v. Baltimore & O. R. Co.*, 139 Pa. St. 347, 21 Atl. Rep. 2.

**9. Tacking one adverse possession upon another.**—Where realty of which a debtor has had adverse and continuous possession under written color of title, is in the hands of a receiver appointed at the instance of creditors, the possession of the receiver may, to make out the full period of

the prescriptive term, be tacked to that of the debtor and to that of the purchaser of the premises at a judicial sale. *Verdery v. Savannah, F. & W. R. Co.*, 82 Ga. 675, 9 S. E. Rep. 1133.

**10. Interrupted possession.**—Where a party enjoys the use of an easement in a manner otherwise sufficient to gain a right by adverse use, he will not be prevented from acquiring the right, even if the other party owning the servient estate verbally objects, or denies the right occasionally during such user, if he does not in any way interfere with or interrupt that enjoyment, having the power to do so, and the easement being of such character that the owner of the dominant estate had only to enjoy the use without other adversary acts on his part. *Kimball v. Ladd*, 42 Vt. 747.—DISAPPROVED IN *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 339.

Mere denials of the right, complaints, remonstrances or prohibitions of user, unaccompanied by any act which in law would amount to a disturbance, and be actionable as such, will not prevent the acquisition by a canal company of a right to maintain a dam by prescription. *Lehigh Valley R. Co. v. McFarlan*, 11 Am. & Eng. R. Cas. 509, 43 N. J. L. 605.—NOT FOLLOWING *Lehigh Valley R. Co. v. McFarlan*, 30 N. J. Eq. 180.

**11. Payment of taxes.**—Where a claimant to land sells to a company before he receives title from the state, and the company enters upon the land and constructs a railroad thereon, and has held it adversely and paid the taxes thereon for more than five years prior to the beginning of suit, the company may hold it under the Statute of Limitations, though it is not enclosed on all sides by a substantial enclosure, it appearing that the landowner had obtained the title from the state more than five years before bringing suit. *Daniels v. Gualala M. Co.*, 77 Cal. 300, 19 Pac. Rep. 519.

**12. When adverse use is a question for the jury.**—A street in which a railroad track was laid, including a crossing, had been used by the public as a street for more than 20 years, the street itself having been kept in repair by the town and the crossing having been planked and kept in repair for the railroad company. *Held*, that it was a question for the jury to say, upon all of the evidence, whether such use was



adverse or merely permissive. *Fitchburg R. Co. v. Page*, 7 *Am. & Eng. R. Cas.* 86, 131 *Mass.* 391.

**13. When a conveyance will be presumed.**—After continuous user of a right of way by a railroad company for a period of fifty years, a grant in fee simple, or a judgment of condemnation under a writ of condemnation, will be presumed, though the land is a part of the sixteenth section. *Davis v. Memphis & C. R. Co.*, 39 *Am. & Eng. R. Cas.* 65, 87 *Ala.* 633, 6 *So. Rep.* 140.

A right acquired by prescription can never exceed the user in which it had its origin; it is measured by the extent of that use, and that in turn by its purpose, and where essentially different purposes govern separate and successive users, it is, as a general rule, impossible to deem the latter identical in any respect or degree with the former. Although a fraction of the right claimed appears to have been common to each user, where no one of them has been of itself and independent of the other for twenty years, and where the fraction was not capable of a separate user, having of itself a real and conceivable purpose, a grant cannot be presumed. *American Bank Note Co. v. New York El. R. Co.*, 50 *Am. & Eng. R. Cas.* 292, 129 *N. Y.* 252.—**DISTINGUISHING** *Baldwin v. Calkins*, 10 *Wend. (N. Y.)* 169.—**QUOTED IN** *Syracuse S. Co. v. Rome, W. & O. R. Co.*, 51 *N. Y. S. R.* 520.

**14. Conveyance of land held adversely.**—Inasmuch as the possession of a highway by a railroad company, under a statutory license, is presumed to be subordinate to the rights of the owner of the fee, a deed thereof by such owner to a third person is not void because of adverse possession. *Broistedt v. South Side R. Co.*, 55 *N. Y.* 220.—**DISTINGUISHED IN** *American Bank Note Co. v. New York El. R. Co.*, 129 *N. Y.* 252. **FOLLOWED IN** *American Bank Note Co. v. New York El. R. Co.*, 27 *J. & S. (N. Y.)* 175.

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#### IV. PUBLIC AGENTS. 86

#### I. APPOINTMENT, AND HOW PROVED.

**1. Power to appoint agents.**—Corporations have an implied power to employ

agents to perform services that are in keeping or harmony with the general design of their creation, without any special grant by charter. *Kitchen v. Cape Girardeau & S. L. R. Co.*, 59 Mo. 514, 8 Am. Ry. Rep. 481.

A railroad company is a private corporation, and may appoint agents for the accomplishment of its purposes. *Alabama & T. R. R. Co. v. Kidd*, 29 Ala. 221.

A provision in a charter empowering the directors to expend the funds of the company "toward making, completing and maintaining the railroad," authorizes them to appoint an agent to solicit municipal aid, and to make his compensation a charge on the funds of the road; and for that purpose a resolution of the directors, or an entry on their minutes, is sufficient, without a by-law under seal. *Wood v. Ontario & Q. R. Co.*, 24 U. C. C. P. 334.

The letter making plaintiff such general agent was from the company's managing director. Held, that evidence that he was such managing director was not sufficient proof of his authority to make the contract. It should be shown that the act was in accordance with the powers conferred on him. *Taylor v. Cobourg, P. & M. R. & M. Co.*, 24 U. C. C. P. 200.

The appointment of an agent to sell or protect the timber or lands of a railroad company by the president, vice-president or a director will not bind the corporation unless it appear that the power to make such appointment was delegated to such officers by an express provision of the company's charter, to be exercised either under an order of the board of directors or *ex-officio*, but if it appear that the authority was to be exercised under an order of the directors, then the agency may be established by proof of acts of acquiescence. *Chicago & N. W. R. Co. v. James*, 22 Wis. 194.—REVIEWING *Walworth County Bank v. Farmers' Loan & Trust Co.*, 14 Wis. 325. DISTINGUISHING *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231.

2. When a *parol* appointment is valid.—The appointment of an agent by a corporation need not be evidenced by the written vote of its functionaries, but may be inferred from the adoption of his acts. *Alabama & T. R. R. Co. v. Kidd*, 29 Ala. 221.

Where the act of incorporation does not require that the appointment of an agent or the making of a contract shall be by written instrument, and it does not appear to have

been so made, the appointment or contract may be proved by *parol*. *Hamilton v. Newcastle & D. R. Co.*, 9 Ind. 359.

It is the duty of a corporation carrying on a trade to have on the spot an officer with authority to do for the company all that the ordinary exigencies of its business might require to be done promptly. In this respect there is no difference between a corporation and a partnership, and it is not necessary, in order to bind the company, to show that the officer had authority under seal. *Giles v. Taff Vale R. Co.*, 2 El. & Bl. 822.—FOLLOWED IN *Goff v. Great Northern R. Co.*, 3 El. & Bl. 672, 30 L. J. Q. B. 148.

### 3. Who are deemed to be agents.\*—

A person engaged by a company to buy materials and employ labor for it, who is paid for his services a certain per cent., based upon his disbursements, is the agent of the company. *New Orleans & N. E. R. Co. v. Reese*, 18 Am. & Eng. R. Cas. 110, 61 Miss. 581.

Contractors engaged in constructing a railroad are regarded as the servants of the company, making it liable for their tortuous acts. *Chicago, St. P. & F. L. R. Co. v. McCarthy*, 20 Ill. 385.—FOLLOWING *Hinde v. Wabash N. Co.*, 15 Ill. 72.—DISTINGUISHED IN *Atlanta & F. R. Co. v. Kimberly*, 87 Ga. 161, *West v. St. Louis, V. & F. H. R. Co.*, 63 Ill. 545, *Carter v. Berlin M. Co.*, 58 N. H. 52. FOLLOWED IN *Illinois C. R. Co. v. Barrow*, 5 Wall. (U. S.) 90, *Rockford, R. I. & St. L. R. Co. v. Wells*, 66 Ill. 321.

An engineer is an agent within the meaning of the statute imposing a duty on railroads to fence their roads. *St. Johnsbury & L. C. R. Co. v. Hunt*, 29 Am. & Eng. R. Cas. 234, 59 Vt. 294, 7 Atl. Rep. 277.—REVIEWING *Clement v. Canfield*, 28 Vt. 302, *Suydam v. Moore*, 8 Barb. (N. Y.) 358.

4. —and who are not.†—Persons who have donated lands to a company for a right of way cannot constitute themselves agents, either of the company or of other landowners, to receive promises or offers to donate their lands, and the company cannot enforce a promise obtained in such a way. *Chicago, I. & D. R. Co. v. Estes*, 30 Am. & Eng. R. Cas. 276, 71 Iowa 603, 33 N. W. Rep. 124.—FOLLOWED IN *Estes v. Chicago, I. & D. R. Co.*, 72 Iowa 235.

\* Distinction between servants and agents, see note, 2 L. R. A., 192.

† See also *post*, 91.

Where the engineer and conductor of a train occasionally stopped the train to take on freight at points along the line not regular stations, such acts did not constitute the engineer and conductor receiving and forwarding agents of the railroad company within the terms of § 1964 of N. C. Code. *Kellogg v. Suffolk & C. R. Co.*, 35 *Am. & Eng. R. Cas.* 529, 100 *N. Car.* 158, 5 *S. E. Rep.* 379.

As a street-car came to the crossing of a steam-railway track, a train thereon was passing. Just as the rear car had passed the flagman signaled the street-car driver to go ahead, but when in the act of crossing the train backed, and plaintiff, who was a passenger in the street-car, was injured by the collision. *Held*, that proof that such driver had been directed by those in authority to obey the signals of the flagman, that in this case he did so, did not convert the flagman into an agent of the street-car company. *Chicago R. Co. v. Volk*, 45 *Ill.* 175.

#### 5. Proof of agency, generally.—

A corporation, as well as a natural person, is bound by those acts which create a presumption of agency. But when an effort is made to prove the fact of agency by an order upon the corporation books, the books themselves must be produced, or secondary evidence of the contents, after notice to produce them. *Montgomery R. Co. v. Hurst*, 9 *Ala.* 513.

Where it was in evidence that S., the regular agent of the defendant at a certain depot, lived three miles from the depot, and that T. lived at the depot for two years prior to the bringing of the action, and discharged the duties of agent in receiving and forwarding freight, selling tickets, etc., all of which was done in the name of S. and with the knowledge and acquiescence of defendant, *held*, that T. was the agent of defendant, and that defendant was bound by any act of his within the scope of the authority impliedly given. *Katsenstein v. Raleigh & G. R. Co.*, 6 *Am. & Eng. R. Cas.* 464, 84 *N. Car.* 688.

Plaintiff sued defendants for services performed by him as their agent in obtaining bonuses from the different municipalities through which defendants' railroad was to pass, and the only evidence of his appointment was a letter written by one of the directors, stating that at a meeting of the board he was directed to make arrange-

ments with plaintiff to proceed forthwith. It was shown also that the president had recognized and adopted his services, and partially paid therefor. *Held*, not sufficient proof of plaintiff's engagement. *Wood v. Ontario & Q. R. Co.*, 24 *U. C. C. P.* 334.

A company was sued for a trespass in cutting timber by one who was superintending or performing work connected with the construction of the road. The question of the company's liability turned upon whether such person was an independent contractor or only the agent of the company. *Held*, that if the names of the persons employed by such person were entered upon the payroll of the company, and they were in fact employés of the company, and received certificates of their time from the company's timekeeper, this would fix his relation to the company as a mere servant. *New Orleans & N. E. R. Co. v. Reese*, 18 *Am. & Eng. R. Cas.* 110, 61 *Miss.* 581.

6. — by holding out.—A principal may become liable by permitting his agent to hold himself out as having apparent authority. *Winchell v. National Exp. Co.*, 64 *Vt.* 15, 23 *Atl. Rep.* 728.

The question of agency of a defendant railroad company for another railroad company depends, so far as the public are concerned, not upon the actual fact of an arrangement or contract between the two companies, but upon what the defendant, by its holding out, invited the public and the plaintiff to believe. *Dye v. Virginia M. R. Co.*, 9 *Mackey (D. C.)* 63.

Where a person testified that he was station-agent at the depot of a railroad, and had full charge of receiving and forwarding freight there, although he testified that he had no authority to make contracts and no control over the locomotive power of the road, *held*, that a jury might legally find that the corporation held him out as their agent to contract for sending freight the next day. *Deming v. Grand Trunk R. Co.*, 48 *N. H.* 455.

7. — by alleged agents' acts.—As a general rule, the fact of agency cannot be established by proof of the acts of a pretended agent, in the absence of evidence tending to show the principal's knowledge of such acts or assent to them; yet when the acts are of such a character and so continued as to justify a reasonable inference that the principal had knowledge of them, and would not have permitted the same if

unauthorized, the acts themselves are competent evidence of agency. *Fowlds v. Evans*, 52 Minn. 551, 54 N. W. Rep. 743.

Agency may be established by showing that the principal had habitually ratified the acts of the alleged agent in similar transactions. *International & G. N. R. Co. v. Kagsdale*, 67 Tex. 24, 2 S. W. Rep. 515.—QUOTING *Beattie v. Delaware, L. & W. R. Co.*, 90 N. Y. 643.

Evidence that a party upon a railroad train was performing service as a brakeman from one point to another, will justify the conclusion that he was a regular employé of the company. *St. Louis, I. M. & S. R. Co. v. Hendricks*, 48 Ark. 177, 2 S. W. Rep. 783.

Evidence that one had acted for two or three years as an agent for a corporation, settling its obligations, is sufficient to establish *prima facie* the fact of an authorized agency. *Neibles v. Minneapolis & St. L. R. Co.*, 37 Minn. 151, 33 N. W. Rep. 332.

**8. — or his declarations.**—Mere representation of an assumed agent cannot be taken as constituting an agency. *Taylor v. Second Ave. R. Co.*, 17 J. & S. (N. Y.) 513—FOLLOWING *Marvin v. Wiibur*, 52 N. Y. 270.

The declarations of an agent are not admissible to prove an agency, but where there is testimony to show ratification, or original authority, or a holding out to the world as having authority, such declarations accompanying the act are admissible to show in what capacity he contracted. *Hirschmann v. Iron Range & H. B. R. Co.*, 97 Mich. 384.

Evidence of the mere statement of a conductor or agent of a railroad company, that he is such conductor or agent, should not be received as proof of the fact; but one who has control of a train, and exercises the authority of a conductor, may rightfully be presumed to be such, aside from his declarations. *Columbus, C. & I. C. R. Co. v. Powell*, 40 Ind. 37.

In order to render a railroad liable for an injury to plaintiff caused by his being pushed from the platform of a car by some person apparently in the employ of the company, it must be shown that such person was actually a servant of the railroad, but his own declarations that he was in charge of the car will not be legal evidence of that fact. *Lindsay v. Central R. & B. Co.*, 46 Ga. 447.

11 *Am. Ry. Rep.* 415.—DISTINGUISHED IN *Central R. Co. v. Gleason*, 69 Ga. 200.

A railroad applied to the owner of a dredging and pile-driving machine for an estimate on certain work of the company, which he furnished. About two weeks thereafter one claiming to be the company's agent, but who, in fact, was only a contractor, secured the machine and crew to operate it. *Held*, that the railroad was not liable to the owner of the machine for the work done. *Chicago & G. E. R. Co. v. Fox*, 41 Ill. 106.—DISTINGUISHED IN *Solomon R. Co. v. Jones*, 34 Kan. 443.

**9. Agent of company when agent of other party to contract.**—A carrier who undertakes to carry cannot make another the consignee's agent for that purpose. *Fischer v. Merchants' Dispatch Transp. Co.*, 13 Mo. App. 133.

In an action to recover on "drawbacks," it appeared that the contract was made by an agent of the company with the shipper, by which the money on the drawbacks was to come through the agent. *Held*, that the agent of the company became the agent of the shipper, and payment of the money by the company to the agent released it from liability. *Pittsburgh, F. W. & C. R. Co. v. Fawcett*, 56 Ill. 513, 4 *Am. Ry. Rep.* 405.

A contract between a railroad company and a coal company provided that the former should transport coal to a certain designated place and there deliver it on boats as directed by the coal company, the orders being directed to the agent of the railroad company at the point where the coal was to be delivered on the boats. *Held*, that such agent was not the agent of the coal company so as to bind it by his acts and declarations. *Kelly v. Lehigh Valley C. Co.* 8 *Daly (N. Y.)* 291.

Plaintiff employed a depot agent to purchase cotton for him and hold it for forwarding over the agent's railroad according to plaintiff's directions. *Held*, that the agent in such dealings acted solely as the plaintiff's agent, and that there was no liability on the company for any loss resulting from the failure of the agent to perform his duty with reference to such transactions. *Sumner v. Charlotte, C. & A. R. Co.*, 78 N. Car. 289, 16 *Am. Ry. Rep.* 201.

Where it appeared that the plaintiff instructed the depot agent not to ship until he had purchased a certain number of bales, and before he had acquired the requisite

number the railroad was taken by irresistible force into the complete control of the Confederate government, the agent thereafter acquiring the requisite number, *held*, error to submit to the jury an issue as to whether or not it was impossible for the defendant company to ship the cotton. *Sumner v. Charlotte, C. & A. R. Co.*, 78 N. Car. 289, 16 Am. Ry. Rep. 201.

The defendant was not liable as common carrier but as bailee, if at all; and the fact that before the requisite number of bales was obtained by the agent the railroad was seized by the Confederate government, is at least evidence to be considered that the defendant never received the cotton at all, either as bailee or common carrier. *Sumner v. Charlotte, C. & A. R. Co.*, 78 N. Car. 289.

The president of a railroad fraudulently induced his aunt, a stockholder, to part with certain shares of stock, representing that a loan of them for the company was necessary. He at once pledged them for his own debt, and afterward transferred to his aunt in lieu thereof certain certificates of an over-issue of stock. *Held*, that the president acted as the agent of his aunt in the transaction, and that the loss must fall on her. *Wright's Appeal*, 99 Pa. St. 425.

## II. RIGHTS, POWERS AND LIABILITIES OF AGENTS.

### 10. Implied powers, generally.—

A railroad company acts through the instrumentality of its officers and agents, and if not prohibited by the charter it may delegate its authority to its officers and agents, so far as may be necessary to effect the purposes of its creation. *Washburn v. Nashville & C. R. Co.*, 3 Head (Tenn.) 638.—QUOTED IN *Nashville & C. R. Co. v. Carroll*, 6 Heisk. (Tenn.) 347.

It seems that agents entrusted with the duty of procuring the right of way for railways have the incidental authority to contract for crossings that shall be made. *Clouse v. Canada Southern R. Co.*, 14 Am. & Eng. R. Cas. 456, 4 Ont. 28.

A sub-inspector of railway police, whose duty it is to attend on the spot where an accident occurs, and who at such time and place is the superior of all other servants of the company, has implied authority to pledge the credit of the company for the care of and supplies to persons injured. *Langan v. Great Western R. Co.*, 30 L. T. N. S. 173; *affirming* 26 L. T. N. S. 577.

Certain subscribers, interested in a projected road, authorized agents to contract with a railroad company for the construction of the road, and authorized the agents, upon the road being built to deliver the subscriptions to the company. *Held*, that the agents were empowered in delivering such subscriptions to affix the necessary stamps thereto as required by law. *Cedar Rapids & St. P. R. Co. v. Stewart*, 25 Iowa 115.

In *assumpsit* for personal services against a railroad company, it appeared that the plaintiff, by a letter to P., an ex-president of the company, in relation to his unpaid vouchers for said services, which had been left by him with P. for settlement prior to his resignation, authorized P. as follows: "I hereby authorize you to make the best settlement you may be able to do for me." *Held*, that the term "settlement," as used in said letter, included not only the determination by P. of the amount due, but the collection and receipt by him of money coming to the plaintiff under such settlement. *New York, P. & N. R. Co. v. Bates*, 68 Md. 184, 11 Atl. Rep. 705.

The failure of P. to pay over to the plaintiff the money collected from the company under said authority gave the plaintiff no right of recovery against the company, if the latter acted in good faith in the matter of the settlement, and payment of the money to P. *New York, P. & N. R. Co. v. Bates*, 68 Md. 184, 11 Atl. Rep. 705.

**11. — of general agents.**—If an agent of a corporation is allowed to exercise general authority in respect to its business, or a particular branch thereof, for a considerable time; or, in other words, if he is held out to the world as having authority in the premises, the corporation is bound by his acts in the same manner as if the authority were expressly granted. *Hirschmann v. Iron Range & H. B. R. Co.*, 97 Mich. 384.—QUOTING *Olcott v. Tioga R. Co.*, 27 N. Y. 546.

The powers of the general agent of the owner of a railroad are such as will warrant him in executing a lease of property to be used as a ticket-office for the road. *Ecker v. Chicago, B. & Q. R. Co.*, 1 Am. & Eng. R. Cas. 357, 8 Mo. App. 223.

Where a general agent is clothed with certain power under the company's charter or by its lawful act, the use of that power in an unauthorized or prohibited manner will render the corporation liable as to innocent

third parties. *Madison & I. R. Co. v. Norwich Sav. Society*, 24 Ind. 457.

An agent of a corporation, appointed by the directors for the purpose of superintending and carrying on its business, has no authority, in virtue of such agency, to pledge or mortgage the machinery used by the company for the security of a loan. *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205.

Where the corporation have a general agent, who is employed by them for the express purpose of receiving and transporting merchandise for hire, and is held out to the world as invested with authority for this purpose, if goods are delivered to him to be transported in the way of his duty, the corporation will be liable for the manner in which that duty is performed, and the contract of bailment may be regarded as made with them. *Mayall v. Boston & M. R. Co.*, 19 N. H. 122.

The power to make declarations or admissions in behalf of a company as to events or defaults that have occurred and are past, cannot be inferred as incidental to the duties of a general agent to superintend the current dealings and business of the company. *Smith v. North Carolina R. Co.*, 68 N. C. 107.—NOT FOLLOWING *Charleston & S. R. Co. v. Blake*, 12 Rich. (S. Car.) 634. DISTINGUISHING *Morse v. Connecticut River R. Co.*, 6 Gray (Mass.) 450.

Defendant, by its general manager, contracted with plaintiff for the publication in its paper of certain matter by a given date, the matter to be furnished and the details of the publication to be looked after by defendant's passenger-agent. The agent failed to furnish the matter until after the date named in the contract for its publication. As soon as the matter was furnished plaintiff published it, in accordance with the contract except as to time. Held, that the plaintiff had a right to assume that the delay of the agent was authorized by defendant. *American Graphic Co. v. Minneapolis, St. P. & S. S. M. R. Co.*, 44 Minn. 93, 46 N. W. Rep. 143.

**12. — of special agents.**—Where a company sends an agent to the scene of an accident in charge of a wrecking train and crew, he has the implied authority to employ additional help if he deems it necessary. *Goff v. Toledo, St. L. & K. C. R. Co.*, 28 Ill. App. 529.

Where a person is specially employed to

trace and find property which has been lost or mislaid by a railroad company, he has not the implied authority to settle the damages for the company's neglect to carry safely or promptly. *Congar v. Galena & C. U. R. Co.*, 17 Wis. 477.

A mere agent to solicit business has no power to make for the company a contract for the carriage of freight beyond its line, unless such power has been expressly conferred, or is to be implied from his previous conduct, on the principle that the company has allowed him to hold himself out as possessing such a power. *Crouch v. Louisville & N. R. Co.*, 42 Mo. App. 248.

**13. — of agent to ship goods.**—Authority to an agent to ship goods implies the authority, as a general rule, to negotiate for terms of shipment and to accept a bill of lading from the carrier containing limitations of the carrier's liability. *Illinois C. R. Co. v. Jonte*, 13 Ill. App. 424; *Brown v. Louisville & N. R. Co.*, 36 Ill. App. 140.—QUOTING *Illinois C. R. Co. v. Jonte*, 13 Ill. App. 424, *Merchants' Despatch Transp. Co. v. Joesting*, 89 Ill. 152. *Western Transit Co. v. Hosking*, 19 Ill. App. 607. *Nelson v. Hudson River R. Co.*, 48 N. Y. 498.—APPLYING *London & N. W. R. Co. v. Bartlett*, 7 H. & N. 400. FOLLOWING *London v. North Western R. Co.*, 7 H. & N. 600; *Lewis v. Great Western R. Co.*, 5 H. & N. 867. REVIEWING *Squire v. New York C. R. Co.*, 98 Mass. 239.

An agent employed to ship goods to the owner has authority to make such contract with the common carrier as in the honest exercise of his discretion he sees fit. Where no particular agreement is made at the time of shipment, the fact that the agent and the carrier have a habitual course of dealing in respect to contracts for transportation is a material and important element in determining the construction to be put upon their acts. *Shelton v. Merchants' Despatch Transp. Co.*, 59 N. Y. 258, 48 How. Pr. 257; reversing 4 J. & S. 527.—FOLLOWING *Mills v. Michigan C. R. Co.*, 45 N. Y. 622. DISTINGUISHED IN *Wilde v. Merchants' Despatch Transp. Co.*, 47 Iowa 247; *Little v. Fargo*, 43 Hun (N. Y.) 233, 5 N. Y. S. R. 462.

Where parties are directed to ship goods by express, they are deemed to have the authority to make such contracts as the express company insisted upon, such as the signing of a receipt which is in a book pre-

pared and printed by the express company and furnished for such purpose. *Meyer v. Harnden's Exp. Co.*, 24 *How. Pr.* (N. Y.) 290.

Where a purchaser of oil has made a written contract with a railroad company for shipment to him of the oil, his agent at the point of shipment, to whom the written contract is forwarded and who was intrusted only with forwarding the oil, has no authority to vary the written contract. *Wiggins v. Erie R. Co.*, 5 *Hun* (N. Y.) 185.

A shipper's broker has no implied authority, as such, to direct for the shipper the delivery of goods held by a carrier subject to the shipper's order. *Watson v. Hoosac Tunnel Line Co.*, 13 *Mo. App.* 263.

**14.—of company's agent to receive goods for shipment.**—An agent of a railroad company who is authorized to contract for the transportation of goods has the power to contract so as to bind the company to carry the goods in a reasonable time. *Blodgett v. Abbot*, 72 *Wis.* 516, 7 *Am. St. Rep.* 873, 40 *N. W. Rep.* 491.

The agent of a company who is intrusted with the duty of making special rates may contract to give a rebate. *Marsh v. Chicago, R. I. & P. R. Co.*, 79 *Iowa* 332, 44 *N. W. Rep.* 562.

Where, according to the general scope of the business of a railroad, it only carries goods over its own line, it will not be bound by a contract made by one of its agents to carry beyond its line, where it appears that he acts contrary to his instructions and without the knowledge of the superior officer of the company. *Burroughs v. Norwich & W. R. Co.*, 100 *Mass.* 26.—APPROVED IN *Wait v. Albany & S. R. Co.*, 5 *Lans.* (N. Y.) 475. REVIEWED IN *Grover & B. S. Mach. Co. v. Missouri Pac. R. Co.*, 70 *Mo.* 672.

**15.—of selling agent.**—A broker who was charged with selling a lot of railroad iron for cash, and who did not have possession of the iron, is not authorized to demand or receive payment of the price when the goods are delivered, nor to vary the terms of the sale and receive notes therefor; nor, having received notes, afterward to collect them. *Western R. Co. v. Roberts*, 4 *Phila. (Pa.)* 110.

**16.—of purchasing agent.**—A local agent who is intrusted with buying cotton for non-residents and shipping the same to them is presumed to have authority to make any lawful contract concerning the shipment

of the cotton, in the absence of anything to show the limited authority given him. *Missouri Pac. R. Co. v. International M. I. Co.*, 84 *Tex.* 149, 19 *S. W. Rep.* 459.

The by-laws of defendant provided that "the purchasing-agent shall, under the direction of the executive committee or some one authorized by them, buy all materials and supplies in general use in every department of the service, excepting such articles or materials the purchase of which may be especially intrusted to other parties. He shall order for and furnish supplies to the various departments on written requisitions of the heads thereof or such other officers of the company as may be designated by the president or first vice-president, such requisition to be examined and approved by the auditing committee, to whom he shall certify all bills for purchases made by him."

*Held*, that as matter of law, the purchasing-agent had actual authority to make contracts to supply defendants with all blank-books it would require in its business from June 1, 1883, to May 1, 1884, and to supply it with all the printed blanks it would require in its business for the year 1884. *Levey v. New York C. R. Co.*, 4 *Misc.* (N. Y.) 415.

**17.—engineers.**—The duties of an engineer are such that, without special authority, he has no power to make contracts that will bind the company. *Gardner v. Boston & M. R. Co.*, 70 *Me.* 181.

An engineer, as such, has no authority to pledge the company to pay indebtedness due from a contractor, who is engaged in building the road, to one of his employés. *Powrie v. Kansas Pac. R. Co.*, 1 *Colo.* 529.

**18.—railway surgeons.**—The surgeon of a railroad company has no implied authority to bind the company by an agreement to pay for services and meals furnished nurses and others in attendance upon an employé injured by an accident on the road, and under the surgeon's treatment. *Bushnell v. Chicago & N. W. R. Co.*, 69 *Iowa* 620, 29 *N. W. Rep.* 753.—DISTINGUISHED IN *Pieart v. Chicago, R. I. & P. R. Co.*, 82 *Iowa* 148. See *St. Louis, A. & T. R. Co. v. Hoover*, 53 *Ark.* 377; 13 *S. W. Rep.* 1092.

**19.—roadmasters.**—Neither an assistant roadmaster nor a master of transportation can be presumed to have authority to represent a railroad company in claiming disputed titles. *Drew v. Comstock*, 57 *Mich.* 176, 23 *N. W. Rep.* 721.

It is not incident to the operation of a



railway company to board its employés; nor is it within the apparent scope of a roadmaster's authority to bind the company to pay for the board of employés. *St. Louis, I. M. & S. R. Co. v. Bennett*, 53 Ark. 208, 13 S. W. Rep. 742.

A roadmaster who is only charged with repairs to his portion of the roadway will not be deemed to have the implied authority to contract on the credit of the company for the nursing of a person who is injured while working under him, where it appears that a superior agent was within reach, and that there was no immediate emergency for so acting; but if the general manager of the company ratifies such contract, upon his attention being called to it, the company will then be bound. *Louisville, E. & St. L. R. Co. v. McVay*, 22 Am. & Eng. R. Cas. 382, 98 Ind. 391, 49 Am. Rep. 770.—*REVIEWING* *Tucker v. St. Louis, K. C. & N. R. Co.*, 54 Mo. 177; *Lafayette v. James*, 92 Ind. 240, 47 Am. Rep. 140; *Brown v. Missouri, K. & T. R. Co.*, 67 Mo. 122; *Mayberry v. Chicago, R. I. & P. R. Co.*, 75 Mo. 492; *Rankin v. New England & N. Silver Min. Co.*, 4 Nev. 78; *Marquette & O. R. Co. v. Taft*, 28 Mich. 289; *Cox v. Midland Counties R. Co.*, 3 Exch. 268; *Atlantic & P. R. Co. v. Reisner*, 18 Kan. 458; *New Albany & S. R. Co. v. Haskell*, 11 Ind. 301; *Cairo & St. L. R. Co. v. Mahoney*, 82 Ill. 73; *Pacific R. Co. v. Thomas*, 19 Kan. 256.

**20. Necessity of proof of agents' authority.**—Where it is sought to enforce an obligation against common carriers created by the act of an agent, the agent's authority must be established, but what constitutes such authority is a question for the jury. *Thurman v. Wells*, 18 Barb. (N. Y.) 500.

Where it is sought to recover from a railroad company damages to corn which is being carried, in order to introduce indorsements upon a bill of lading which had been referred to certain agents of the company, the indorsements tending to show the condition of the corn, it must appear that it was the duty of such agents to examine corn and to indorse the result of the examination upon the bills of lading. *Evans v. Atlanta & W. P. R. Co.*, 56 Ga. 498.

Under Ga. Code, § 2084, making the last carrier of connecting roads liable, there must be some proof that it received the goods in good condition, and the indorsement of an agent made some time after the

goods were received is not evidence, unless it be shown also that it was his business to act in the matter and make the indorsement. *Evans v. Atlanta & W. P. R. Co.*, 56 Ga. 498.—*FOLLOWED IN* *Joseph v. Georgia R. & B. Co.*, 88 Ga. 426.

When a conductor pays out an illegal note in change to a passenger, the penalty cannot be recovered from the company, without proof that he had the authority from the president, directors and treasurer, or some of them, to do it; and this authority may be inferred from circumstances. *Commonwealth v. Ohio & P. R. Co.*, 1 Grant Cas. (Pa.) 329.

**21. Admissibility and sufficiency of such proof.**—Whether a particular act of a servant was or was not in the line of his duty, is a question for the jury to determine from the surrounding facts and circumstances; and evidence that it was the custom of the master's servants to perform such acts is admissible to prove it. *St. Louis, I. M. & S. R. Co. v. Hendricks*, 48 Ark. 177, 2 S. W. Rep. 783.

Evidence that brakemen of a railroad train are in the habit of ejecting tramps from the train, who refuse to pay fare, is admissible to prove that it is within the line of the brakemen's duty to do so. *St. Louis, I. M. & S. R. Co. v. Hendricks*, 48 Ark. 177, 2 S. W. Rep. 783.

Where the issue is made whether a certain party had authority to act for several connecting railroads and to bind them by his contracts for the carriage of goods, proof tending to show that such roads form a through line, and had a common office in charge of a general agent, with a clerk with whom the contract in question was made, are proper to submit to the jury, on the question of agency, and the statements of the alleged agent are not conclusive. *Barrett v. Indianapolis & St. L. R. Co.*, 9 Mo. App. 226.

The frequent exercise of power by an agent, which from its nature must have been known to the principal, may be regarded by persons dealing with the agent as sufficient evidence of the real existence of the power which the agent assumes to exercise. *Hull v. East Line & R. R. Co.*, 28 Am. & Eng. R. Cas. 221, 66 Tex. 619, 2 S. W. Rep. 831.

**22. Question of authority when for jury.**—Where, in an action for damages growing out of alleged negligence on part of the company in complying with a verbal



contract between the plaintiff and the company's agent, the company denies the authority of the agent to make the contract, and there is evidence tending to prove that the agent had no authority to make the contract, it is error for the court to assume that the agent had authority and so instruct the jury. The question of authority should be submitted to the jury. *Missouri Pac. R. Co. v. Carpenter*, 44 Kan. 257, 24 Pac. Rep. 462.

A drover having sued a railroad company for a personal injury received while riding on the engine, the company set up the defence that the rules of the company forbade its employés to permit any person to ride on an engine, and that the plaintiff was not entitled to be carried as a part of the contract to carry his cattle. *Held*, that it was a question for the jury to say, under all the facts of the case, whether the company had by its conduct held out its employés as authorized to consent to carry him on the engine under the contract to carry the cattle. *Waterbury v. New York C. & H. R. R. Co.*, 21 Blatchf. (U. S.) 314, 17 Fed. Rep. 671.—*REVIEWING* *Eaton v. Delaware, L. & W. R. Co.*, 57 N. Y. 382; *Ohio & M. R. Co. v. Muhling*, 30 Ill. 9; *Ryan v. Cumberland Valley R. Co.*, 23 Pa. St. 384; *Gillshannon v. Stony Brook R. Co.*, 10 Cush. (Mass.) 228.

Plaintiff sued defendants for breach of an agreement to carry lumber for them at a stipulated price. Defendants pleaded that the agreement was made by them as agents and directors of the company, of which plaintiff had notice. It appeared that defendants were, at the date of the agreement, one president and the other managing director of a main line and lessees of a branch line; that by reason of the company having been long insolvent the main line had been solely within defendants' control, as principal bondholders of the company; and that what they did personally was in substance, therefore, done on the company's behalf. *Held*, that whether the agreement was made by defendants acting as agents for the directors of the company, of which plaintiffs had notice, was for the jury. *McDougall v. Covert*, 18 U. C. C. P. 119.

**23. Limitations of agents' authority—Secret instructions.\***—Those dealing with an agent of a railroad company have a right to conclude that the principal

intends the agent to have and exercise those powers, and those only, which necessarily, properly and legitimately belong to the character in which he holds him out, and this irrespective of any instructions or restrictions on his power; and this authority may be inferred from the agent's employment. *Harrison v. Kansas City, C. & S. R. Co.*, 50 Mo. App. 332.

Restrictions upon an agent's apparent authority are not binding upon third persons, where there is nothing to put them on inquiry as to the extent of his actual authority. *Lake Shore & M. S. R. Co. v. Foster*, 104 Ind. 293, 4 N. E. Rep. 20, 54 Am. Rep. 319. *APPROVING* *Brooke v. New York, L. E. & W. R. Co.*, 108 Pa. St. 529, 1 Cent. Rep. 123. *EXPLAINING* *Armour v. Michigan C. R. Co.*, 65 N. Y. 111, 22 Am. Rep. 603. *Baker v. Kansas City, St. J. & C. B. R. Co.*, 28 Am. & Eng. R. Cas. 61, 91 Mo. 152, 3 S. W. Rep. 486.—*APPROVING* *Grover & B. S. Mach. Co. v. Missouri Pac. R. Co.*, 70 Mo. 672. *QUOTING* *Burtis v. Buffalo & S. L. R. Co.*, 24 N. Y. 274.

It is not sufficient for the master to give proper instructions to his servants to avoid liability; but he must also see that they are obeyed. *Johnson v. Central Vt. R. Co.*, 19 Am. & Eng. R. Cas. 169, 56 Vt. 707.

The liability of a common carrier cannot be limited by secret instructions given to his general agent. When a stage proprietor has habitually carried in his coaches persons and baggage or packages, the regulations of his line and instructions to his agents not to receive goods to be carried, except as the baggage of passengers or in the care of, but at the risk of the owner or of the person sending them, will not limit his liability for goods received by his agents, unless the owner or his agent was notified of the rule or instructions at the time of the receipt of the goods. *Walker v. Skipwith, Meigs (Tenn.)* 502.—*EXPLAINED IN* *Southern Exp. Co. v. Womack*, 1 Heisk. (Tenn.) 256.

Any arrangement made between a carrier and his servant, by which the servant is to be paid for the carriage of particular parcels, will not exempt the carrier from responsibility for the loss of them, unless such arrangement is known to the owner thereof, so that he contracts exclusively with the servant. *Mayall v. Boston & M. R. Co.*, 19 N. H. 122.—*REVIEWED IN* *Wilson v. Grand Trunk R. Co.*, 57 Me. 138.

\*See also *infra*, 46, 74.

**24. Must contract in name of principal.**—In order to make a written contract made by an agent binding on the principal *per se*, it should appear to have been made in the name of the latter; but the form of the signature is unimportant. *Lazarus v. Shearer*, 2 Ala. 718.

A written contract for the sale of wood to a railroad, which on its face purports to have been made by one of the parties thereto through their agent, and which is signed and sealed by the agent in his own name, is not a binding obligation. *Sherman v. New York C. R. Co.*, 22 Barb. (N. Y.) 239.

**25. Signing as "agent for" principal.**—A writing in these words: "Hired of R. C. the following negroes, to wit," &c., "to work on the M. & C. railroad, from now until the 25th December next; for which I agree to pay said C. twenty-five dollars per month each, and I also agree to feed, and pay all medical expenses, if any; and the said C. loses all runaway time, if any. Given under my hand and seal;" and signed, "W. H. E., agent for M. & C. R. R. Co., per W. M. N.," is, *prima facie*, the contract of the agent, and not binding on the principal personally. *Crutcher v. Memphis & C. R. Co.*, 38 Ala. 579.

**26. Right to employ sub-agent or assistant.**—A head brakeman of a construction train, in the temporary absence of the conductor at a station, has no implied authority to engage a bystander to get on the cars and assist in switching. *Church v. Chicago, M. & St. P. R. Co.*, 50 Minn. 218, 52 N. W. Rep. 647.

A railroad company employed a detective to recover a lot of stolen goods and to capture the thief, who in turn employed plaintiff, telling him that if the company did not pay him he would. *Held*, in the absence of any evidence to show that the detective was authorized to employ plaintiff, a verdict against the company for his services could not be supported. *Illinois & St. L. R. Co. v. Dawson*, 3 Ill. App. 292.

Where the servant of a railway corporation, not having authority from the corporation to employ other servants, engaged G. to assist him in moving a crate of crockery, and through the negligence or inefficiency of G., combined with the carelessness of the servant, the crate was overturned, striking the plaintiff, whereby he suffered a severe injury, *held*, that the corporation was not liable for the negligence of G., nor

for the fault of its servant in employing G. to assist him, even admitting G. to have been an improper person to engage for that service. *Jewell v. Grand Trunk R. Co.*, 55 N. H. 84, 11 Am. Ry. Rep. 496.

**27. Right of agent to deal for his own benefit.**—An agent employed by a company to purchase wood or timber-lands for its use, has no right to receive from the vendor a commission on the amount of the purchase-money, for procuring the sale. *Morrison v. Ogdensburg & L. C. R. Co.*, 52 Barb. (N. Y.) 173.

An agent whose duty it was to purchase wood or timber-land for the use of the road, examined certain lands in company with a director, gave his opinion as to the amount of wood thereon and advised the purchase. It turned out that at the time the agent was to receive a commission on the sale from the vendor if the sale was completed, which was not made known to the director or any one else. *Held*, that such conduct was good ground for his discharge, and it appearing that the company had paid more for the land than they otherwise would have paid, the amount of the agent's commission belonged to the company. *Morrison v. Ogdensburg & L. C. R. Co.*, 52 Barb. (N. Y.) 173.

A person employed by a company to procure subscriptions to stock, while so engaged and without the knowledge of the company, received certain awards or compensation from individuals for procuring their lands to be taken as stocks subscribed. *Held*, that receiving such compensation was a violation of his duties to the company, and worked a forfeiture of any claim to compensation from the company. *Cleveland & St. L. R. Co. v. Pattison*, 15 Ind. 70.

The purchase of bonds by the financial agents of a railroad company on behalf of a syndicate, of which two partners of the firm acting as agents were members, is not invalid as a breach of the fiduciary relation of the financial agents, when it appears that the price of the bonds was fixed by the railroad company, and that the agents did not abuse any trust or obtain any advantage from the transaction. *HINTON, J.*, dissenting. *Atwood v. Shenandoah Valley R. Co.*, 38 Am. & Eng. R. Cas. 534, 85 Va. 966, 9 S. E. Rep. 748.

An indebtedness of a railroad company to a town was assigned in writing to one who purchased with his own money, but was act-

ing at the same time as the agent of the company. *Held*, that the company could not have the benefit of the purchase without an offer to pay, and that it was immaterial in what light the town council regarded the transaction. *Ridenour v. Wherritt*, 30 Ind. 485.

**28. Duty to account.**—An agent of a railroad who is required to remit all sums over \$10 to the company daily, has a reasonable time in which to remit, and where money was received by him too late to be remitted on account of other duties, he cannot be held liable where it was stolen. *Robinson v. Illinois C. R. Co.*, 30 Iowa 401.

A power of attorney to a party to sell lands belonging to a railroad company, at not less than a fixed price, makes it the duty of the attorney-in-fact to sell the land for the highest price he can get, and it becomes his implied duty to account to the company for the whole amount of the purchase-money; and if it appears that he reports the sale at a less amount than he in fact received, the purchaser being privy to an arrangement by which the agent shall claim a part of the purchase-money, a bill in equity may be maintained by the company to rescind the sale. *Miller v. Louisville & N. R. Co.*, 83 Ala. 274, 3 Am. St. Rep. 722, 4 So. Rep. 842.

**29. Liability to principal, generally.**—A cashier or clerk of a company who has charge of its moneys is under a legal liability to the company to take care of and preserve its funds so intrusted to him, and if he loans the company's money to a fellow-servant without authority, he will be liable personally to the company for the same, and if he pays the same he cannot recover it back. *St. Louis, A. & T. H. R. Co. v. Thomas*, 85 Ill. 464.

The balance-sheet of a freight agent returned to the company, of the receipts and disbursements of his office, is not an admission on his part that a deficit is chargeable to himself. *Chicago & A. R. Co. v. Higgins*, 58 Ill. 128, 10 Am. Ry. Rep. 434.

Where bonds of a railroad company are deposited in the hands of agents for the company, to be issued by them to contractors on the performance of, and as required by the terms of their contract, but the bonds were never earned and delivered after demand, the company may maintain a suit in equity against the agents to compel a surrender of the bonds, and for damages

accruing from their detention; or if the bonds cannot be obtained, then for their value, it appearing that the bonds were payable to order, and if issued, constituted valid obligations of the company. *Western R. Co. v. Bayne*, 75 N. Y. 1; affirming 11 Hun 166.

Where agents of a railroad company have wrongfully disposed of its bonds, in an action against the agents to recover the bonds or their value, *prima facie*, their value is the amount of the bonds with interest until paid; but it is competent to show the inability of the company to pay, either in whole or part. In such case proof of their market value is not proof of the value as between the company and the agents. *Western R. Co. v. Bayne*, 75 N. Y. 1; affirming 11 Hun 166.

In order to recover by a railroad company for funds charged to have been fraudulently misapplied and embezzled by its agent, it is necessary to show that the agent received the money, and also that he fraudulently misapplied or embezzled it, the burden of proof to establish these facts being always on the company. *Panama R. Co. v. Johnson*, 58 Hun (N. Y.) 557, 35 N. Y. S. R. 560, 12 N. Y. Supp. 499.

The agent of a railroad company, by mistake, delivered coal to the wrong party. A general agent discovered the mistake and attempted to collect the price from the person to whom the coal was delivered, but failing, sued the agent who delivered the coal. *Held*, that if the agent was thrown off his guard or suffered by the act of the general agent by not informing him of the mistake sooner, then there could be no recovery. *Philadelphia & R. R. Co. v. O'Donnell*, 12 Phila. (Pa.) 213.

A person, as the agent of a firm of contractors for the construction of a railroad, procured subscriptions for the purpose of securing the location of a depot at a certain point on the road, in which those who made the subscriptions were interested, the contractors having no power, under the terms of their arrangement with the railroad company, to fix the location of the depot at the place desired. The agent who thus procured the subscriptions was at the time a director in the railroad company, and, having applied the proceeds of the subscriptions to his own use, in a suit by his principals to recover from him the money so obtained, he set up the supposed illegality of the contract

resulting from his official relation to the railroad company as a defence; but it was *held*, he was estopped from relying upon such defence as against his principals. *Snell v. Pells*, 113 Ill. 145. — DISTINGUISHING *Marsh v. Fairbury*, P. & N. W. R. Co., 64 Ill., 414; *St. Louis, J. & C. R. Co. v. Mathers*, 71 Ill. 592.

Defendant being employed by the plaintiffs as their locomotive and car superintendent, made use of their materials and men in doing work for a sewing-machine manufactory, in which he was a partner, and untruly entered such time and materials as employed in the plaintiffs' service. The plaintiffs having sued him upon the common counts, claiming in their particulars for goods furnished but not for work and labor, *Held*, that they could recover under the particulars, for proof of the work expended in the goods was a mode of ascertaining their value, and the defendant could not have been misled. Defendant was precluded by his own misconduct from setting up as a defence that the plaintiffs, under their charter, could not sue on such a cause of action. *Northern R. Co. v. Lister*, 27 U. C. Q. B. 57.

**30. —on official bond.**—The sureties in a general freight agent's bond are not liable for a deficit in his accounts, arising from the default of his subordinates, under a general clause in the bond, that "such agent shall well and truly perform and execute the duties of freight agent, and shall render a just and true account of all moneys, goods and chattels which shall come into his charge or possession," where the subordinates are appointed by the company, with the approbation and consent of the general agent, and acting under his control. *Chicago & A. R. Co. v. Higgins*, 58 Ill. 128, 10 Am. Ry. Rep. 434.

A surety on a bond given by an agent of a railroad company for the faithful performance of his duties as agent is not released by his discharge in bankruptcy from liabilities accruing under the bond after the estate of the surety is settled up by his assignee, but he is released by his discharge from liabilities accruing before that time. *Greenville & C. R. Co. v. Maffett*, 8 So. Car. 307.

A bond for the faithful discharge of his duties by an agent is a continuous indemnity, binding the sureties from time to time as breaches occur; and until there is a

1 D. R. D.—4.

breach there is no debt of the surety, either existing or to become due, which can be proved against his estate in bankruptcy. *Greenville & C. R. Co. v. Maffett*, 8 So. Car. 307.

Where a ticket agent gives bond and security as agent of one of two offices that the company maintains in a city, the consolidation of the offices and imposing the duties of both upon him without the consent of the sureties in his bond will discharge them. *Mumford v. Memphis & C. R. Co.*, 2 Lea (Tenn.) 393.—REVIEWING *Northern R. Co. v. Whinray*, 26 Eng. L. & Eq. R. 488.

Where a company has two ticket offices in a city, and the agent gives bond to faithfully account for money received at an office in the city, without showing to which office he is to be assigned, and afterward the duties of both offices are imposed upon him, without the assent of the sureties, it is competent to prove by parol to which office the bond related. *Mumford v. Memphis & C. R. Co.*, 2 Lea (Tenn.) 393.

**31. — for negligence or misconduct.**—Where a third party has recovered against a railroad company for injuries sustained through the negligence or misconduct of its employes, the company may recover over against such employes. *Grand Trunk R. Co. v. Latham*, 63 Me. 177.

Common carriers, who, by negligent delivery of goods have been rendered liable for their value, cannot maintain an action against their agent, through whose means the goods are lost, unless such agent was in the first instance guilty of the negligence. *Brooks v. Lawrence*, 1 Edm. Sel. Cas. (N.Y.) 496.

An agent may be liable to his principal for loss occasioned by his misconduct, although such misconduct is not the direct cause of the loss, and the loss was immediately attributable to the intervention of third parties. *Memphis & C. R. Co. v. Greer*, 38 Am. & Eng. R. Cas. 248, 87 Tenn. 698, 11 S. W. Rep. 931.

One may employ a servant for the express purpose of protecting himself from loss that may arise from negligence of his other servants, and if such employe negligently and in violation of his duty puts his principal in an attitude whereby loss occurs through negligence of his other servants, and such loss could not have arisen had such duty been performed, then such employe is liable to his employer for such loss. *Memphis &*

*C. R. Co. v. Greer*, 38 *Am. & Eng. R. Cas.* 248, 87 *Tenn.* 698, 11 *S. W. Rep.* 931.

### 32. — misconduct of sub-agents.

—Where a local agent of a railroad company is empowered to employ assistants or sub-agents, so that they become directly liable to the company for the manner in which they discharge their duties, the agent hiring them is not himself responsible for their conduct, unless he fraudulently procures their appointment with knowledge of their dishonesty or incompetence. *Louisville & N. R. Co. v. Blair*, 4 *Bart. (Tenn.)* 407; *affirming* 1 *Tenn. Ch.* 351.

**33. Liability of agents to third persons.**—A servant of a corporation who does an act forbidden by law is responsible for it in his own person, and the corporation is not presumed to have given him any authority to do such an act. *Commonwealth v. Ohio & P. R. Co.*, 1 *Grant Cas. (Pa.)* 329.

A person who does an act by command of another within the scope of his authority is liable for the consequences, unless such act is one that the superior would have been justified in doing himself. *Poulton v. London & S. W. R. Co.*, 8 *B. & S.* 616, 16 *W. R.* 309, *L. R.* 2 *Q. B.* 534, 36 *L. J. Q. B.* 294, 17 *L. T. N. S.* 11.—CONSIDERED IN *Bolingbroke v. Swindon New Town Local Bd.*, 30 *L. T.* 723.

It seems that the agent or servant is liable as well as the master where the injury is caused by his misfeasance, although committed in the master's business; but where it is the result of non-feasance on his part he is not, as a general rule, liable. *Murray v. Usher*, 117 *N. Y.* 542, 23 *N. E. Rep.* 564, 27 *N. Y. S. R.* 928; *affirming* 46 *Hun* 404, 11 *N. Y. S. R.* 789.—DISTINGUISHED IN *Cregan v. Marston*, 126 *N. Y.* 568.

After an accident to a freight train carrying hogs the company's manager directed certain employes to secure a safe place for the hogs, whereupon the hogs were taken to plaintiff's barn-yard and left, in his absence and without permission. On his return he did not object nor assent, but being asked to feed the hogs did so. It appeared that the hogs were diseased at the time, and the disease was immediately communicated to plaintiff's hogs, but the fact of their being diseased was not known to either the manager or to plaintiff. Plaintiff sued the manager for time and expense in tending the hogs and for damages to his own on account of the communicated disease. *Held*

(1) that the manager acted within the general scope of his authority; (2) that it could not be said, as a matter of law, that the manager had been guilty of a trespass, making him liable on account of the disease. *Hawks v. Locke*, 139 *Mass.* 205, 1 *N. E. Rep.* 543.

An agreement was made between the plaintiffs of the one part and "The G. W. R. Co. by their agent" of the other part, by which the plaintiffs contracted to furnish a large quantity of cordwood on the terms specified. The agreement was signed and sealed by the plaintiffs and by defendant, styling himself "agent." No representation as to authority was shown to have been made by defendant, but it was proved that after the company had accepted and paid for a portion of the wood they refused to carry out the contract, and defeated the plaintiffs in an action brought upon it by setting up the want of their corporate seal. *Held*, that this evidence was insufficient to sustain an action against defendant for falsely representing to the plaintiffs that he had authority to bind the company. *McDonald v. McMillan*, 17 *U. C. Q. B.* 377.

**34. Compensation—When entitled to commissions.\***—A corporation, under its common-law power to contract, may make a valid agreement to compensate an agent for obtaining subscriptions of stock. *Cincinnati, I. & C. R. Co. v. Clarkson*, 7 *Ind.* 595.

A person employed by the month or year in a particular service may have a right to compensation for services rendered on request out of the sphere of such employment, though there was no express agreement that he should be paid therefor. *Cincinnati, I. & C. R. Co. v. Clarkson*, 7 *Ind.* 595.

The jury were instructed that the defendant company had authority to receive, with the consent of the directors, subscriptions to the capital stock, under regulations prescribed by the directors, in real estate and other property, and allow their agents two per cent. in stock on such subscriptions when accepted; and that if the defendant company agreed to give plaintiff two per cent. in stock for accepted subscriptions in real estate he would be entitled to demand the per cent. for stock obtained by him, and

\* Employment of station agent and accepting services implies a contract to compensate him. See 24 *AM. & ENG. R. CAS.* 99, *abstr.*

upon a refusal to allow it in stock he might recover its value at the time of demand. *Held*, under the evidence, that the instructions were substantially correct. *Cincinnati, I. & C. R. Co. v. Clarkson*, 7 Ind. 595.

A town issued bonds in aid of a railroad and placed them in the hands of a party for sale, or to be exchanged for stock. After some of the bonds had been disposed of the town demanded from him the proceeds of the bonds, and denied their validity and his power to dispose of them. *Held*, that claiming the proceeds of the bonds was a recognizing of their validity, which entitled the party to his commission upon the sales. *Lyons v. Chamberlain*, 89 N. Y. 578.—*APPLYING Cagwin v. Hancock*, 84 N. Y. 542.

**35. — when not so entitled.**—A person authorized to make calls upon subscribers to capital stock, and to be paid a certain commission on the amounts collected, is not entitled to a commission for receiving bonds from a city which had subscribed, but paid in bonds instead of money. *Lakenan v. Hannibal & St. J. R. Co.*, 24 Mo. 505.

Where B. was employed to secure subscriptions to railroad stock, his compensation "to be paid as the subscriptions to its stock shall be paid in," and a large amount of stock was afterwards forfeited for non-payment, including the subscriptions procured by B., the company not having remitted the forfeitures nor attempted to sell the forfeited stock, nor even instituted actions to recover the subscriptions, *held*, that B. was not entitled to compensation with respect to such forfeited shares until the money was realized thereon. *Maryland Agric'l College v. Baltimore & P. R. Co.*, 43 Md. 434. 14 Am. Ry. Rep. 266.

The company not having remitted the forfeitures, nor having attempted to sell the forfeited stock, nor even instituted actions to recover the subscriptions, B. may have a remedy to compel the company to either sell the stock or remit the forfeitures, and institute actions to recover the balance of the subscriptions. *Maryland Agric'l College v. Baltimore & P. R. Co.*, 43 Md. 434.

Plaintiff, as agent, negotiated for defendants, a railroad and mining company, a sale of ore, for which he was paid a commission. The purchasers were to have the option of ordering a certain additional quantity within the next five years. Afterward plaintiff was made general agent, to be paid a commission on all ore sold. During the time

limited the purchasers of the lot sold exercised the option, and made another large order, upon which plaintiff claimed a commission. *Held*, that the contract making him general agent only covered commissions on sales thereafter, and did not include orders afterward made under the existing option. *Taylor v. Cobourg, P. & M., R. & M. Co.*, 24 U. C. C. P. 200.

**36. Right to reimbursement and indemnity.**—Where an agent of a railroad company purchases land in his own name upon the request and for the benefit of his principal, pays part of the consideration and gives his mortgage for the residue, with a bond in which his constituent joins, the agent is a surety for his constituent in respect of such bond; and equity will decree that he be paid his advance and indemnified against the bond and mortgage, on his conveying the title to the principal. *Mohawk & H. R. Co. v. Costigan*, 2 Sandf. Ch. (N. Y.) 306.

A banking firm who had the general control of the finances of a railroad, and who were largely interested in the stocks and bonds of the road, advanced large sums of money to enable the company to meet demands. After the lapse of some time, and while they were still carrying a considerable floating-debt against the railroad, the company's revenues not being sufficient to pay the interest falling due on certain first-mortgage bonds, the banking firm purchased with their own bonds the interest coupons due and unpaid. *Held*, that such purchase could not be taken as an extinguishment of the coupons, and that the bank had a right to reimburse themselves, but that the coupons were not entitled to any priority over the principal and interest of others subsequently maturing. *Duncan v. Mobile & O. R. Co.*, 3 Woods (U. S.) 567.

### III. RIGHTS, DUTIES AND LIABILITIES OF PRINCIPALS.

#### 1. In General.

**37. Admissions and declarations of agent, when bind principal.**—A corporation is bound by the admissions, declarations and representations of its agents whenever an individual could be bound under like circumstances. *Henderson v. San Antonio & M. G. R. Co.*, 17 Tex. 560.

The statements and representations of an agent made in reference to an act which he

is authorized to perform, and while engaged in its performance, are binding upon the principal. They are part of the *res gesta*. *Union Pac. R. Co. v. Hepner*, 3 *Colo. App.* 313.

**38. — and when do not.**—The rule that where an agent's acts will bind his principal, his declarations and admissions accompanying such acts, and, with respect to the subject-matter, will also bind him, does not apply to a case where there is no effort to fix the principal's liability by showing any act of the agent, but simply his naked declarations concerning a matter with which he was entirely unconnected, and of which he did not appear to have any personal knowledge. *Baltimore & O. R. Co. v. Christie*, 5 *W. Va.* 325.

Railway companies are not responsible for the declarations or admissions of any of their servants beyond the immediate sphere of their agency and during the transaction of the business in which they are employed. *Missouri Pac. R. Co. v. Stults*, 15 *Am. & Eng. R. Cas.* 97, 31 *Kan.* 752, 3 *Pac. Rep.* 522.

The directions given by a baggage-master as to the delivery of freight, while away from the baggage-room and about his own private affairs, are not binding on the company. *Chillicothe ex rel. v. Raynard*, 80 *Mo.* 185.—QUOTING *Adams v. Hannibal & St. J. R. Co.*, 74 *Mo.* 554.

A person who acts as a special policeman about a depot, whose duties are confined to keeping order about the grounds and buildings, and in assisting passengers on and off trains, cannot bind the company by declarations and statements in respect to transportation. *Wells v. Alabama G. S. R. Co.*, 40 *Am. & Eng. R. Cas.* 645, 67 *Miss.* 24, 6 *So. Rep.* 737.

A company is not bound by representations as to its accommodations made by an agent employed by it to obtain custom. *Kirby v. Great Western R. Co.*, 18 *L. T. N. S.* 658.

**39. Notice to agent, when notice to principal.**—Where the business of an incorporated company is of such a nature as to require it to be conducted through servants or agents, notice to one of its officers relative to a matter in which he acted within the scope of his employment, and in the usual course of the company's business, will bind the company. *Pontchartrain R. Co. v. Hierne*, 2 *La. Ann.* 129.

Notice to an agent of a corporation relating to any matter of which he has the management and control, is notice to the corporation. *Pittsburgh, Ft. W. & C. R. Co. v. Ruby*, 38 *Ind.* 294, 10 *Am. Ry. Rep.* 199.

Notice to an agent in transactions in which he is employed, where it becomes his duty, by virtue of his employment, to act on such notice, is notice to the principal. *Denver, S. P. & P. R. Co. v. Conway*, 8 *Colo.* 1, 54 *Am. Rep.* 537, 5 *Pac. Rep.* 142.

Notice to an agent, to be binding upon his principal, must be concerning some fact within the scope of the powers and duties of the agent as such. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 *Am. & Eng. R. Cas.* 603, 27 *Fla.* 1, 9 *So. Rep.* 661.

Notice to an agent, in order to bind the principal, must be in the same transaction. *Blumenthal v. Brainerd*, 38 *Vt.* 402.

If a railroad corporation occupies land after its agent has been notified by the owner that rent will be charged, it is liable in assumpsit for use and occupation. *Illinois C. R. Co. v. Thompson*, 116 *Ill.* 159, 5 *N. E. Rep.* 117.

**40. — various illustrations of the rule.**—Where a master-mechanic is charged with the duty of employing and discharging engineers and firemen, notice to such master-mechanic of a violation by engineers and firemen of the orders of the company is the same as notice to the company. *Ohio & M. R. Co. v. Collarn*, 5 *Am. & Eng. R. Cas.* 554, 73 *Ind.* 261, 38 *Am. Rep.* 134. *Pittsburgh, Ft. W. & C. R. Co. v. Ruby*, 38 *Ind.* 294; *Baulec v. New York & H. R. Co.*, 59 *N. Y.* 356.

Notice to the yard-master that certain frogs are unblocked, one of which is pointed out to him, is notice to the company. *Ashman v. Flint & P. M. R. Co.*, 53 *Am. & Eng. R. Cas.* 80, 90 *Mich.* 567, 51 *N. W. Rep.* 645.

Notice to a depot agent of an assignment of wages by an employé is notice to the company, where it appears that such agent has been receiving such notice for years and transmitting them to the company under orders from his superiors. *Illinois C. R. Co. v. Bryant*, 70 *Miss.* 665, 12 *So. Rep.* 592.

The only representative or agent of a company in a certain town was charged, among other duties, with that of paying wages to employés. A certain employé transferred his claim to one who gave notice thereof to the agent and demanded



payment, but notwithstanding, the agent paid the money to the original employé. *Held*, that notice to such agent was notice to the company, making it liable to the assignee of the claim. *Memphis, K. & C. R. Co. v. Koch*, 9 Am. & Eng. R. Cas. 429, 28 Kan. 565.

Where it appears that a locomotive is unsafe, in order to charge the company with implied notice, it is not necessary to show that the persons having charge of it had actual knowledge of the defects, it being sufficient if it appear that they had such reports of its unsafe condition as should, in the exercise of proper diligence, have put them on inquiry and knowledge of its true condition. *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338.—DISTINGUISHED IN *McKelvey v. Chesapeake & O. R. Co.*, 35 W. Va. 500. FOLLOWED IN *Toledo, St. L. & K. C. R. Co. v. Bailey*, 145 Ill. 159.

**41. Notice to agent, when not notice to principal.**—In order to charge a corporation with implied notice on account of actual notice to one of its agents or officers, it must appear that such agent or officer received the notice while acting within the scope of his duties and employment, and not while engaged in private business of his own. *Reid v. Bank of Mobile*, 14 Am. & Eng. R. Cas. 554, 70 Ala. 199.

A complaint of a defective railroad crossing, made to one who has no charge or control of the same, though he be a servant of the railway company, is no notice of the defect to the company. *Union Pac. R. Co. v. Springsteen*, 41 Kan. 724, 21 Pac. Rep. 774.

Notice to the caller (whose business it is merely to call the conductors in a certain order when trains are ready, and, if one cannot go to call the next), of a special temporary incompetency of a conductor called by him, is not notice to the company. *Michigan C. R. Co. v. Dolan*, 32 Mich. 510.—FOLLOWING *Davis v. Detroit & M. R. Co.*, 20 Mich. 105.

Plaintiff, with others, was employed by a contractor to fence a track and they were furnished a hand-car by the company on which to move themselves and tools from place to place, and while using the car plaintiff was injured. *Held*, that notice to the contractor of the company's rules as to the use of the car was not notice to the plaintiff, as the contractor was not the company's agent. *Garteiser v. Galveston, H. & S. A. R. Co.*, 2 Tex. Civ. App. 230, 21 S. W. Rep. 631.

**42. Knowledge of agent, when imputed to principal.**—Where an employé is furnished a defective hammer which had been sent to an agent to repair, the employer is charged with the knowledge of such agent as to its defects. *Johnson v. Missouri Pac. R. Co.*, 96 Mo. 340.

Where a person in the employ of a horse-car company sues for injuries caused by a vicious horse, proof that the superintendent of the stable and another in higher authority than plaintiff knew of the vicious disposition of the horse, is sufficient to show knowledge by the company. *McGarry v. New York & H. R. Co.*, 18 N. Y. Supp. 195; affirmed in 137 N. Y. 627, 33 N. E. Rep. 745.

If the unsoundness of the roadway be known to the officers of the company who are charged with the duty of repairing it, this would be notice to the corporation. *Krogg v. Atlanta & W. P. R. Co.*, 77 Ga. 202, 4 Am. St. Rep. 79.

Where an employé of a railroad company is charged with keeping the track in good condition, knowledge by him of a defect in the track is the same as knowledge by the company. *Speed v. Atlantic & P. R. Co.*, 2 Am. & Eng. R. Cas. 77, 71 Mo. 303. *Fort Worth & D. C. R. Co. v. Wilson*, 3 Tex. Civ. App. 583, 24 S. W. Rep. 686. *Porter v. Hannibal & St. J. R. Co.*, 2 Am. & Eng. R. Cas. 44, 71 Mo. 66, 36 Am. Rep. 454.—FOLLOWING *Texas M. R. Co. v. Whitmore*, 58 Tex. 276; *Houston & T. C. R. Co. v. Dunham*, 49 Tex. 181; *Railway Co. v. Farmer*, 73 Tex. 85.—DISTINGUISHED IN *Corbett v. St. Louis, I. M. & S. R. Co.*, 26 Mo. App. 621.

Where a former receiver and officers of a railroad continue in the services of purchasers at a foreclosure sale, the knowledge of such receiver and officers as to the condition of the road, obtained while they were in possession of it, will be deemed the knowledge of the subsequent purchasers. *George v. Wabash W. R. Co.*, 40 Mo. App. 433.

Where it appears that the head switchman knew of defects in a car while he is making it up, he being intrusted with making up the train, this amounts to knowledge of the defects and notice to the company. *Reed v. Burlington, C. R. & N. R. Co.*, 31 Am. & Eng. R. Cas. 190, 72 Iowa 66, 33 N. W. Rep. 451.

The knowledge of the receiving agent of



a common carrier as to the character of goods taken for transportation is deemed to be the knowledge of his principal. *Merrill v. American Exp. Co.*, 62 N. H. 514.

A husband sent a man to a freight yard with his wife's horse and cart for goods, and upon entering the yard the man saw that the car containing the goods was out on the track in a dangerous place, but instead of having it moved, as he might have done, he led the horse to the car, where it was killed. *Held*, in an action by the wife against the company to recover the value of the horse, that the company was entitled to an instruction; that if the man knew the situation, or the danger, and voluntarily assumed the risk, plaintiff could not recover. *Miner v. Connecticut River R. Co.*, 153 Mass. 398, 26 N. E. Rep. 994.

**43. — and when not.**—A carrier is not bound by its agent's knowledge or notice of facts outside of his duties and employment as such agent. *Wells v. American Exp. Co.*, 44 Wis. 342.

The knowledge of the arbitrary mark of a consignee of goods by railroad, possessed by a former officer or agent of the railroad company, such knowledge not having been acquired by any usage, custom or course of business of the company, is not the knowledge of the company. A corporation has no memory except through its agents, and from the nature of the case, the notice should attach to the principal only so long as the knowledge remains present in the agency. *Great Western R. Co. v. Wheeler*, 20 Mich. 419.

**44. Rights and liabilities of undisclosed principal.**—A person shipped cattle belonging to himself and to another party, but took the receipt in his own name, there being nothing to show that they did not all belong to him. The cattle were injured in the hands of the railroad company, and the party whose name had not been disclosed sued the railroad for his share of the loss, not making the party taking the bill of lading a co-plaintiff. The action was tried upon its merits, without the question of a defect of parties being raised, and judgment rendered for the plaintiff. *Held*, on appeal, that the action could be maintained. *St. Louis, K. C. & N. R. Co. v. Thacher*, 13 Kan. 564.

The general manager of a railroad directed a subordinate to have certain work done, who in turn made a contract with a third

party to do the work. A memorandum of agreement was entered into reciting that the party would do the work for a certain sum, under the direction of the company's engineer, without mentioning for whom the work was to be done. The subordinate signed the memorandum without any assumption of personal liability and without anything to show for whom he acted. The work done was entirely for the benefit of the company. *Held*, that the memorandum was the contract of the company. *Missouri, K. & T. R. Co. v. Brown*, 14 Kan. 557.

## 2. When Bound by Agents' Contracts.

**45. In general.**\*—Corporations are only bound by the acts of their agents where natural persons would be bound under the same conditions, i.e., when the agents act within the scope of their employment. *Chicago & N. W. R. Co. v. James*, 22 Wis. 194. *Ellis v. Central Pac. R. Co.*, 5 Nev. 255. *Covington v. Covington & C. Br. Co.*, 10 Bush (Ky) 69.

A railroad company will be bound by a contract made in its name by another as agent, when such other person has been accustomed to make similar contracts for it as agent, with its knowledge and approbation, which have been recognized and ratified; but when the authority is denied it must be proved. *Texas & P. R. Co. v. Hamm*, 2 Tex. App. (Civ. Cas.) 436.

A regulation of the company forbidding its agents to make any contract is not binding upon a stranger who has no notice of this regulation. *Walker v. Wilmington, C. & A. R. Co.*, 26 S. Car. 80, 1 S. E. Rep. 366.

Unless sanctioned by a superior officer, the act of a subordinate rescinding a contract does not bind the corporation. *Allegheny Valley R. Co. v. Steele*, 1 Pennyp. (Pa.) 312.

A railroad company is not bound by the act of its local agent and engineer in erroneously locating its right of way on a town plat, in the absence of proof that they were authorized by the company to make the plat in the manner that it was made. *Hannibal & St. J. R. Co. v. Green*, 68 Mo. 169.

**46. — where agent deviates from his instructions.**†—The test of a master's responsibility for the act of his servant is, whether the act was done in the

\* Liability of company on contracts made by agents generally, see note, 20 L. R. A. 696.

† See also *ante*, 23.

prosecution of the master's business; not whether it was done in accordance with the instructions of the master to the servant. When, therefore, the servant while engaged in the prosecution of the master's business deviates from his instructions as to the manner of doing it, this does not relieve the master from liability for his acts. *Cosgrove v. Ogden*, 49 N. Y. 255.—FOLLOWED IN *Hughes v. New York & N. H. R. Co.*, 4 J. & S. (N. Y.) 222; *Atchison, T. & S. F. R. Co. v. Randall*, 38 Am. & Eng. R. Cas. 255, 40 Kan. 421, 19 Pac. Rep. 783.

**47. Agreements and promises as to location of depots.**—The agent of a railway company, acting under a general power to procure a right of way for the railroad, does not have, as connected with or incidental to such a power, the right to designate and locate for his principals the depots along the line of road; and his agreement to locate a depot at a particular place, as a consideration for a deed to the company of a right of way, would not be binding on the company. *Houston & T. C. R. Co. v. McKinney*, 8 Am. & Eng. R. Cas. 723, 55 Tex. 176.—DISTINGUISHING *Henderson v. San Antonio & M. G. R. Co.*, 17 Tex. 560.

The representations of the agent of a railway company made in the sale of lots at a depot town, as to the future location of the road with reference thereto, when made as inducements to the purchaser of a lot to contract therefor, become, when acted on in making the purchase, assurances and undertakings which the road is bound to comply with. *Greenwood v. Pierce*, 58 Tex. 130.

Agents acting on behalf of persons interested in the building of a railroad were authorized to contract with the railroad company for the construction of the road according to their discretion, and upon such terms as they, or a majority of them, might deem best. *Held*, that the agents had authority to bind their principals in a covenant to provide a right of way and to furnish depot grounds, the providing of which should be conditions precedent to the completion of the contract on the part of the company. *Cedar Rapids & St. P. R. Co. v. Stewart*, 25 Iowa 115.

Where certain petitioners were induced to sign a petition calling an election in a township, upon the representations of an agent of the railway company that the de-

pot would be located on section 16 of said township, when, in fact, the depot was afterwards located on section 17, the company was bound by the representations of its agents, and persons who had been deceived thereby and induced to sign the petition might set up such facts to enjoin the issuing of the bonds. *Wullenwaber v. Dunigan*, 30 Neb. 877.—DISTINGUISHING *Perkins v. Lougee*, 6 Neb. 220. FOLLOWING *Donisthorpe v. Fremont, E. & M. V. R. Co.*, 30 Neb. 142. QUOTING *Sandford v. Handy*, 23 Wend. (N. Y.) 265.

**48. — to build gates or crossings.**—A company will not be bound by an agreement to put up gates on certain land, unless it appear that the person who made the agreement had authority, either actual or ostensible, to contract for the company, or that his act was subsequently ratified by the company. *McCoy v. Southern Pac. R. Co.*, 94 Cal. 568, 29 Pac. Rep. 1110.

An attorney employed by a company, among other things, to procure a right of way, in taking a deed for such right of way told the grantor that a provision in the deed requiring the company to construct and maintain certain wagon-ways, in conformity to the charter, would not prejudice or affect his rights. Upon the refusal of the company to construct crossings or ways, the grantor constructed them and sued the company for their cost. *Held*, that an injunction would issue to restrain the company from setting up the deed as a defence. *Morris & E. R. Co. v. Green*, 15 N. J. Eq. 469; *affirming* 12 N. J. Eq. 165.—FOLLOWED IN *Martin v. New York, S. & W. R. Co.*, 12 Am. & Eng. R. Cas. 448, 36 N. J. Eq. 109.

Plaintiff declared *in assumpsit*, setting out that he had brought two actions against defendants—the first for breach of an agreement made by them to construct a bridge or crossing, with cattle-guards, over their road, which passed through his land; and the second for an alleged injury occasioned by them, the particulars of which were not stated; that while both actions were pending the plaintiff and defendants by their said attorney, who was then duly authorized in such behalf, made an agreement in writing setting it out, of which the terms were, that plaintiff was to receive £175 for all claims against the company, the company to pay costs and to make the cattle-pass and complete the crossing by the 16th of

July then next; the suits to be withdrawn, the agreement to be carried out by M. (plaintiff's attorney) on plaintiff's account, and R. on behalf of the company, as soon as the court was over (this was signed by R. for the company). That in consideration of the premises, and that the plaintiff at defendants' request would perform said agreement on his part, defendants promised to perform on their parts; that confiding in such promise he withdrew the actions and did all that was to be done on his part, but that, although defendants in part-performance paid £75 and costs, yet they did not make the cattle-pass or complete the crossing. *Held*, on demurrer to the declaration, that it must be assumed by the averments that R. had been authorized under the defendant's corporate seal to make the agreement; but that no promise of the corporation, such as was declared upon, could be implied therefrom; that the proper construction of the agreement was, that it required a proper legal covenant by the company to bind them to the terms which they had authorized him to accept, and that they could not be charged as liable through him on a parol agreement to do that which they could only have bound themselves under seal to perform. *Doran v. Great Western R. Co.*, 14 U. C. Q. B. 403.—  
—DISTINGUISHING *Faviell v. Eastern Counties R. Co.*, 2 Exch. 344. REVIEWING *Jackson v. North Wales R. Co.*, 18 L. J. Ch. 91, 13 Jur. 69.

**49. Construction contracts.**—Plaintiff entered into negotiations with the agent of a railroad company, looking toward the employment of some person of means to build a certain part of defendant's road. Subsequently an arrangement was made by which plaintiff, the agent and a third party took the contract on certain conditions, the profits of the enterprise to be divided in specified proportions between the three. *Held*, that plaintiff could not recover compensation for services which led to the making of the contract. *Van Valkenburg v. Thomasville, T. & G. R. Co.*, 22 N. Y. S. R. 379, 52 Hun 610, 4 N. Y. Supp. 782.

**50.** — for supplies to persons constructing road.—An inspector who superintends the erection of a railroad bridge may contract for stone and sand without the contract being under seal. But apart from this, where the company adopts the acts of the inspector, and receives the material, it must pay for them. *O'Brien v.*

*Credit Valley R. Co.*, 25 U. C. C. P. 275.

Plaintiffs sued to recover for supplies furnished to parties engaged in the construction of defendant's road, upon the claim that the goods were delivered upon orders given by defendant's agent, and upon its credit. *Held*, that the question of the authority conferred upon the alleged agent was one of fact for the jury. *Hirschmann v. Iron Range & H. B. R. Co.*, 97 Mich. 384.

If defendant relinquished to another (to whom it had let a contract for building its road, and who was the promoter and organizer of the scheme) the matter of the construction of the road, and he knew that the alleged agent (who was the engineer in charge of the work, which was being performed by a sub-contractor) was contracting the obligations sued upon in defendant's name and upon its credit, he must be deemed to have adopted them, and his knowledge was the knowledge of the defendant, and it is liable on said obligations. *Hirschmann v. Iron Range & H. B. R. Co.*, 97 Mich. 384.

If defendant's officers were advised that said agent had incurred certain indebtedness to plaintiffs in the name and upon the credit of defendant, and made no protest, but, on the contrary, corresponded directly with plaintiffs, and paid them that indebtedness, plaintiffs were justified in relying upon such action as an assurance of the authority of the agent, and in extending further credit. and defendant is estopped from denying such authority. *Hirschmann v. Iron Range & H. B. R. Co.*, 97 Mich. 384.

If the agent, in the exercise of the authority given to him by the sub-contract to declare it forfeited in case of the inability of the sub-contractor to perform it, was prosecuting the work for and on behalf of the defendant, which had assumed its performance, and incurred the indebtedness to plaintiffs in such prosecution, plaintiffs are entitled to recover. *Hirschmann v. Iron Range & H. B. R. Co.*, 97 Mich. 384.

**51. Arrangements relative to passenger traffic.**—A contract made with a general passenger agent of a railroad intrusted with the supervision of its passenger business, and a part of that business being to make arrangements and special contracts for excursions, is binding on the company. *Houston & T. C. R. Co. v. Hill*, 21 Am. & Eng. R. Cas. 263, 63 Tex. 381.

A statement or agreement of a ticket agent or a conductor, in contravention of the rules and regulations of the company, that a train shall stop at a certain station, cannot bind the company. *White v. Evansville & T. H. R. Co.*, 133 *Ind.* 480, 33 *N. E. Rep.* 273.

The acts of a ticket agent selling a certain ticket are binding on the company, when it is proven that such tickets had been furnished under the same circumstances by the ticket agents on previous occasions. *International & G. N. R. Co. v. Johnson*, 1 *Tex. App. (Civ. Cas.)* 150.

**52. Contracts for shipment of freight.**—As corporations can only act through officers and agents, when such officers or agents are left in entire charge of freight trains, their acts and conduct touching the same are to be considered the same as the act of the corporation itself. *Missouri Pac. R. Co. v. Finley*, 38 *Kan.* 550, 16 *Pac. Rep.* 951.

Where a general freight agent, under a by-law, is empowered to contract for the transportation of freights "with the approval of the president," the restriction as to approval must be held to mean that the approval or disapproval must be exercised before the execution of the contract, but if no interference with such contracts was made before the goods were transported, the company would be liable for the contract as made by the general freight agent. *Medbury v. New York & E. R. Co.*, 26 *Barb. (N. Y.)* 564.

Where a railroad holds one out as its freight agent, with general authority in that line of business, it will be bound by the acts of such agent within the scope of his general authority. *Baker v. Kansas City, St. J. & C. B. R. Co.*, 28 *Am. & Eng. R. Cas.* 61, 91 *Mo.* 152, 3 *S. W. Rep.* 486.

A statement made by a depot agent to a shipper of perishable goods as to the time that it would require for transportation is a part of the contract of shipment when acted on, and is binding on the company. *Blodgett v. Abbot*, 72 *Wis.* 516, 7 *Am. St. Rep.* 873, 40 *N. W. Rep.* 491.

**53. — over connecting lines.**—In the absence of express authority to a local agent, or an established custom, a company is not bound by a contract of such agent agreeing to ship goods beyond the end of its line. *Wait v. Albany & S. R. Co.*, 5 *Lans. (N. Y.)* 475. APPROVING Burroughs

*v. Norwich & W. R. Co.*, 100 *Mass.* 28. —DISTINGUISHING *Wilson v. Great Northern & B. R. Co.*, 18 *Eng. L. & Eq.* 557, note; *Schroeder v. Hudson River R. Co.*, 5 *Duer (N. Y.)* 55.

Where the freight agent of a railroad has full authority to make arrangements as to the time and place of the delivery of freights, an agreement by him to ship by a line of boats binds the railroad company. *Michigan S. & N. I. R. Co. v. Day*, 20 *Ill.* 375.

The agent of a railroad company made a verbal contract with a shipper of fruit for a through shipment without a change of cars, but in issuing the bill of lading the shipment was limited to the initial carrier's line. In an action to recover damages,—held, (1) that the verbal agreement for through shipment was not merged in the bill of lading, no reference thereto being made; (2) that it appearing that the agreement was one within the power of the agent to make, the company was bound thereby. *Riley v. New York, L. E. & W. R. Co.*, 34 *Hun (N. Y.)* 97.

**54. — to receive freight from connecting line.**—An agent employed for the sole purpose of soliciting passengers to patronize the road, and who is not held out by the company as their agent for any other purpose, has no power to bind the company by a contract to receive freight from another road and transport it to the depot of, and ship it on, the road for which he is such agent. *Taylor v. Chicago & N. W. R. Co.*, 74 *Ill.* 86.

**55. — fixing rates and charges.**—A contract of a railway company or association of such companies, made by its usual agents with a shipper, to ship a large quantity of grain at a reduced rate, which is five cents on the hundred pounds less than the customary rates, but that the same should be billed at the regular rates then current and the freight paid at the latter rates, the difference in the two rates to be forthwith paid back to the shipper, is valid and binding on the company or companies making the same. *Erie & P. Despatch v. Cecil*, 112 *Ill.* 180. — FOLLOWING Toledo, W. & W. R. Co. *v. Elliott*, 76 *Ill.* 67.

The mere announcement of the rate for freight by the general agent of a connected railroad will not operate as a guarantee to the shipper of goods on the connected line. *Hill v. Burlington, C. R. & N. R. Co.*, 9 *Am. & Eng. R. Cas.* 21, 60 *Iowa* 196, 14 *N. W. Rep.* 249.

Where a local freight agent made a written order to ship cotton at 69½ cents per hundred for plaintiff, who at once, and in writing, accepted the offer, and it was conceded that said agent was authorized to make such proposal, and the agent plainly and unequivocally expressed what he understood to be the price, and there was no misunderstanding between plaintiff and the agent as to the terms of the contract; but that, by an error in the transmission of a telegram from the general freight agent to the local agent "89½" was changed to "69½":—*held*, (1) that the contract was binding on defendant company, notwithstanding the mistake; (2) that in an action by the shipper (who had paid the larger rate under protest) to recover the difference between the two rates, all evidence in regard to plaintiff's purchase of cotton was irrelevant, and plaintiff was entitled to recover. *Borden v. Richmond & D. R. Co.*, 113 *N. Car.* 570, 18 *S. E. Rep.* 392.

**56. — contracts by agent of shipper.**—An agent authorized to ship goods has power to contract as to the terms and conditions of shipment, and may take a bill of lading limiting the carrier's liability. *Root v. New York & N. E. R. Co.*, 27 *N. Y. Supp.* 611, 76 *Hun* 23.

Where a shipper employs an agent to deliver cattle to the company he is bound by such agent's signature to the consignment note. *Kirby v. Great Western R. Co.*, 18 *L. T. N. S.* 658.

**57. Agreements to store goods.**—The local agent of a railroad company in charge of its general business has *prima facie* power to bind the company by contracts for the storage of goods, but cannot contract against the established rules of the company, of which the other party has notice. *Angle v. Mississippi & M. R. Co.*, 18 *Iowa* 555.

A railway company is not liable for loss of goods where they have been delivered to the owner and receipted for, and he then makes an arrangement with the baggageman to leave them for a while in the warehouse. A baggageman, having no authority to make such arrangement, is not the agent of the company in doing so. *Mulligan v. Northern Pac. R. Co. (Dak.)*, 27 *Am. & Eng. R. Cas.* 33, 29 *N. W. Rep.* 659.

**58. Waiver of limitation of liability.**—Where an express company receives goods to be carried, and gives a

receipt containing conditions or limitations of the liability of the company, the agent of the company at the place of shipment may afterward bind the company by a waiver of the conditions. *Vroman v. American M. U. Exp. Co.*, 5 *T. & C. (N. Y.)* 22, 2 *Hun* 512.

**59. Promise to pay for lost goods.**—Where goods are lost, and the consignee calls at the railroad auditor's office and finds a gentleman in charge who proved to be the clerk, and who promised that the goods should be paid for, the consignee not knowing that he was not the auditor, such promise will not bind the company, in the absence of anything to show that the clerk had authority to bind the company by such a contract. *Gulf, C. & S. F. R. Co. v. Jacobs*, 3 *Tex. Civ. App.* 485, 23 *S. W. Rep.* 145.

**60. Compromise of claim for injury to live stock.**—Where the evidence is sufficient to prove that the defendant's general freight agent came to the place where a wreck had occurred, by the authority of and acting for the defendant, for the purpose of looking after the injured property and adjusting claims for damages; that he knew the number of horses that were shipped in the car; and that he took charge of the injured horses, ordered them cared for and treated—an agreement by which the company agreed to pay the plaintiff a sum in full for a mare injured in the wreck, the mare thereafter to be the company's property, is within the scope of the authority of the general freight agent, and is binding on the company. *Chicago & E. I. R. Co. v. Katzenbach*, 38 *Am. & Eng. R. Cas.* 375, 118 *Ind.* 174, 20 *N. E. Rep.* 709.

Such a settlement is based upon a sufficient consideration to be supported. *Chicago & E. I. R. Co. v. Katzenbach*, 38 *Am. & Eng. R. Cas.* 375, 118 *Ind.* 174, 20 *N. E. Rep.* 709.

**61. Engagements for board of laborers.**—A walking boss who was the representative of the principal contractors in the building of a railroad and superintended the work for them, having authority to compel the sub-contractors to keep a sufficient number of men on the work to fulfil their contracts, could bind his principals to pay the board bills of laborers for whom he secured board. *Cannon v. Henry*, 78 *Wis.* 167, 47 *N. W. Rep.* 186.

Testimony tending to show that such walking boss promised the plaintiff to see that such board bills were paid; that in so

doing he was acting for his principals, though he did not name them; and that the plaintiff dealt with him as an agent only, giving credit for the board solely to the principals, will sustain a finding that the agent promised on behalf of his principals to pay the board bills. *Cannon v. Henry*, 78 Wis. 167, 47 N. W. Rep. 186.

The agency conferred upon a roadmaster is special, and does not confer authority to bind the company for provisions purchased to supply a boarding-house which he runs for the accommodation of certain of the company's employes, where there is nothing to show that he represented the company at the time he made such purchases except his own declarations. *Ft. Worth & D. C. R. Co. v. Johnson*, 2 Tex. App. (Civ. Cas.) 179.

**62. — of persons injured on railway.**—A surgeon employed by a railway company to render professional services cannot bind the employer for the patient's board. *St. Louis, A. & T. R. Co. v. Hoover*, 53 Ark. 377; 13 S. W. Rep. 1092.

A physician in the employ of a railroad company, who is authorized to buy medicines on the credit of the company, cannot bind the company by a contract to pay for board, lodging and other attentions to a person injured by the road. *Mayberry v. Chicago, R. I. & P. R. Co.*, 11 Am. & Eng. R. Cas. 29, 75 Mo. 492.—**DISTINGUISHED** IN *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358. **REVIEWED** IN *Louisville, E. & St. L. R. Co. v. McVay*, 98 Ind. 391.

Where a laborer on a railroad is injured while in the service of the railroad company, a telegram from the general superintendent directing one of his subordinates to employ a physician and do all he can to save the injured limb and make the sufferer comfortable, is authority for a contract binding the company to pay for the board and care of the injured party while recovering from the injury. *Atchison & N. R. Co. v. Reeher*, 1 Am. & Eng. R. Cas. 343, 24 Kan. 228.—**REVIEWED** IN *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358.

**63. Granting permission to ride on train or engine.**—A locomotive engineer, being subordinate to the conductor, has no authority to permit persons to ride upon the train, and any such permission in violation of the rules of the company is not binding upon the company. *Chicago, B. & Q. R. Co. v. Casey*, 9 Ill. App. 632.—**QUOTING** *Chicago & A. R. Co. v. Michie*, 83 Ill. 427.

It is not within the scope of the employment of a baggage master connected with a train, but not shown to have been put in charge of the same, to invite or permit any person or persons to enter or ride on a coach of such train; and permission given under such circumstances cannot create the relation of carrier and passenger. *Reary v. Louisville, N. O. & T. R. Co.*, 34 Am. & Eng. R. Cas. 277, 40 La. Ann. 32, 8 Am. St. Rep. 497, 3 So. Rep. 390.

A brakeman employed on a freight train in charge of a conductor has no implied authority to bind the company by a contract of passage, and his permission to a person to ride does not make such person a passenger. *Candiff v. Louisville, N. O. & T. R. Co.*, 42 La. Ann. 477, 7 So. Rep. 601.

E. and a friend arrived at the station immediately after the departure of the train. An employe of the company who had charge of the trains, trainmen and rolling-stock invited them to get on an engine which was at the station, and informed them that the engine would overtake the train at the bridge, a short distance from the station, where they could catch the train. The engine overtook the train, but as a collision with the rear car was imminent, E. jumped from the engine to escape the danger. Held, that the act of the employe was that of the company, and that E. and his friend were not guilty of negligence, and were properly upon the engine. *Nashville & C. R. Co. v. Erwin*, 3 Am. & Eng. R. Cas. 465.—**DISTINGUISHED** IN *Ohio & M. R. Co. v. Allender*, 47 Ill. App. 484.

**64. — on hand-cars.**—In an action for damages sustained by plaintiff through the alleged negligence of defendant in operating a hand-car on which plaintiff was riding under an invitation from a servant of the company, it cannot be assumed as matter of law that the act of the servant in transporting the passenger in that manner was the act of the company. The authority of the servant to thus use a hand-car must be shown in order to render the company liable. *International & G. N. R. Co. v. Cock*, 68 Tex. 713, 5 S. W. Rep. 635.—**DISTINGUISHING** *Prince v. International & G. N. R. Co.*, 64 Tex. 144; *Pool v. Chicago, M. & St. P. R. Co.*, 56 Wis. 227; 14 N. W. Rep. 46.

The trainmaster of a railroad company who was shown by the evidence to be the representative of the company in all mat-

ters connected with the use of its road, cars of all kinds, and services of its employés, has authority to invite a person, not an employé, to ride upon a hand-car. If such trainmaster violates a rule of the company forbidding anybody but employés to ride upon hand-cars, and thus places a person ignorant of such rules in a position where he is injured by the negligence of the company's servants, the company must respond in damages for such injuries. *International & G. N. R. Co. v. Prince*, 44 *Am. & Eng. R. Cas.* 294, 77 *Tex.* 560, 14 *S. W. Rep.* 171.

The foreman of a railroad section who has under his care hand-cars for other purposes, acts without the scope of his authority in engaging to carry a person thereon. *Hoar v. Maine C. R. Co.*, 70 *Me.* 65.

**65. — to move building across track.**—A ticket agent gave persons, hired to move a house, permission to move it across a railroad track, but while it was on the track it was run into by a train. It appeared that the ticket agent had formerly granted such leave to others, but it did not appear that he had any special authority to do so, or that the company had any knowledge of his having done so. *Held*, that the owner of the house could not recover against the company for the injury. *Chicago, R. I. & P. R. Co. v. Halleck*, 13 *Ill. App.* 643.

**66. — to use embankment as a dam.**—An agreement by the agent of a railroad company that its embankment might be incidentally used as a dam, is not such a deviation from the strict use of the embankment as would charge a lack of authority on the part of the agent to make such contract, and persons so using it will be liable for damages resulting. *Jones v. Western Vt. R. Co.*, 27 *Vt.* 399.

Where such agent agrees that an embankment may be used as a dam for the purpose of improving water-power, if the use is but a slight deviation from the original purpose of the embankment, it is a matter between the stockholders and the corporation, and does not affect the rights of strangers. *Jones v. Western Vt. R. Co.*, 27 *Vt.* 399.

**67. Bills of lading.\***—Where a railway shipping-clerk, colluding with the consignee, issues a fictitious bill of lading, the goods represented by it not having been re-

ceived, the railway company is liable to an innocent third person deceived thereby. As between a railway company and third persons the true limit of a railway agent's authority to bind his company is the apparent authority with which he is invested. *Brooke v. New York, L. E. & W. R. Co.*, 21 *Am. & Eng. R. Cas.* 64, 108 *Pa. St.* 529, 1 *Atl. Rep.* 206.—NOT FOLLOWED IN *National Bank v. Chicago, B. & N. R. Co.*, 44 *Minn.* 224.

A bill of lading was issued by the agent of a railroad company on what turned out to be a forged warehouse receipt—no goods, in fact, being delivered to the railroad. Plaintiffs paid drafts for the price with the bills of lading attached. It appeared that the issuing of bills of lading was within the scope of the employment of the railroad agent. *Held*, that the company was bound by the agent's act, and was estopped from denying the receipt of the goods.—*Armour v. Michigan C. R. Co.*, 65 *N. Y.* 111, 22 *Am. Rep.* 603; *reversing* 3 *J. & S.* 563.—FOLLOWING *Haille v. Smith*, 1 *B. & P.* 563. OVER-RULING *Grant v. Norway*, 10 *C. B.* 665. DISTINGUISHED IN *Dean v. Driggs*, 137 *N. Y.* 274. EXPLAINED IN *Lake Shore & M. S. R. Co. v. Foster*, 104 *Ind.* 293, 54 *Am. Rep.* 319. NOT FOLLOWED IN *National Bank v. Chicago, B. & N. R. Co.*, 44 *Minn.* 224. REVIEWED IN *Sioux City & P. R. Co. v. First Nat. Bank*, 1 *Am. & Eng. R. Cas.* 278, 10 *Neb.* 556.

**68. Deeds.**—A corporation cannot appoint an agent to convey lands except by the vote of its directors or other managing board in whom the power to sell is reposed by charter or by general law; and without legal proof of such corporate act, a deed purporting to be executed in its name by an agent is not evidence of title, though it may operate as a color of title. *Standifer v. Swann*, 78 *Ala.* 88. *Swann v. Miller*, 82 *Ala.* 530, 1 *So. Rep.* 65.

**69. Loans.**—Where the evidence shows that an officer of a railway company was authorized to incur indebtedness on behalf of the company and borrow money to pay off the same, the company is liable to the person lending the money in an action for money had and received. *Liebfritz v. Dubuque St. R. Co.*, 48 *Iowa* 709.

Where money is loaned to certain officers of a railroad company on their own personal credit, but for the use of the company, the lender cannot afterward treat the officers

\*Limitation of agent's authority to issue bills of lading, see note, 21 *AM. & ENG. R. CAS.* 68.



as mere agents and charge the company. *Strider v. Winchester & P. R. Co.*, 21 *Gratt. (Va.)* 440.—QUOTING *Thomson v. Davenport*, 9 *Barn. & C.* 78.

**70. Negotiable paper.**—A corporation is not bound by negotiable paper uttered by its agent, unless he has express authority to issue the paper, or there is an implied general authority arising from such frequent exercise of the power by the agent, followed by ratification, as to constitute a custom of the corporation, or a ratification of the particular act, or an estoppel to deny the agent's authority. *Elwell v. Puget Sound & C. R. Co.*, 7 *Wash.* 487, 35 *Pac. Rep.* 376.

In all cases, even in cases of negotiable instruments, a party contracting with an agent must inquire into his authority; and either a state or a corporation is bound only when its agents keep within the limit of their authority. *Silliman v. Fredericksburg, O. & C. R. Co.*, 27 *Gratt. (Va.)* 119, 17 *Am. Ry. Rep.* 157.

### 3. Liability for Torts of Agents.

#### a. General Rules.

**71. Rule of liability strictly applied to railroad companies.**—Upon a principle of public policy and public necessity, the rules of law which fix the liability of the principal for the torts of his agent are applied with strictness to common carriers, and especially to those using forces for propulsion which are calculated to endanger life or property. *New Orleans, J. & G. N. R. Co. v. Allbritton*, 38 *Miss.* 242.

A railroad company impliedly warrants that its engineers, conductors and other employes engaged in running its trains are possessed of due skill, and are competent and faithful, and it is liable under all circumstances for any injury occasioned by the misconduct, rashness or negligence of such persons; and where an injury is caused by the gross negligence, or wanton and wilful misconduct of its employes, it is liable for exemplary damages. *New Orleans, J. & G. N. R. Co. v. Allbritton*, 38 *Miss.* 242.—DISTINGUISHING *McCoy v. McKowen*, 26 *Miss.* 487; *McManus v. Cricket*, 1 *East* 106.

Companies are liable for the non-feasance and misconduct of their employes, and such liability is not affected by the good or bad motives by which such employes are actuated. *Blackstock v. New York & E. R. Co.*, 20 *N. Y.* 48; *affirming* 1 *Bosw.* 77.

**72. Corporation liable if natural person would be.**—A corporation is liable to the same extent and under the same circumstances as a natural person for the consequences of its wrongful acts, and for the acts and negligence of its agents while engaged as such, and will be held to respond in a civil action at the suit of an injured party for every grade and description of forcible, malicious or negligent tort it commits, however foreign to its nature or beyond its granted powers the wrongful act may be. *New York & N. H. R. Co. v. Schuyler*, 34 *N. Y.* 30; *modifying* 38 *Barb.* 534.—QUOTING *Ranger v. Great Western R. Co.*, 5 *H. of L. Cas.* 86; *Nolton v. Western R. Co.*, 15 *N. Y.* 444. *Miller v. Burlington & M. R. Co.*, 8 *Neb.* 219. *Brokaw v. New Jersey R. & T. Co.*, 32 *N. J. L.* 328.—QUOTING *Sharrod v. London & N. W. R. Co.*, 4 *Exch.* 585. *First Baptist Church v. Schenectady & T. R. Co.*, 5 *Barb. (N. Y.)* 79. *Hughes v. Cincinnati & S. R. Co.* 15 *Am. & Eng. R. Cas.* 100, 39 *Ohio St.* 461.—FOLLOWED IN *New York & N. H. R. Co. v. Ketchum*, 3 *Keyes (N. Y.)* 363; *Thomas v. Utica & B. R. Co.*, 20 *Am. & Eng. R. Cas.* 93, 97 *N. Y.* 245; *reversing* 24 *Hun* 488. QUOTED IN *Calhoun v. Delhi & M. R. Co.*, 28 *Hun (N. Y.)* 379, 64 *How. Pr.* 291; *Hodges v. Wilmington & W. R. Co.*, 105 *N. Car.* 170, 10 *S. E. Rep.* 917. REFERRED TO IN *Cogswell v. New York, N. H. & H. R. Co.*, 105 *N. Y.* 319, 11 *N. E. Rep.* 518, 7 *N. Y. S. R.* 203, 12 *Civ. Pro. Rep.* 222; *reversing* 22 *J. & S.* 92. REVIEWED IN *Tome v. Parkersburgh Branch R. Co.*, 39 *Md.* 36.

The servants of a corporation are no more and no less than the servants of natural persons, and whatsoever is negligently done or omitted by them is, to the public, the employer's act. *Gillenwater v. Madison & I. R. Co.*, 5 *Ind.* 339.

A corporation is liable civilly for the torts of its servants wherever natural persons would be liable under the same circumstances, and they are liable wherever the agent acts by authority; but it is not necessary that the authority be conferred by a writing under seal, nor upon a vote of the corporation. *State v. Morris & E. R. Co.*, 23 *N. J. L.* 360.—QUOTED IN *Denver & R. G. R. Co. v. Harris*, 3 *N. Mex.* 109; *Quinn v. South Carolina R. Co.*, 37 *Am. & Eng. R. Cas.* 166, 29 *So. Car.* 381, 7 *S. E. Rep.* 614, 1 *L. R. A.* 682.



**73. Liable if act is within scope of employment.**—A master is liable for the wrongful act of his servant, to the injury of a third person, where the servant is engaged at the time in doing his master's business, and is acting within the general scope of his authority, although he is reckless in the performance of his duty, or through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances, goes beyond the strict line of his duty, and inflicts unnecessary and unjustifiable injury. *Cohen v. Dry Dock, E. B. & B. R. Co.*, 69 N. Y. 170; *affirming 8 J. & S.* 368.—FOLLOWING *Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 129. *Georgia Pac. R. Co. v. Propst*, 83 Ala. 518, 3 So. Rep. 764. *Western & A. R. Co. v. Turner*, 28 Am. & Eng. R. Cas. 455, 72 Ga. 292, 53 Am. Rep. 842. *Johnson v. Chicago, R. I. & P. R. Co.*, 8 Am. & Eng. R. Cas. 206, 58 Iowa 348, 12 N. W. Rep. 329. *Ayrigg v. New York & E. R. Co.*, 30 N. J. L. 460.—RECONCILED IN *Pittsburgh, C. & St. L. R. Co. v. Kirk*, 102 Ind. 399, 52 Am. Rep. 675. *Davis v. Chautauqua Lake S. S. A.*, 2 N. Y. S. R. 365, 41 Hun 638. *Hussey v. Norfolk S. R. Co.*, 98 N. Car. 34, 2 Am. St. Rep. 312, 3 S. E. Rep. 923.—FOLLOWING *Gruber v. Washington & J. R. Co.*, 92 N. Car. 1; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. (U. S.) 202. NOT FOLLOWING *Orr v. Bank of U. S.*, 1 Ohio, 36; *Gillett v. Missouri V. R. Co.*, 55 Mo. 315. QUOTING *Denver & C. R. Co. v. Harris*, 122 U. S. 597. *Jones v. Western Vt. R. Co.*, 27 Vt. 399. *Bayley v. Manchester, S. & L. R. Co.*, 28 L. T. N. S. 366, L. R. 8, C. P. 148, 42 L. J. C. P. 78; *affirming L. R.* 7, C. P. 415, 41 L. J. C. P. 278.—CONSIDERED IN *Bollingbroke v. Swindon N. T. L. Board*, 30 L. T. 723. *Erb v. Great Western R. Co.*, 3 Ont. App. 446; *affirming 42 U. C. Q. B.* 90.—REVIEWING *Oliver v. Great Western R. Co.*, 28 U. C. C. P. 143; *McLean v. Buffalo & L. H. R. Co.*, 24 U. C. Q. B. 270.

A master is responsible for the illegal acts of commission or omission, short of wilful wrong, done or suffered by his servant or agent, in the prosecution of the business entrusted to him by his principal, whereby

\* Liability of master for torts of servants while acting within scope of employment, see 53 AM. & ENG. R. CAS. 70, *abstr.* See also notes, 8 AM. REP. 316, 40 *Id.* 226, 60 *Id.* 880, 6 L. R. A. 242, 12 *Id.* 337.

third persons are injured. *Myers v. Snyder, Bright N. P. (Pa.)* 489.

Railroad companies are liable for the tortious acts of their agents, if they are apparently in the interests of the company, and in obedience to the general or special authority to the agents, so long as they act within the apparent scope of the company's corporate powers. *Payne v. Western & A. R. Co.*, 18 Am. & Eng. R. Cas. 119, 13 *Lea (Tenn.)* 507, 49 Am. Rep. 666.

A master is liable for a wrong done by his servant, whether through negligence or the malice of the latter, in the course of an employment in which the servant is engaged to perform a duty which the master owes to the person injured. *Craker v. Chicago & N. W. R. Co.*, 36 Wis. 657.—APPLIED IN *Smith v. Manhattan R. Co.*, 45 N. Y. S. R. 865. QUOTED IN *Chicago & E. R. Co. v. Flexman*, 8 Am. & Eng. R. Cas. 354, 103 Ill. 546. REVIEWED IN *Stewart v. Brooklyn & C. T. R. Co.*, 90 N. Y. 588, 43 Am. Rep. 185.

Corporations are liable for the wrongful acts of their servants done while in the discharge of duty, though outside of the line of duty. So held, where a person employed to clean cars and to keep persons out of them, struck the hand of a boy from the car-railing while in motion, causing the child to fall and to be run over. *North Western R. Co. v. Hack*, 66 Ill. 238.—DISTINGUISHED IN *Illinois C. R. Co. v. Ross*, 31 Ill. App. 170.

Where railroad employes are charged, in addition to other duties, with seeing that refuse materials are properly disposed of, it cannot be said, as a matter of law, that such servants are not acting within the scope of their employment when engaged in placing old timbers, formerly used by the railroad, in a highway, the fee to which land is in the company. *Tinker v. New York, O. & W. R. Co.*, 71 Hun (N. Y.) 431.—DISTINGUISHING *Mulligan v. New York & R. B. R. Co.*, 129 N. Y. 506; *Pittsburgh, F. W. & C. R. Co. v. Maurer*, 21 Ohio St. 421; *Dells v. Stollenwerk*, 78 Wis. 339. QUOTING *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 482. REVIEWING *Quinn v. Power*, 87 N. Y. 537; *Dwinelle v. New York C. & H. R. R. Co.*, 120 N. Y. 117.

**74. — even though contrary to orders.**—A railroad company is liable for

\* See also *ante*, 23, 40.

the tortious act of its servant when done in the course of his employment, though in violation of the directions of the company. *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 468.—APPROVED IN *Perkins v. Missouri, K. & T. R. Co.*, 55 Mo. 201; *Porter v. New York C. R. Co.*, 34 Barb. (N. Y.) 353. DISTINGUISHED IN *Cox v. Keahey*, 36 Ala. 340. QUOTED IN *Heenrich v. Pullman Palace Car Co.*, 18 Am. & Eng. R. Cas. 379, 20 Fed. Rep. 100, 10 Sawy. (U. S.) 80; *Tinker v. New York, O. & W. R. Co.*, 71 Hun. (N. Y.) 431; *De Camp v. Mississippi & M. R. Co.*, 12 Iowa 348. REFERRED TO IN *Byrant v. Rich*, 106 Mass. 180. REVIEWED IN *Goddard v. Grand Trunk R. Co.*, 57 Me. 202. *Heenrich v. Pullman Palace Car Co.*, 18 Am. & Eng. R. Cas. 379; 20 Fed. Rep. 100, 10 Sawy. (U. S.) 80.—QUOTING *Ramsden v. Boston & A. R. Co.*, 104 Mass. 117; *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 468. RECONCILING *Tuller v. Voght*, 13 Ill. 285; *Oxford v. Peter*, 28 Ill. 435; *Foster v. Essex Bank*, 17 Mass. 508; *Mali v. Lord*, 39 N. Y. 381. *Lake Shore & M. S. R. Co. v. Brown*, 31 Am. & Eng. R. Cas. 61, 123 Ill. 162, 14 N. E. Rep. 197. *Whitehead v. St. Louis, I. M. & S. R. Co.*, 39 Am. & Eng. R. Cas. 410, 99 Mo. 263, 11 S. W. Rep. 751.—QUOTING *Wilton v. Middlesex R. Co.*, 107 Mass. 108; *Sherman v. Hannibal & St. J. R. Co.*, 72 Mo. 64. REVIEWING *Muehlhausen v. St. Louis R. Co.*, 91 Mo. 332. *Gregory v. Ohio River R. Co.*, 37 W. Va. 606, 16 S. E. Rep. 819.

While the principal is not liable for the wilful or malicious acts of his agents done without the authority of the principal, he is responsible for the negligences, omissions and malfeasances committed in the regular course of their employment, even though they were expressly forbidden to do the acts complained of. *Turner v. North Beach & M. R. Co.*, 34 Cal. 594.

Where an employé of a railroad performs an act incident to his employment, unskillfully, negligently or wantonly, and thereby persons whose fault does not contribute are injured, the company will be liable. And the fact that the company may have rules and by-laws prohibiting the performance of such wrongful and dangerous acts, or that particular instructions may have been given how to do the particular thing, will not release them. *Toledo W. & W. R. Co. v. Harmon*, 47 Ill. 298.

Where a servant is engaged in accomplish-

ing an end which is within the scope of his employment, and while so engaged adopts means reasonably intended and directed to the end, which result in injury to another, the master is answerable for the consequences, regardless of the motives which induced the adoption of the means; and this, too, even though the means employed are outside of his authority and against the express orders of the master. *Pittsburgh, C. & St. L. R. Co. v. Kirk*, 102 Ind. 399, 52 Am. Rep. 675, 1 N. E. Rep. 849.—QUOTING *Quinn v. Power*, 87 N. Y. 535, 41 Am. Rep. 392. RECONCILING *Marrier v. St. Paul, M. & M. R. Co.*, 15 Am. & Eng. R. Cas. 135, 31 Minn. 351; *Aycriggs v. New York & E. R. Co.*, 30 N. J. L. 460. REVIEWING *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 468.

**75. Not liable where act is not within scope of employment.**—A company is not liable for the act of its servant unless it be done within the scope of his general authority in furtherance of his master's business and for the accomplishment of the purposes for which he is employed. *International & G. N. R. Co. v. Anderson*, 53 Am. & Eng. R. Cas. 59, 82 Tex. 516, 17 S. W. Rep. 1039. *Hudson v. Missouri, K. & T. R. Co.*, 16 Kan. 470. *Eckert v. St. Louis T. Co.*, 2 Mo. App. 36. *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110.—REVIEWED IN *Lakin v. Oregon & P. R. Co.*, 31 Am. & Eng. R. Cas. 500, 15 Oreg. 220. *Moore v. Columbia & G. R. Co.*, 38 S. Car. 1, 16 S. E. Rep. 781.—APPLYING *Cobb v. Columbia & G. R. Co.*, 37 S. Car. 194.

The doctrine of *respondent superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or wrong, at the time and in respect to the very transaction out of which the injury arose. *Wyllie v. Palmer*, 137 N. Y. 248, 33 N. E. Rep. 381, 50 N. Y. S. R. 706. *Arasmith v. Temple*, 11 Ill. App. 39.

Where the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and is not responsible for the negligence of his servant in doing it. *Morris v. Brown*, 19 N. Y. S. R. 355; reversing 4 N. Y. S. R. 832.

The mere fact that a tortious act is committed by a servant while he is actually en-

gaged in the performance of a service he has been employed to render, cannot make the master liable. Something more is required. It must not only be done while so employed, but it must pertain to the particular duties of that employment, and a general statement that the acts of defendant's servants were within the range of their employment is a mere conclusion of law and is not sufficient. *Snyder v. Hannibal & St. J. R. Co.*, 60 Mo. 413.—QUOTED IN *Stringer v. Missouri Pac. R. Co.*, 96 Mo. 299, 9 S. W. Rep. 905. *Stringer v. Missouri Pac. R. Co.*, 96 Mo. 299, 9 S. W. Rep. 905. QUOTING *Snyder v. Hannibal & St. J. R. Co.*, 60 Mo. 413. *Farber v. Missouri Pac. R. Co.*, 32 Mo. App. 378. APPLIED IN *Snider v. Crawford*, 47 Mo. App. 8.

**70. — illustrations—**(1) *Injuries to children.*—A company will not be liable for injuries to a child received while attempting to get on one of its cars, at the invitation of an employé, in the absence of anything to show authority in the employé to permit persons to ride on the car; and when the invitation and riding would not be in furtherance of the interests of the company, nor connected in any way with the servant's duties. *Snyder v. Hannibal & St. J. R. Co.*, 60 Mo. 413.—DISTINGUISHING *Lynch v. Nordin*, 1 Q. B. 29. QUOTING *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210. REVIEWING *Eaton v. Delaware, L. & W. R. Co.*, 13 Am. Law Reg. 665. REVIEWING, QUOTING and DISTINGUISHING *Wilton v. Middlesex R. Co.*, 107 Mass. 108.—DISTINGUISHED IN *Sloan v. Central I. R. Co.*, 11 Am. & Eng. R. Cas. 145, 62 Iowa 728. REVIEWED IN *Little Rock & Ft. S. R. Co. v. Miles*, 13 Am. & Eng. R. Cas. 10, 40 Ark. 298, 48 Am. Rep. 10.

Where a servant of a railroad company, who is in charge of one of its gravel trains, advises a boy of tender years, whom he has invited to ride upon the train, and who is sitting beside the track with the servant, to get upon an approaching train belonging to the same company, which is to pass the home of the boy, to which he has expressed a desire to return, the company is not liable for injuries to the boy consequent upon his following said advice, the same being outside of the servant's employment, and in no way connected with or relating to the business in which he is at the time engaged. *Keating v. Michigan C. R. Co.*, 97 Mich. 154.

A conductor and others in charge of a

train stopped it and pursued a boy to his father's house with pistols in hand and took him aboard the train and carried him to the next station under the pretence of protecting the train. *Held*, that these wrongful acts were not within the range of the employment of the conductor and those acting with him, and consequently the company was not liable, in the absence of anything to show that it commanded, authorized or ratified them. *Gilliam v. South. & N. Ala. R. Co.*, 15 Am. & Eng. R. Cas. 138, 70 Ala. 268.—NOT FOLLOWING *Foster v. Essex Bank*, 17 Mass. 479; *Illinois C. R. Co. v. Downey*, 18 Ill. 259; *Wesson v. Seaboard & R. R. Co.*, 4 Jones' (N. Car.) 379; *Thames Steamboat Co. v. Housatonic R. Co.*, 24 Conn. 40; *DeCamp v. Mississippi & M. R. Co.*, 12 Iowa 348. REVIEWED IN *Cameron v. Pacific Exp. Co.*, 48 Mo. App. 99.

A colored boy was found in an express car, whereupon the express messenger called to a baggage-master, and the two, out of a disposition to have fun at the expense of the boy, so frightened him that he jumped from the train and received fatal injuries. *Held*, that the company was not liable for the act of the baggage-master in quitting his apartment and going into the express car to participate in the conduct which led to the injury, unless he was about its business. *Louisville, N. O. & T. R. Co. v. Douglass*, 69 Miss. 723, 11 So. Rep. 933.

A fireman was put in charge of an engine and certain cars to run to a water-station, the duty usually devolving upon the engineer. At the station he invited a boy to climb on the tender and turn on the water, and in doing so was killed by other cars running against the tender. *Held*, it not being within the scope of the employment of either an engineer or fireman to ask persons on the engine for such purposes, that the company was not liable for the killing. *Flower v. Pennsylvania R. Co.*, 69 Pa. St. 210.—DISTINGUISHED IN *Sloan v. Central Iowa R. Co.*, 11 Am. & Eng. R. Cas. 145, 62 Iowa 728. FOLLOWED IN *Everhart v. Terre Haute & I. R. Co.*, 4 Am. & Eng. R. Cas. 599, 78 Ind. 292, 41 Am. Rep. 567. QUOTED IN *Little Rock & Ft. S. R. Co. v. Miles*, 40 Ark. 298, 13 Am. & Eng. R. Cas. 10, 48 Am. Rep. 10; *Atchison, T. & S. F. R. Co. v. Lindley*, 41 Am. & Eng. R. Cas. 72, 42 Kan. 714, 6 L. R. A. 646, 41 Alb. L. J. 92, 7 R. R. & Corp. L. J. 133, 22 Pac. Rep. 703; *Darwin v. Charlotte C. & A. R. Co.*,

23 So. Car. 531, 55 Am. Rep. 32. REVIEWED AND QUOTED IN *Snyder v. Hannibal & St. J. R. Co.*, 60 Mo. 413; *Wischam v. Rickards*, 136 Pa. St. 109; *Cotter v. Frankford & S. R. Co.*, 15 Phila. (Pa.) 255.

(2) *Other illustrations.*—A company cannot be held liable for the acts of its agents in using a culvert near plaintiff's residence for the purposes of a privy and thereby creating a nuisance. *Hopkins v. Western Pac. R. Co.*, 50 Cal. 190, 12 Am. Ky. Rep. 176.

A company is not liable for an injury to a person hit by a bundle which a train porter threw out of a car window, where such bundle is the personal property of the porter. *Walton v. New York C. S. Car Co.*, 139 Mass. 556, 2 N. E. Rep. 101.

An agent of a railroad company, having and exercising supervision over the lands of the company and in charge of such lands, making leases, collecting rents and stumpage, and negotiating sales of the lands for the company, who invokes the criminal law by bringing a charge of grand larceny against a party for spoliation of the timber-lands of the company, is not in so doing acting within the scope of his agency or in the course of his employment, and the company is therefore not to be held responsible for such actions done maliciously by him. *Pressley v. Mobile & G. R. Co.*, 11 Am. & Eng. R. Cas. 227, 4 Woods (U. S.) 569, 15 Fed. Rep. 199.—QUOTED IN *Gulf, C. and S. F. R. Co. v. James*, 73 Tex. 12, 10 S. W. Rep. 744.

Where a company furnishes hand-cars for the exclusive use of its employes, who, without the knowledge of the company, permit plaintiff, who is not connected with the company's business, to ride thereon, held, in an action to recover for an injury received while so riding, that plaintiff's ignorance of the fact that the cars were for the exclusive use of employes will not make the company liable; neither will it be bound by the acts of its employes in permitting him to ride, as such acts were not within the apparent scope of their authority. *Gulf, C. & S. F. R. Co. v. Dawkins*, 77 Tex. 228, 13 S. W. Rep. 982.

Plaintiff was in the employment of one C., a contractor with the defendants for building fences along their line. C., as a matter of convenience to him, was permitted by defendants to carry his tools on their trains, and was thus taking two crowbars from H. to a point on the line where his men were

at work. As the train passed the spot C. dropped one bar out, and the baggage-master pitched out the other, which struck and injured the plaintiff. C. swore that it was his business to put the bars on and take them off the car, the baggageman having nothing to do with him nor any right to meddle with his tools, nor did he ask him to put the bar out. Held, that defendants were not responsible for the injury, for the baggageman was not acting as their servant or in pursuance of his employment. *Cunningham v. Grand Trunk R. Co.*, 31 U. C. Q. B. 350.—QUOTING *Murray v. Currie*, L. R. 6, C. P. 24.

**77. — contrary doctrine.**—Because of the absolute necessity for more stringent rules for the protection of life and property against the perils of the steam-engine with its capacity for mischief, the common-law rule that the master is not liable for the tortious acts of his servant committed without the scope of his employment, does not apply to railroad companies. *Nashville & C. R. Co. v. Starnes*, 9 Heisk. (Tenn.) 52.

Railroad corporations only act through agents, and having placed in their hands such deadly instruments, the law demands of them the utmost caution in the selection of agents, and holds them strictly accountable. *Nashville & C. R. Co. v. Starnes*, 9 Heisk. (Tenn.) 52, 19 Am. Ry. Rep. 280.

**78. Unauthorized acts.**—A corporation is not bound by the unauthorized acts of its officers. *Reynolds & H. C. Co. v. Police Jury*, 44 La. Ann. 863, 11 So. Rep. 236.

The master is not liable, in an action of trespass, for the act of his servant, where such act was neither expressly ordered nor authorized to be done. *Thames Steamboat Co. v. Housatonic R. Co.*, 24 Conn. 40.—APPROVED IN *Porter v. Chicago, R. I. & P. R. Co.*, 41 Iowa 358. NOT FOLLOWED IN *Gilliam v. South & N. Ala. R. Co.*, 15 Am. & Eng. R. Cas. 138, 70 Ala. 268.

A company is not liable for a trespass committed by one of its agents who, in doing so, acts in violation of the company's instructions as to the very thing out of which the trespass grew. *McClung v. Dearborne*, 19 Phila. (Pa.) 500.

A railroad company is not liable for a wrongful conversion committed by one of its agents, where the company did not authorize it or receive any benefit from it, and which was outside of the regular em-

ployment of the agent. *Wilson v. Donaghy*, 7 *Phila. (Pa.)*, 153.

One who has been injured by the servant of another person cannot hold the master for the injury, if the injury was the result of arrangements made by him with the servant, with knowledge that they were in contravention of prior directions from the master of the servant. *Snider v. Crawford*, 47 *Mo. App.* 8.—APPLYING *Farber v. Missouri Pac. R. Co.*, 32 *Mo. App.* 378.

After the delivery of goods to the owner, a baggage-master or warehouseman has no authority to allow the goods to remain in the warehouse, and the company is not liable to the owner in case they are destroyed. *Mulligan v. Northern Pac. R. Co. (Dak.)*, 29 *N. W. Rep.* 659.

Defendants agreed with a contractor for the construction of their railway, to furnish a construction train to be used in carrying materials for ballasting and laying the track; defendants to provide the conductor, engineer and fireman; the contractor furnishing the brakeman. After work was over for the day, and the train was returning to O., where plaintiff, one of the contractor's workmen, lived, plaintiff, with the permission of the conductor, but without the authority of the defendants, got on the train. Through the negligence of the person in charge of the train plaintiff was injured. *Held*, that defendants were not liable, for their contract was to carry materials only, not passengers, and the conductor in permitting plaintiff to get upon the train was not acting as defendants' agent. *Graham v. Toronto. G. & B. R. Co.*, 23 *U. C. C. P.* 541.—DISTINGUISHING *Torpy v. Grand Trunk R. Co.*, 20 *U. C. Q. B.* 446.—REVIEWED IN *Hoar v. Maine C. R. Co.*, 70 *Me.* 65.

**79. Wilful acts—General rule of non-liability.\***—A corporation is liable for the tortious acts of its employes or agents while engaged in the performance of their duties, but not for such acts as in their nature are wilful or criminal. *De Camp v. Mississippi & M. R. Co.*, 12 *Iowa* 348.—QUOTING *Philadelphia & R. R. Co. v. Derby*, 14 *How. (U. S.)* 468. FOLLOWED IN *Cooke v. Illinois C. R. Co.*, 30 *Iowa* 202; *Porter v. Chicago, R. I. & P. R. Co.*, 41 *Iowa* 358. NOT FOLLOWED IN *Gilliam v. South & N. Ala. R.*

*Co.*, 15 *Am. & Eng. R. Cas.* 138, 70 *Ala.* 268; *Marion v. Chicago, R. I. & P. R. Co.*, 64 *Iowa* 568. *Winterson v. Eighth Ave. R. Co.*, 2 *Hill (N. Y.)* 389. *Wesson v. Seaboard & R. R. Co.*, 4 *Jones (N. C.) L.* 379. NOT FOLLOWED IN *Gilliam v. South & N. Ala. R. Co.*, 15 *Am. & Eng. R. Cas.* 138, 70 *Ala.* 268. *South & N. Ala. R. Co. v. Chappell*, 61 *Ala.* 527.—EXPLAINING *Owsley v. Montgomery & W. P. R. Co.*, 37 *Ala.* 560.

A railroad company is only liable for the malicious acts of its agents, where it, with full knowledge of the facts, ratifies the act. *Gulf, C. & S. F. R. Co. v. Moore*, 69 *Tex.* 157, 6 *S. W. Rep.* 631.—FOLLOWING *Hays v. Houston & G. N. R. Co.*, 46 *Tex.* 272.

Where an employe commits a crime, or his act is malicious or wilful, the law presumes that the company did not authorize or sanction the act, but this is only a presumption and may be rebutted. *Gulf, C. & S. F. R. Co. v. Reed*, 48 *Am. & Eng. R. Cas.* 423, 80 *Tex.* 362, 15 *S. W. Rep.* 1105.

An express wilful intent to do an injury resulting in damage cannot be imputed to the principal when the injury was inflicted by an employe, and when the wrongful act has neither been authorized nor ratified. *Houston & T. C. R. Co. v. Cowser*, 57 *Tex.* 293.

**80. — unless act done is in line of duty.**—A company is not liable for the wilful act of its employe unless he is engaged at the time about the company's business. *Louisville, N. O. & T. R. Co. v. Douglass*, 69 *Miss.* 723, 11 *So. Rep.* 933. *Ryan v. Hudson River R. Co.*, 1 *J. & S. (N. Y.)* 137.

A company is not liable for damages resulting from a wilful and malicious trespass committed upon a stranger to the company by its engineer or conductor, outside of and beyond the scope of his authority or line of duty. *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 *Miss.* 112.—DISTINGUISHING *Brown v. New York C. R. Co.*, 32 *N. Y.* 597; *Lalor v. Chicago, B. & Q. R. Co.* 52 *Ill.* 401.—QUOTED IN *Darwin v. Charlotte, C. & A. R. Co.*, 23 *S. Car.* 531, 55 *Am. Rep.* 32.

The earlier doctrine that, "in general, a master is liable for the fault or negligence of the servant, but not for his wilful wrong or trespass," has been greatly modified in modern jurisprudence, which places the test of the master's liability, not in the motive of the servant or in the character of the wrong, but in the inquiry whether the act done was something which his employment contem-

\* Company not liable for wilful and malicious acts of servants. See note, 15 *AM. & ENG. R. CAS.* 141.

plated, and which, if properly and lawfully done, would have been within the scope of his functions. *Williams v. Pullman Palace Car Co.*, 33 *Am. & Eng. R. Cas.* 407, 40 *La. Ann.* 87, 3 *So. Rep.* 631.

Railroad companies are liable for the wilful acts of their employes when committed within the scope of their employment. *Jeffersonville R. Co. v. Rogers*, 38 *Ind.* 116.—QUOTING *Ramsden v. Boston & A. R. Co.*, 104 *Mass.* 117. *Indiana, B. & W. R. Co. v. Burdge*, 18 *Am. & Eng. R. Cas.* 192, 94 *Ind.* 46. *Arasmith v. Temple*, 11 *Ill. App.* 39. *Cobb v. Columbia & G. R. Co.*, 37 *S. Car.* 194.

A corporation is liable for the wilful acts and torts of its agents committed within the general scope of their employment, as well as acts of negligence, although the particular acts have not been previously authorized or subsequently ratified. *Indianapolis, P. & C. R. Co. v. Anthony*, 43 *Ind.* 183.—DISTINGUISHING *Evansville & C. R. Co. v. Baum*, 26 *Ind.* 70. QUOTING *Jeffersonville R. Co. v. Rogers*, 38 *Ind.* 116. *Terre Haute & I. R. Co. v. Jackson*, 6 *Am. & Eng. R. Cas.* 178, 81 *Ind.* 19. *Quigley v. Central Pac. R. Co.*, 11 *Nev.* 350.—NOT FOLLOWING *Hagan v. Providence & W. R. Co.*, 3 *R. I.* 88.—*Redding v. South Carolina R. Co.*, 3 *S. Car.* 1.

Where the servants of a railroad, while in the discharge of their duties, pervert the appliances of the company to wanton and malicious purposes to the injury of others, the company is liable for such injuries. *Chicago, B. & Q. R. Co. v. Dickinson*, 63 *Ill.* 151, 7 *Am. Ry. Rep.* 45.—FOLLOWING *Toledo, W. & W. R. Co. v. Harmon*, 47 *Ill.* 298.

The agents and servants of a railroad company while engaged in running a train of cars are in the line of their duty, and for their acts wilfully done the company is liable. *Terre Haute & I. R. Co. v. Graham*, 46 *Ind.* 239, 6 *Am. Ry. Rep.* 358.

**81. — scope and extent of the rule.**—A railroad corporation is not liable for a trespass committed by its servants in wilfully expelling a passenger, where in doing so they exceed the authority given them under certain regulations of the company. *Hibbard v. New York & E. R. Co.*, 15 *N. Y.* 455.—FOLLOWING *Wright v. Wilcox*, 19 *Wend. (N. Y.)* 343.—APPROVED IN *Cox v. Keahey*, 36 *Ala.* 340. CRITICISED IN *Isaacs v. Third Ave. R. Co.*, 47 *N. Y.* 122. DISTINGUISHED IN *Higgins v. Watervliet, T. & R. Co.*, 46 *N. Y.* 23. NOT FOLLOWED IN *Weed v. Panama R. Co.*, 17 *N. Y.* 362.

Corporations are not bound by the wanton and wilful trespasses of their agents. So *held*, where a female passenger requested the conductor to stop a street-car and let her off, but on the contrary he violently threw her from the car while in motion with such force as to seriously injure her. *Isaacs v. Third Ave. R. Co.*, 47 *N. Y.* 122.—CRITICISING *Hibbard v. New York & E. R. Co.*, 15 *N. Y.* 455. FOLLOWING *Mali v. Lord*, 39 *N. Y.* 381. REVIEWING *Vanderbilt v. Richmond Turnpike Co.*, 2 *N. Y.* 479.—APPLIED IN *Mars v. Delaware & H. C. Co.*, 54 *Hun (N. Y.)* 625. DISTINGUISHED IN *Cohen v. Dry Dock, E. B. & B. R. Co.*, 8 *J. & S. (N. Y.)* 368; *Shea v. Sixth Ave. R. Co.*, 62 *N. Y.* 180. FOLLOWED IN *Hughes v. New York & N. H. R. Co.*, 4 *J. & S. (N. Y.)* 222. LIMITED IN *Stewart v. Brooklyn & C. T. R. Co.*, 90 *N. Y.* 588, 43 *Am. Rep.* 185. NOT FOLLOWED IN *Carter v. Louisville, N. A. & C. R. Co.*, 98 *Ind.* 552; *Hoffman v. New York C. & H. R. R. Co.*, 12 *J. & S. (N. Y.)* 1.

The owners of a steamboat are not liable for damages resulting from a collision caused by the wilful act of their servants and agents in charge of the boat. *Cox v. Keahey*, 36 *Ala.* 340.—APPROVING *McManus v. Crickett*, 1 *East* 106; *Hibbard v. New York & E. R. Co.*, 15 *N. Y.* 455. DISTINGUISHING *Philadelphia & R. R. Co. v. Derby*, 14 *How. (U. S.)* 468; *Vicksburg & J. R. Co. v. Patton*, 31 *Miss.* 156; *Cleveland, C. & C. R. Co. v. Keary*, 3 *Ohio St.* 201; *Henderson, San Antonio & M. G. v. R. Co.*, 17 *Tex.* 560; *Hegeman v. Western R. Co.*, 16 *Barb. (N. Y.)* 353. FOLLOWING *Blackburn v. Baker*, 1 *Ala.* 173; *Lindsay v. Griffin*, 22 *Ala.* 629; *Walker v. Bolling*, 22 *Ala.* 294; *Kirksey v. Jones*, 7 *Ala.* 622.

A railroad company is not liable for the act of an engineer in purposely and wantonly backing a train toward a street-car for the purpose of frightening the passengers therein, whereby a passenger, believing himself in imminent danger, is injured by jumping to avoid a collision, though the engineer did not mean to strike the car. *Stephenson v. Southern Pac. R. Co.*, 93 *Cal.* 558, 29 *Pac. Rep.* 234.

Plaintiff, while travelling in a buggy along a street in the city of New York, was stopped by a blockade of vehicles just as he had crossed defendant's track. The rear of his buggy was so near the track that a car could not pass without hitting it. A car came up, the driver of which, after waiting



a moment or two, ordered plaintiff to "get off the track." Plaintiff was unable to move either way, and so notified the driver, who replied with an oath that he was late, and that if plaintiff did not get off he would put him off, and immediately thereafter drove on, striking and upsetting plaintiff's buggy and injuring him. In an action to recover damages, *held*, that the evidence did not authorize a finding as matter of law, that the act of the driver was with a view to injure plaintiff, and not with a view to his master's service; but that this question was one of fact, and a dismissal of the complaint on trial was error. *Cohen v. Dry Dock, E. B. & B. R. Co.*, 69 N. Y. 170, 18 Am. Ry. Rep. 109; *affirming* 8 J. & S. 368.

**82.—its limits and exceptions.**—When a railroad company is sued for a delay in carrying goods it cannot excuse the delay by showing that it was the result of a wilful act on the part of one of its conductors. *Weed v. Panama R. Co.*, 17 N. Y. 362; *affirming* 5 Duer 193.—**DISTINGUISHING** *Richmond Turnpike Co. v. Vanderbilt*, 1 Hill (N. Y.) 480. **NOT FOLLOWING** *Hibbard v. New York & E. R. Co.*, 15 N. Y. 455.—**APPROVED** IN *Perkins v. Missouri, K. & T. R. Co.*, 55 Mo. 201; *Milwaukee & M. R. Co. v. Finney*, 10 Wis. 388. **DISTINGUISHED** IN *Geisner v. Lake Shore & M. S. R. Co.*, 26 Am. & Eng. R. Cas. 287, 102 N. Y. 563, 7 N. E. Rep. 828, 2 N. Y. S. R. 514; *reversing* 34 Hun 50; *Gulf, C. & S. F. R. Co. v. Levi*, 42 Am. & Eng. R. Cas. 439, 76 Tex. 337, 13 S. W. Rep. 191, 8 L. R. A. 323; *reversed in* 40 Am. & Eng. R. Cas. 115, 12 S. W. Rep. 677.—**FOLLOWED** IN *Read v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 199; *Blackstock v. New York & E. R. Co.*, 20 N. Y. 48; *Meyer v. Second Ave. R. Co.*, 8 Bosw. (N. Y.) 305. **REVIEWED** IN *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Pittsburg, C. & St. L. R. Co. v. Shields*, 47 Ohio St. 387; *Palmer v. Charlotte, C. & A. R. Co.*, 3 S. Car. 580.

While the master is not responsible for the wilful wrong of the servant, not done with a view to the master's service, or for the purpose of executing his orders, if the servant is authorized to use force against another when necessary in executing his master's orders, and if, while executing such orders, through misjudgment or violence of temper the servant uses more force than is necessary, the master is liable. *Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *affirming* 3 Hun 329, 5 T.

& C. 475.—**FOLLOWING** *Higgins v. Water-vliet Turnpike Co.*, 46 N. Y. 23. **REVIEWING** *McManus v. Crickett*, 1 East 106.—**APPLIED** IN *Mars v. Delaware & H. C. Co.*, 54 Hun (N. Y.) 625; *Lang v. New York, L. E. & W. R. Co.*, 22 N. Y. S. R. 110. **FOLLOWED** IN *Cohen v. Dry Dock, E. B. & B. R. Co.*, 69 N. Y. 170; *Murphy v. Central Park, N. & E. R. R. Co.*, 16 J. & S. (N. Y.) 96. **REVIEWED** IN *Carter v. Louisville, N. A. & C. R. Co.*, 98 Ind. 552; *Molloy v. New York C. & H. R. R. Co.*, 10 Daly (N. Y.) 453.

If a servant is authorized to use force against another when necessary in executing his master's orders the master commits it to him to decide what degree of force he shall use, and if, through misjudgment or violence of temper, he goes beyond the necessity of the occasion and gives a right of action to another, he cannot, as to third persons, be said to have been acting without the line of his duty or to have departed from his master's business. If, however, the servant, under guise and cover of executing his master's orders and exercising the authority conferred upon him, wilfully and designedly, for the purpose of accomplishing his own independent, malicious or wicked purposes, does an injury to another, then the master is not liable. The relation of master and servant as to that transaction does not exist between them. It is a wilful and wanton wrong and trespass, for which the master cannot be held responsible. *Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *affirming* 3 Hun 329, 5 T. & C. 475.

Where the misconduct of an agent causes a breach of the obligation or contract of the principal, then the principal is liable in an action, whether such misconduct be wilful or malicious, or merely negligent; and in such case, though the action be brought nominally in tort, it will be treated as *ex contractu* and be governed by the same rules, unless the malice or wantonness of the agent be brought home and directly charged to the principal. *Milwaukee & M. R. Co. v. Finney*, 10 Wis. 388.—**APPROVING** *Weed v. Panama R. Co.*, 17 N. Y. 362.—**REVIEWED** IN *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Winnegar v. Central Pass. R. Co.*, 34 Am. & Eng. R. Cas. 462, 85 Ky. 547, 4 S. W. Rep. 237.

An authority given by the board of directors will not, in all cases, be the authority of the corporation. To fix the liability of a

corporation for the tortious act of one of its employes, done in obedience to the commands of its officers, the act must be connected with the transaction of the business for which the company was incorporated. *Brokaw v. New Jersey R. & T. Co.*, 32 N. J. L. 328.—QUOTING *Railway Co. v. Brown*, 6 Exch. 325; *Green v. London Omnibus Co.*, 7 C. B. N. S. 301; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. (U. S.) 202.—QUOTED IN *Central R. & B. Co. v. Smith*, 76 Ala. 572.

If the trespass was committed by the agent of the company, wilfully, or of his own malice, under color of discharging the duties of his employment, or if he has departed beyond the line of his duty to commit a trespass, the company will not be liable. But if the act of the agent was authorized by the rules and regulations of the company, or was necessary to accomplish the purposes of his employment, the company is answerable, even for the unnecessary violence of the agent. *Brokaw v. New Jersey R. & T. Co.*, 32 N. J. L. 328.—REVIEWED IN *Vance v. Erie R. Co.*, 32 N. J. L. 334.

### 83. Negligent acts—General rule.\*

—Railroad companies are liable for the negligent acts of its employes or agents wherever individuals would be liable under the same circumstances. *King v. Ohio & M. R. Co.*, 8 Am. & Eng. R. Cas. 119, 11 Biss. (U. S.) 362, 14 Fed. Rep. 277.—FOLLOWED IN *Little Rock & M. R. Co. v. Mosley*, 56 Fed. Rep. 1009.—*Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201.—QUOTING *Marshall v. Baltimore & O. R. Co.*, 16 How. (U. S.) 327.

The general rule of *respondent superior* charges the master with liability for the servant's negligence in the master's business causing injury to third persons, and the acts of the servant may, in general, be treated as the acts of the master. *Murray v. Usher*, 117 N. Y. 542, 23 N. E. Rep. 564, 27 N. Y. S. R. 928; *affirming* 46 Hun 404, 11 N. Y. S. R. 789. *Evansville & C. R. Co. v. Baum*, 26 Ind. 70. *Smith v. Memphis & A. C. Packet Co. (Tenn.)* 1 S. W. Rep. 104. *Houston & T. C. R. Co. v. Gorbett*, 49 Tex. 573.

As corporations can only act through agents, where a complaint charges negligence against the company, it is competent to admit evidence showing negligence on

the part of its agents who are charged with the duty of performing the act complained of. *St. Louis & S. F. R. Co. v. George*, 85 Tex. 150, 19 S. W. Rep. 1036. *Houston & T. C. R. Co. v. Rand*, 9 Am. & Eng. R. Cas. 399.

The negligence of the agent, of whatsoever grade, as to matters within the scope of his employment with reference to passengers, is the negligence of the corporation. *Gulf, C. & S. F. R. Co. v. McGowan*, 26 Am. & Eng. R. Cas. 274, 65 Tex. 640.

The duty of observing the greatest care in the custody and use of dangerous agencies cannot be shifted by a master to his servants, so as to exonerate him from the negligence of a servant in the use and custody of them. *Pittsburg, C. & St. L. R. Co. v. Shields*, 44 Am. & Eng. R. Cas. 647, 47 Ohio St. 387, 8 L. R. A. 464, 24 N. E. Rep. 658.

84. — Its scope and extent.—Where the business of two roads at a junction is intrusted to one agent, the fact that the agent is employed and paid by one road will not relieve the other from liability for damages that may result from his negligence. *Taylor v. Western Pac. R. Co.*, 45 Cal. 323.

The Iowa Code, § 1307, makes railway corporations liable for all damages resulting from the negligence of their employes or agents, and under the statute no special contract will exempt the company from liability, and the statute applies both to passengers and servants of such corporations. *Rose v. Des Moines, Valley R. Co.*, 39 Iowa 246.

A railroad company is liable, under § 1307, for the gross negligence of its employes, resulting in an injury to a person riding upon its cars, though without right; as, in this case, one riding upon the non-transferable commutation ticket of another. *Way v. Chicago, R. I. & P. R. Co.*, 34 Am. & Eng. R. Cas. 286, 73 Iowa 463, 35 N. W. Rep. 525.

A railroad company is liable for the injuries caused by a fireman who was temporarily left in charge of an engine with instructions from the engineer to watch it, in negligently blowing off steam while so in charge. *Andrews v. Mason City & Ft. D. R. Co.*, 77 Iowa 669, 42 N. W. Rep. 513.

It is a part of the course of employment of a brakeman to invite and assist passengers on and off cars, and it being so, the company will be liable for his negligent or improper act while so engaged. *Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49.—FOLLOWED

\* Liability of master to third persons for injuries caused by negligence of servant. See note, 8 L. R. A. 464.



IN *Drew v. Sixth Ave. R. Co.*, 1 Abb. App. Dec. (N. Y.) 556; *Simonin v. New York, L. E. & W. R. Co.*, 36 Hun (N. Y.) 214.

Where dangerous agencies are entrusted to a servant, the proper custody, as well as the use of them, becomes a part of the servant's employment by the master, and his negligence in either regard is imputable to the master, in an action by one injured thereby. And where the injury results from the negligence of the servant in the custody of the instrument, it is immaterial, so far as the liability of the master is concerned, as to what use may have been made of it by the servant. *Pittsburg, C. & St. L. R. Co. v. Shields*, 44 Am. & Eng. R. Cas. 647, 47 Ohio St. 387, 8 L. R. A. 464, 24 N. E. Rep. 658.

A company is liable for damages caused by the negligent firing of a signal gun by an agent, though he acts contrary to his instructions as to the manner of firing. *Oliver v. North Pac. Transp. Co.*, 3 Oreg. 84.

Negligence of the agent of the company having the care and control of one of its yards in permitting obstructions to accumulate along the tracks in such yard, is negligence of the company. *Bessex v. Chicago & N. W. R. Co.*, 45 Wis. 477.—QUOTING *Smith v. Chicago, M. & St. P. R. Co.*, 42 Wis. 520. DISTINGUISHED IN *Peschel v. Chicago, M. & St. P. R. Co.*, 17 Am. & Eng. R. Cas. 545, 62 Wis. 338. REVIEWED IN *Flannagan v. Chicago & N. W. R. Co.*, 2 Am. & Eng. R. Cas. 150, 50 Wis. 462.

Where a passenger is injured at a station by the negligence of a porter employed on the platform, which was exclusively allotted to the traffic of another company, which had running arrangements over the line of the company owning the station, and which issued the ticket under which the passenger travelled, the passenger may recover against the company owning the station. *Silf v. London, B. & S. C. R. Co.*, 43 L. T. N. S. 173.

An employé of a railroad company, after he was "off duty," negligently left bars adjoining the track down, whereby horses escaped from a field and were injured by a passing train in the night. It appeared that at the time the bars were left down the employé was about his own private business, but it seemed under a provision of his employment that if the employé saw anything amiss at any time when he was not on duty he was required, without any special

direction, to give it proper attention. *Held*, that the company was liable for the loss of the stock. *Chapman v. New York C. R. Co.*, 33 N. Y. 369; *affirming* 31 Barø. 399.—DISTINGUISHED IN *Morier v. St. Paul, M. & M. R. Co.*, 15 Am. & Eng. R. Cas. 135, 31 Minn. 351, 47 Am. Rep. 793.

Whilst a slave was in the employment of a railroad company as a section-hand, he was directed by an agent of the company to sleep in a certain house which had (unknown to the company and to himself) an open keg of powder standing under one of the beds, placed there a day or two before for temporary purposes by a servant of a bridge contractor with such company. The slave was killed by an explosion of the powder, caused, as was supposed, by fire from a torch whilst he was searching for his hat. *Held*, that the company was chargeable with the negligence of the person who placed and left the powder in such a position. *Allison v. Western N. C. R. Co.*, 64 N. Car. 382.

**85. — its limits and exceptions.**—In cases where an officer of a corporation is intrusted with duties which the corporation cannot perform itself, the negligence of such officer is not the negligence of the corporation, unless it has been negligent in the selection of the officer. *Mobile & M. R. Co. v. Smith*, 59 Ala. 245.

As against the public, but not as between fellow-servants, railroad companies are liable for the negligence of servants in their business. *Thayer v. St. Louis, A. & T. H. R. Co.*, 22 Ind. 26.

The master cannot be held responsible for the negligent act of his servant, unless done in and about the business of the master, or unless the act in the doing of which the negligence occurs is sanctioned or authorized by him. *Reilly v. Hannibal & St. J. R. Co.*, 34 Am. & Eng. R. Cas. 81, 94 Mo. 600, 13 West Rep. 658, 7 S. W. Rep. 407.

In Texas, prior to the Act of March 25, 1887, railroads were only liable for the gross negligence of their servants. *Galveston, H. & S. A. R. Co. v. Kutac*, 37 Am. & Eng. R. Cas. 470, 76 Tex. 473, 13 S. W. Rep. 327.

**86. Fraudulent acts.**—A corporation is liable for the fraud of its agents in conducting its business. *Ranger v. Great Western R. Co.*, 5 H. of L. Cas. 72.

<sup>a</sup>Liability of principal for fraud of agent. See note, 15 AM. & ENG. R. CAS. 97.

Railway corporations are bound by the fraudulent acts of their employes wherever private persons would be bound under the same circumstances. *Nugent v. Cincinnati, H. & I. S. L. R. Co., 2 Disney (Ohio) 302.*—QUOTING *Ranger v. Great Western R. Co., 5 H. of L. Cas. 86.*

A railroad company is liable to persons desiring to become stockholders, for the acts of its agents in permitting the transfer of spurious stock being made on its books, and for issuing false certificates of stock, though such false entries result from negligence only. *New York & N. H. R. Co. v. Schuyler, 38 Barb. (N.Y.) 534.*

Where an agent of a railroad corporation fraudulently sells stock and transfers it on the corporation books, the corporation cannot take advantage of the fraud, where the agent acts within the scope of his official powers. *Bridgeport Bank v. New York & N. H. R. Co. 30 Conn. 231.*—DISTINGUISHED IN *Chicago & N. W. R. Co. v. James, 22 Wis. 194.* QUOTED IN *New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30.*

Where an agent of a railroad company is intrusted with the duty of inspecting ice which is to be delivered to the company, the company itself will be liable where he rejects the ice either fraudulently or in bad faith, and the motive of the agent in doing so is immaterial, whether it be to injure the owner of the ice or to benefit himself or the company. *Lynn v. Baltimore & C. R. Co., 60 Md. 404.* 45 *Am. Rep. 741.*—QUOTING *Baltimore & O. R. Co. v. Polly, 14 Gratt. (Va.) 447.*

**87. — Illustrations.**—Where the roadmaster was authorized to contract for the entire job of building a depot to completion, including the painting of it, and did contract with a contractor for the entire work, the company would be bound thereby; but where the roadmaster made representations to a subcontractor, who painted the building, to the effect that the subcontractor need not record his lien; that the company owed the contractor largely more than the latter owed the subcontractor; that it was the intention of the roadmaster not to settle with the contractor until all debts for work done on the building were brought in and included in the settlement; that the company had other work for the contractor to do; and that the subcontractor was certain of his money; thereby causing the subcontractor to fail to record

his lien; and where the roadmaster immediately thereafter settled with the main contractor and paid him in full, the company was not liable in an action of deceit; and on a suit therefor against the company, a nonsuit was properly awarded. *Hamilton v. Georgia R. Co., 78 Ga. 328.*

A party acting on behalf of a railroad procured defendant, who could neither read nor write, to execute an agreement for subscription, and also relating to the right of way; and such party signed defendant's name to such agreement in his presence and at his request. *Held*, that such signing did not make the party the agent of defendant so as to prevent him from setting up the misrepresentations and fraud of the party procuring his signature, in avoidance of the contract. *Rockford, R. I. & St. L. R. Co. v. Shunick, 65 Ill. 223, 2 Am. Ry. Rep. 28.*

The clerk of a railroad company was intrusted by the president and treasurer with the duty of filling up and issuing certain certificates to the holders of coupons, the certificates being signed when delivered to the clerk, who fraudulently filled them up and issued them to persons not the rightful holders. *Held*, that the company was liable on such certificates in the hands of innocent purchasers for value. *Western Md. R. Co. v. Franklin Bank, 60 Md. 36.*—DISTINGUISHING *Baltimore & O. R. Co. v. Wilkins, 44 Md. 11.* FOLLOWING *Tome v. Parkersburg Branch R. Co., 39 Md. 36.*

A wagoner hauled goods from a depot to his employer's mills, supposing them to be his, when in fact they belonged to a third person. The mill-owner used them, and the railroad company brought trespass on the case, charging they were obtained by deceit. *Held*, that no recovery could be had unless the taking and conversion was fraudulent; that the act of the wagoner in itself would not render the mill-owner liable. *Pennsylvania R. Co. v. Zug, 47 Pa. St. 480.*—APPROVED IN *Porter v. Chicago, R. I. & P. R. Co., 41 Iowa, 358.*

**88. Error of judgment.**—Where a servant acts in good faith, the master will not be liable for an error of judgment which causes an injury to a person in a perilous position, whom the servant is trying to extricate. *Rhing v. Broadway & S. A. R. Co., 53 Hun (N. Y.) 321, 25 N. Y. S. R. 563, 6 N. Y. Supp. 641.*

**89. Acts of incompetent servants.**—Where a railroad company permits its

engineers to allow firemen to handle engines and an incompetent fireman is temporarily put in charge of a train and an injury results from such incompetency, the company is liable. *Harper v. Indianapolis & St. L. R. Co.*, 47 Mo. 567.—DISTINGUISHED IN *Peterson v. Whitebreast C. & M. Co.*, 50 Iowa, 673. FOLLOWED IN *Brothers v. Cartter*, 52 Mo. 372.

**90. Criminal acts.**—The master is not liable for the criminal acts of his servant, not authorized or sanctioned by him, nor for his acts of wilful and malicious trespass. If a conductor knowingly and wilfully participates in the act of taking and transporting upon the cars, against his will, one whom he had no right to receive, he, and not the company, will be liable for his acts. *Jackson v. St. Louis, I. M. & S. R. Co.*, 25 Am. & Eng. R. Cas. 327, 87 Mo. 422.

A railroad company is liable in damages for the wrongful homicide of its customer committed by its depot agent in his office while the customer was lawfully there for the transaction of business with such agent appertaining to his agency. This results from the Code, § 3033, which renders all railroad companies liable for damages done by any person in their employment and service unless their agents have exercised all ordinary care and diligence. *Christian v. Columbus & R. R. Co.*, 38 Am. & Eng. R. Cas. 261, 79 Ga. 460, 7 S. E. Rep. 216.

While, as a general rule, any mental disease or infirmity which would excuse the agent from criminal responsibility would also excuse the company from civil responsibility, this would not be available if the company employed the agent and assigned him to duty with knowledge of his insane condition or of his being subject to sudden fits of insanity. *Christian v. Columbus & R. R. Co.*, 38 Am. & Eng. R. Cas. 261, 79 Ga. 460, 7 S. E. Rep. 216.

A corporation is liable for the penalty imposed by a Pennsylvania statute for paying out bank notes of a less denomination than \$5, where it appears that such notes were passed by its agents or employes, as the law presumes that the officers of a corporation know what its agents do. *Commonwealth v. Pennsylvania R. Co.*, 2 Phila. (Pa.) 250.

As to the liability of railway companies under the Carriers Act for the felonious acts of their servants, see *Vaughton v. London & N. W. R. Co.*, L. R. 9 Exch. 93, 43 L. J. Exch. 75. *McQueen v. Great Western R. Co.*, L. R.

10 Q. B. 569, 44 L. J. Q. B. 130. *Kirk-stall Brewery Co. v. Furness R. Co.*, L. R. 9 Q. B. 468, 42 L. J. Q. B. 142. *Way v. Great Eastern R. Co.*, 1 Q. B. D. 692, 45 L. J. Q. B. 874, 3 Ry. & C. T. Cas. XII.

**91. Who is an agent within the rule.**\*—The agent of an express company in charge of an express car is not the agent of the railroad company that runs the train, so as to make it liable for his conduct. *Louisville, N. O. & T. R. Co. v. Douglass*, 69 Miss. 723, 11 So. Rep. 933.

Several railroad companies used different crossings in common, each company employing and paying one flagman. At the time of an injury, resulting from the negligence of one of such flagmen, he was engaged in flagging a train belonging to another road than the one that employed him. Held that this did not affect the liability of the company employing him. *Buchanan v. Chicago, M. & St. P. R. Co.*, 35 Am. & Eng. R. Cas. 378, 75 Iowa 393, 39 N. W. Rep. 663.

A railway transit company engaged in transferring with its own motive power and trains persons and freights over the Mississippi river to the city of St. Louis, under an arrangement with a bridge company, the two companies acting together. The collector of fares for the bridge company, who was permitted to control the movements of trains, was on the trains crossing the bridge. A passenger, as the train was approaching the bridge, by direction of the collector of fares, was put off on a trestle, fell through and was killed. Held, that the collector of fares was so far the agent of the transit company as to make that company liable for the death. *Union R. & T. Co. v. Kallaher*, 114 Ill. 325, 2 N. E. Rep. 77.

**92. When punitive damages are recoverable for torts of servants.**†—The master is responsible in punitive damages for the wilful act or gross negligence of his servant engaged in his business, whether he did or did not know the servant to be incompetent or unqualified for the service in which he is engaged. *Southern Exp. Co. v. Brown*, 67 Miss. 260, 7 So. Rep. 318.—FOLLOWING *New Orleans, J. & G. N. R. Co. v. Bailey*, 40 Miss. 395; *Vicksburg & J. R. Co. v. Patton*, 31 Miss. 156; *New Orleans,*

\* See also *ante*, 3, 4.

† Liability of master for exemplary damages resulting from act of servant. See note, 62 AM. DEC. 379.

J. & G. N. R. Co. v. Albritton, 38 Miss. 242; New Orleans, J. & G. N. R. Co. v. Hurst, 36 Miss. 666.

Exemplary damages can only be recovered against corporations for the wrongful acts of their agents, where there has been negligence in selecting the agents, or where the wrongful act has been ratified. *Hays v. Houston & G. N. R. Co.*, 46 Tex. 272.—FOLLOWED IN *Galveston, H. & S. A. R. Co. v. Donahoe*, 9 Am. & Eng. R. Cas. 287, 56 Tex. 162; *Gulf, C. & S. F. R. Co. v. Moore*, 69 Tex. 157, 6 S. W. Rep. 631. QUOTED IN *Dillingham v. Anthony*, 37 Am. & Eng. R. Cas. 1, 73 Tex. 47, 3 L. R. A. 634, 11 S. W. Rep. 139.

Corporations are only liable for exemplary damages when individuals would be liable under like circumstances; and their liability for the malicious acts of their agents is no greater than that of individuals. *Hays v. Houston & G. N. R. Co.*, 46 Tex. 272, 13 Am. Ry. Rep. 281.

**93. — and when not.**—A company is not liable in punitive damages for the tort of its servant, unless it be chargeable with misconduct in the employment or retention of the servant, or authorized or ratified the act. *Donivan v. Manhattan R. Co.*, 1 Misc. (N. Y.) 368, 49 N. Y. S. R. 722, 21 N. Y. Supp. 457.

A principal is not liable in exemplary damages for the tort of his agent, unless he is derelict in connection with the offence of the agent. *Redwood v. Metropolitan R. Co.*, 6 D. C. 302.

A railroad company is not liable in punitive damages for the negligence of a servant, though it be gross or palpable, unless the company is also chargeable with gross misconduct; but such misconduct may be established by proof that the act of the employé was authorized, or not being authorized, was ratified, or that the employé was employed or retained after knowledge to the company that he was incompetent or unfit for the position. *Cleghorn v. New York C. & H. R. R. Co.*, 56 N. Y. 44, 6 Am. Ry. Rep. 179.—APPROVED IN *Sullivan v. Oregon R. & N. Co.*, 21 Am. & Eng. R. Cas. 391, 12 Oreg. 392. FOLLOWED IN *Louisville, N. & G. S. R. Co. v. Fleming*, 14 Lea (Tenn.) 128. QUOTED IN *Donivan v. Manhattan R. Co.*, 1 Misc. (N. Y.) 368. REVIEWED IN *Fisher v. Metropolitan El. R. Co.*, 34 Hun (N. Y.) 433.

It is well settled in Texas that a company

is not liable in exemplary or punitive damages for the torts of its employes unless the tort was authorized, or the company knowingly adopts or ratifies the act. *Gulf, C. & S. F. R. Co. v. Reed*, 48 Am. & Eng. R. Cas. 423, 80 Tex. 362, 15 S. W. Rep. 1105. *Galveston, H. & S. A. R. Co. v. Donahoe*, 9 Am. & Eng. R. Cas. 287, 56 Tex. 162.—FOLLOWING *Hays v. Houston & G. N. R. Co.*, 46 Tex. 280.—APPROVED IN *Dillingham v. Anthony*, 37 Am. & Eng. R. Cas. 1, 73 Tex. 47, 3 L. R. A. 634, 11 S. W. Rep. 139.

b. Various Applications of the Rules.

**94. Arresting, detaining or searching persons — Company liable.\***—A railroad company is liable for the act of its ticket agent in falsely charging a passenger, who has just purchased a ticket, with passing counterfeit money and for procuring his arrest on such charge. *Mulligan v. Long Island R. Co.*, 39 N. Y. S. R. 20, 60 Hun 579.—APPLYING *Lynch v. Metropolitan El. R. Co.*, 90 N. Y. 77.—*Furlong v. South L. T. Co.*, 48 J. P. 329, 1 C. & E. 316.

A company employing a person to arrest and prosecute persons who place obstructions on the track, will be liable where such person arrests an innocent man, carries him away and leaves him in a wood. *Evansville & T. H. R. Co. v. McKee*, 22 Am. & Eng. R. Cas. 366, 99 Ind. 519, 50 Am. Rep. 102.—APPLYING *Chicago City R. Co. v. McMahon*, 103 Ill. 485, 42 Am. Rep. 29. DISTINGUISHING *Helfrich v. Williams*, 84 Ind. 553.—DISTINGUISHED IN *Cincinnati, H. & I. R. Co. v. Carper*, 31 Am. & Eng. R. Cas. 36, 112 Ind. 26, 11 West. Rep. 223, 13 N. E. Rep. 122.

Where a person has been employed to pursue a criminal, the company so employing him will be liable for his illegally arresting a man after he has been told not to pursue the criminal further. *Harris v. Louisville, N. O. & T. R. Co.*, 35 Fed. Rep. 116.

A railway company is liable for the acts of a ticket clerk and station master in detaining and searching a person whom they erroneously believed to have stolen a ticket. *Van Den Eynde v. Ulster R. Co.*, 5 Ir. R., C. L. 6; affirmed 5 Ir. R., C. L. 328.

Plaintiff purchased a ticket of defendant's agent at one of its stations, and, after some altercation about the amount of change

\* Liability for arrest by station agent of person in waiting-room. See 48 AM. & ENG. R. CAS 428, *abstr.*

passed through the gate to take a train. The agent followed her out upon the platform, charged her with having passed upon him a counterfeit twenty-five cent piece, and demanded another in its place. She refused, insisting that her money was genuine, and refused to give back the change received. The agent called her a counterfeiter and a common prostitute, placed his hand upon her, and told her not to stir until he had procured a policeman to arrest and search her. He detained her on the platform for a while, but, not getting an officer, let her go. *Held*, that an action for damages was maintainable; that, in the acts complained of, the agent was engaged about the defendant's affairs, in endeavoring to protect and recover its property, and so it was responsible for his acts. *Palmeri v. Manhattan R. Co.*, 53 *Am. & Eng. R. Cas.* 56, 133 *N. Y.* 261, 30 *N. E. Rep.* 1001, 44 *N. Y. S. R.* 894; *affirming* 60 *Hun* 579, 39 *N. Y. S. R.* 23, 14 *N. Y. Supp.* 468.—**DISTINGUISHING** *Mulligan v. New York & R. B. R. Co.*, 129 *N. Y.* 506; *Mali v. Lord*, 39 *N. Y.* 381.

**95. — company not liable.**—A railway company is not liable for the act of a foreman porter who, having charge of a station in the absence of the station master, gives into custody an innocent person whom he suspects of stealing the company's property. *Edwards v. London & S. W. R. Co.*, *L. R.* 5 *C. P.* 445, 39 *L. J. C. P.* 241, 18 *W. R.* 834, 22 *L. T. N. S.* 656.

A railway company is not liable for the act of its servant in giving into custody a person on the charge of assaulting him, and obstructing him in the discharge of his duty. *Lumsden v. London & S. W. R. Co.*, 16 *L. T. N. S.* 609.

A railway company is not liable for the act of a clerk whose duty it is to sell tickets, in giving into custody a person whom he suspects of an attempt to rob the till, after the attempt has ceased. *Allen v. London & S. W. R. Co.*, *L. R.* 6 *Q. B.* 61, 40 *L. J. Q. B.* 55, 11 *Cox C. C.* 621, 33 *L. T. N. S.* 612, 19 *W. R.* 127.

Where, by the regulations of a railway company, its constables are authorized to take into custody any one they see committing an assault at a station, but are directed to use this power cautiously, and not if the fight is at an end before they interpose, the company is not liable for the act of a constable in wrongfully giving into custody at the conclusion of the scuffle a person on the

charge of assaulting the company's servants. *Walker v. South Eastern R. Co.*, *L. R.* 5 *C. P.* 640, 39 *L. J. C. P.* 346, 18 *W. R.* 1032, 23 *L. T. N. S.* 14.

A railway company is not liable for an act of its station master in arresting a passenger where such arrest is not within the powers conferred on railway companies by sections 103 and 104 of the Railways Clauses Act, 1845. *Poulton v. London & S. W. R. Co.*, 17 *L. T. N. S.* 11, 36 *L. J. Q. B.* 294, *L. R.*, 2 *Q. B.* 534, 8 *B. & S.* 616, 16 *W. R.* 309.—**CONSIDERED IN** *Bolingbroke v. Swindon New Town Local Bd.*, 30 *L. T. N. S.* 723.

A railway company is not responsible for the acts of a station master in arresting a passenger under the erroneous belief that he had not paid for the conveyance of a horse which he had with him. *Poulton v. London & S. W. R. Co.*, 8 *B. & S.* 616, *L. R.* 2 *Q. B.* 534, 36 *L. J. Q. B.* 294, 17 *L. T. N. S.* 11, 16 *W. R.* 309.—**CONSIDERED IN** *Bolingbroke v. Swindon New Town Local Bd.*, 30 *L. T. N. S.* 723.

**96. Assaults upon passengers.\***—A person knocked down and robbed just as he was about to enter a train as a passenger cannot, under a petition charging that plaintiff was assaulted and injured by the servant and employees operating and controlling the train, recover against the company without showing that the person who assaulted him was in the employ of the company and that the wrongful acts were done by the servant or agent of the company in the course or within the scope of his employment. *Sachravnitz v. Atchison, T. & S. F. R. Co.*, 34 *Am. & Eng. R. Cas.* 332, 37 *Kan.* 212, 15 *Pac. Rep.* 242.

Where a porter whose duty it is to prevent passengers going by wrong trains, causes injury to a passenger by violently pulling him out of a carriage under the erroneous impression that he was not in the right train, the act is within the scope of his employment and the company is liable. *Bayley v. Manchester, S. & L. R. Co.*, *L. R.* 8 *C. P.* 148, 42 *L. J. C. P.* 78, 28 *L. T. N. S.* 366; *affirming* *L. R.* 7 *C. P.* 415, 41 *L. J. C. P.* 278.—**CONSIDERED IN** *Bolingbroke v. Swindon New Town Local Bd.*, 30 *L. T. N. S.* 723.

A passenger on a street car to whom the driver, who was also conductor, has used profane and abusive language, replied:

\* Liability of company for assaults by servants see note 13 *AM. & ENG. R. CAS.* 4

"When we get to the office of the company I will report you," the office being at the stables, where the car stopped for a change of horses. Before reaching the stables the passenger got off, intending, as he said, to go to the office of the company and report the driver while the horses were being changed and then to resume his seat in the car, but such intention was not communicated to the driver. The driver seeing the passenger going towards the office of the company stopped the car, and jumping off went across the street, intercepted the passenger on the sidewalk and violently assaulted him. In an action against the railway company by the passenger to recover damages for the injuries he had sustained, *held*, that when the assault was committed the contract of carriage had ceased; that the wrongful act of the driver was not within the line and scope of his employment, and the railway company, his employer, was not answerable therefor. *Central R. Co. v. Peacock*, 69 Md. 257, 14 Atl. Rep. 709.—DISTINGUISHING *New Jersey Steamboat Co. v. Brockett*, 121 U.S. 645; *Keokuk N. L. Packet Co. v. True*, 88 Ill. 608; *Jeffersonville, M. & I. R. Co. v. Riley*, 39 Ind. 568; *State v. Grand Trunk R. Co.*, 58 Me. 176.

After purchasing a ticket plaintiff applied to the baggage-master to have his baggage checked, and by certain abusive language and importunate conduct provoked a quarrel, whereupon the baggage-master struck him with a hatchet furnished for the purposes of the baggage-master's employment. *Held*, that the assault could not be regarded as authorized by the company, nor the act in the line of the baggage-master's authority, the fact of the hatchet being used not affecting the case. *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110.—DISTINGUISHED IN *Pittsburg, C. & St. L. R. Co. v. Shields*, 47 Ohio St. 387. REVIEWED IN *Lakin v. Oregon Pac. R. Co.*, 34 Am. & Eng. R. Cas. 500, 15 Oreg. 220.

A passenger by boat, who had purchased a round trip excursion ticket, claimed the right to return a day after, under an agreement with the purser who had taken up the ticket, but which agreement was denied, whereupon the purser directed the porter to seize the passenger's valise and hold it until the fare was paid. In attempting to do so a scuffle ensued and the passenger was injured. *Held*, that the porter, in attempting to seize the valise, was acting outside of the

scope of his employment, and the navigation company was not liable. *Emerson v. Niagara Nav. Co.*, 2 Ont. 528.—QUOTING *Bayley v. Manchester, S. & L. R. Co.*, L. R. 8 C. P. 148.—REVIEWING *Goff v. Great Northern R. Co.*, 3 E. & E. 672; *Moore v. Metropolitan R. Co.*, L. R. 8 Q. B. 36. REVIEWING AND QUOTING *Poulton v. London & S. W. R. Co.*, L. R. 2 Q. B. 534.

**97. Other tortious acts towards passengers.**—A common carrier of passengers is responsible for the wilful misconduct of his servant toward a passenger. *Goddard v. Grand Trunk R. Co.*, 57 Me. 202.—REVIEWING *Brand v. Schenectady & T. R. Co.*, 8 Barb. (N. Y.) 368; *Moore v. Fitchburg R. Co.*, 4 Gray (Mass.) 465; *Seymour v. Greenwood*, 7 Hurl. & Nor. 354; *Milwaukee & M. R. Co. v. Finney*, 10 Wis. 388; *Pennsylvania R. Co. v. Vandiver*, 42 Pa. St. 365; *Weed v. Panama R. Co.*, 17 N. Y. 362; *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 468; *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. St. 512; *Flint v. Norwich & N. Y. Trans. Co.*, 34 Conn. 554; *Landreaux v. Bell*, 5 La. 275; *Chamberlain v. Chandler*, 3 Mason (U. S.) 242; *Nieto v. Clark*, 1 Cliff. (U. S.) 145.—APPLIED IN *Smith v. Manhattan R. Co.*, 45 N. Y. S. R. 865. FOLLOWED IN *Hanson v. European & N. A. R. Co.*, 62 Me. 84. QUOTED AND DISTINGUISHED IN *Williams v. Pullman Palace Car Co.*, 33 Am. & Eng. R. Cas. 407, 40 La. Ann. 87, 3 So. Rep. 631. REVIEWED IN *Winnegar v. Central Pass. R. Co.*, 34 Am. & Eng. R. Cas. 462, 85 Ky. 547, 4 S. W. Rep. 237.

A corporation is liable for the acts of its employés toward passengers, while engaged in carrying out what they mistakenly suppose to be orders of the corporation, even though such acts be malicious and criminal. *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa 314.—DISTINGUISHED IN *Stone v. Chicago & N. W. R. Co.*, 47 Iowa 82. NOT FOLLOWED IN *Marion v. Chicago, R. I. & P. R. Co.*, 64 Iowa 568.

A carrier is responsible for injuries wilfully or carelessly inflicted upon passengers by servants engaged in the performance of duties within the general scope of their employment, whether the particular act was or was not authorized by the master. *Louisville*

\* Liability of company to passengers for torts of trainmen. See notes 41 AM. REP. 340, 42 Id. 36.



*So N. R. Co. v. Kelly*, 13 *Am. & Eng. R. Cas.* 1, 92 *Ind.* 371, 47 *Am. Rep.* 149.

A carrier is liable for an unlawful and improper act, and for the natural and legitimate consequences thereof, which is committed by its servant towards its passenger while such servant is engaged in performing a duty which the carrier owes to the passenger, no matter what the motive is which incites the commission of the act. *Dwinelle v. New York C. & H. R. R. Co.*, 44 *Am. & Eng. R. Cas.* 384, 120 *N. Y.* 117, 24 *N. E. Rep.* 319, 30 *N. Y. S. R.* 578, 8 *L. R. A.* 224; *reversing* 45 *Hun* 139, 9 *N. Y. S. R.* 838.—APPLYING *Stewart v. Brooklyn & C. T. R. Co.*, 90 *N. Y.* 588.—REVIEWED IN *Tinker v. New York, O. & W. R. Co.*, 71 *Hun* (N. Y.) 431.—*Palmeri v. Manhattan R. Co.*, 53 *Am. & Eng. R. Cas.* 56, 133 *N. Y.* 261, 30 *N. E. Rep.* 1001, 44 *N. Y. S. R.* 894; *affirming* 60 *Hun* 579, 39 *N. Y. S. R.* 23, 14 *N. Y. Supp.* 468.

The corporation, therefore, is liable for acts of injury and insult by an employé, although in departure from the authority conferred or implied, if they occur in the course of the employment. *Palmeri v. Manhattan R. Co.*, 53 *Am. & Eng. R. Cas.* 56, 133 *N. Y.* 261, 30 *N. E. Rep.* 1001, 44 *N. Y. S. R.* 894; *affirming* 60 *Hun* 579, 39 *N. Y. S. R.* 23, 14 *N. Y. Supp.* 468.

**98. — Illustrations.**—A railway company is liable for an injury to a passenger received in obeying the direction of a brakeman, when leaving a train, to cross a certain bridge over the company's land, which had been erected by third persons. *Chance v. St. Louis, I. M. & S. R. Co.*, 10 *Mo. App.* 351.—APPROVING *McDonald v. Chicago & N. W. R. Co.*, 26 *Iowa* 145.—DISTINGUISHED IN *Cincinnati, H. & I. R. Co. v. Carper*, 31 *Am. & Eng. R. Cas.* 36, 112 *Ind.* 26, 11 *West. Rep.* 223, 13 *N. E. Rep.* 122.

A brakeman who is directed to notify gentlemen not accompanying ladies not to enter certain cars, really exceeds his authority in ejecting a passenger after he has been told and yet entered the forbidden car, but as he does no more than the company had a right to do, he is acting within the scope of his authority in so doing, and it is proper to refuse a nonsuit on the ground that he was not. *Peck v. New York C. & H. R. R. Co.*, 4 *Hun* (N. Y.) 236, 6 *T. & C.* 436.

A company is liable for the tortious act of its baggage-master and conductor toward a passenger seeking to have baggage checked, whether such act be in the cars or about the

baggage-car, or between that and the passenger-car, necessary to be traversed by the passenger in the legitimate business of travel; and for a stronger reason is the company liable, when it appears that such employés have been retained in the service after such acts. *Gastway v. Atlanta & W. P. R. Co.*, 58 *Ga.* 216, 16 *Am. Ry. Rep.* 99.

At the time the conductor took up a ticket he told the passenger that the train did not usually stop at the station that the ticket was for, but on that day he thought it would stop for water. The train did not stop, and after the station was passed the conductor asked the passenger why he did not get off, and in the conversation that followed he grew angry and used insulting language to the passenger. *Held*, that the company was not liable. *Parker v. Erie R. Co.*, 5 *Hun* (N. Y.) 57.—REVIEWING *Hamilton v. Third Ave. R. Co.*, 53 *N. Y.* 25.

Whether or not the conductor had the right to order plaintiff to step off the cars while in motion, or the plaintiff was required to obey it, the former did give the order and the latter obeyed it. Under the facts, the act of the conductor was that of the corporation, and the latter cannot escape responsibility on account of its own wrong. *Central R. Co. v. DeBray*, 71 *Ga.* 406.—APPLIED IN *Mason v. Richmond & D. R. Co.*, 111 *N. Car.* 482.

**99. False representations.**—An incorporated company cannot be called on to answer in damages, in its corporate capacity, for the false and fraudulent representations of its agent, unless it authorized the representations. *Houston & T. C. R. Co. v. McKinney*, 8 *Am. & Eng. R. Cas.* 7-3, 55 *Tex.* 176.

Where an agent having authority to purchase cross-ties for a railroad, but in this case really acting as agent for another party, purchases ties which are delivered and put on the cars of the road, falsely representing to the seller that the railroad wants them to lend to another road, the company will be liable for the price of the ties. *South Western R. Co. v. Knott*, 48 *Ga.* 516.

After examining the accounts of a station-agent, an auditor of the defendant company assured plaintiff that there was a shortage of \$600 only, that payment of that amount would make the accounts straight and satisfactory, and that if it were paid the station-agent would not be discharged. Relying on this representation, plaintiff contributed

§200 to make up the said amount (the balance being contributed by others), which was paid directly to the company. The station agent took no part in this negotiation. Afterwards it was discovered that the shortage was about \$1200, and the station-agent was discharged. The company, however, refused to pay the plaintiff the \$200. *Held*, that the money was obtained by the company by the false representation of its auditor as to the amount of the shortage, and that plaintiff was entitled to recover it, although the auditor believed his statement to be true when he made it. *Burke v. Milwaukee, L. S. & W. R. Co.*, 83 *Wis.* 410, 53 *N. W. Rep.* 692.

**100. Improper starting of train.**—

A person starting a train that is lying on the track with the fire banked, whether it be done by an employé of the company or by some one else, does not represent the company in so doing, and it will not be liable for any damage caused thereby. *Mars v. Delaware & H. C. Co.*, 54 *Hun* (N. Y.) 625, 28 *N. Y. S. R.* 228, 8 *N. Y. Supp.* 107. —*APPLYING ROUNDS v. Delaware, L. & W. R. Co.*, 64 *N. Y.* 136; *Isaacs v. Third Ave. R. Co.*, 47 *N. Y.* 122.

While a company will not be liable if a person without any authority should cause injury to another by starting a train, still a brakeman who starts a train in the absence of an engineer by the consent of the fireman, cannot be said to be without authority so as to relieve the company from liability. *Dillingham v. Parker*, 80 *Tex.* 572, 16 *S. W. Rep.* 335.

**101. Placing torpedoes on track.**

—Where employés of a railroad company are intrusted with torpedoes to be placed upon the track for the purpose of signaling trains, the company will be liable to one injured by such torpedoes, when they are placed on the track with no necessity for their use, and contrary to the company's orders. *Harriman v. Pittsburgh, C. & St. L. R. Co.*, 32 *Am. & Eng. R. Cas.* 37, 45 *Ohio St.* 11, 12 *N. E. Rep.* 451. —*REVIEWING Hoffman v. New York C. & H. R. R. Co.*, 87 *N. Y.* 25.

**102. Putting trespassers off trains**

—**Company liable.**—To charge a railroad company for the wilful wrong of an employé in forcing a boy from a freight train while in motion, whereby he is injured, it must appear that the act was in the course of the employé's business and within the scope of

his authority, the boy being a trespasser, not a passenger. *Bess v. Chesapeake & O. R. Co.*, 53 *Am. & Eng. R. Cas.* 64, 35 *W. Va.* 492, 14 *S. E. Rep.* 234.

Under section 1307 of the Iowa Code, a railroad company is liable for the tort of a brakeman committed in removing a trespasser from a train, whether the wrongful act be merely one of negligence or a wilful and criminal wrong. *Marion v. Chicago, R. I. & P. R. Co.*, 64 *Iowa* 568, 21 *N. W. Rep.* 86. —*NOT FOLLOWING De Camp v. Mississippi & M. R. Co.*, 12 *Iowa* 348; *Cooke v. Illinois C. R. Co.*, 30 *Iowa* 202; *McKinley v. Chicago & N. W. R. Co.*, 44 *Iowa* 314. —*ADHERED TO IN Marion v. Chicago, R. I. & P. R. Co.*, 66 *Iowa* 585.

A corporation is liable for the injury where one of its conductors kicks a trespassing boy from a car platform while it is in motion, and thus injures the boy. *Hoffman v. New York C. & H. R. R. Co.*, 12 *J. & S. (N. Y.)* 1. —*DISTINGUISHING Cohen v. Dry Dock, E. B. & B. R. Co.*, 8 *J. & S.* 368. —*NOT FOLLOWING Isaacs v. Third Ave. R. Co.*, 47 *N. Y.* 122; *Jackson v. Second Ave. R. Co.*, 47 *N. Y.* 274.

Though an engineer acts beyond the scope of his employment in asking a boy to ride with him, yet as it is his duty, under the rules of the company, to prevent persons from riding on the engine, the company may be liable for his wrongfully putting the boy off while the train was in motion, and thus injuring him. *Chicago, M. & St. P. R. Co. v. West*, 125 *Ill.* 320, 15 *West. Rep.* 170, 17 *N. E. Rep.* 788; *affirming* 24 *Ill. App.* 44. —*DISTINGUISHED IN North Chicago St. R. Co. v. Olds*, 40 *Ill. App.* 421.

A brakeman engages in his master's business, and within the general scope of his employment, when removing a trespasser from a train, and the company is liable for his tortious act while so engaged, though the wrong committed be a mistake of judgment. *Lang v. New York, L. E. & W. R. Co.*, 51 *Hun* (N. Y.) 603, 22 *N. Y. S. R.* 110, 4 *N. Y. Supp.* 565; *affirmed in* 123 *N. Y.* 656, *mem.*

It is within the scope of the general authority of a brakeman on a freight train to prevent trespassers from getting on the train, and to remove such persons who wrongfully get thereon; but if, in so doing, he does not exercise care and caution, but acts wantonly or maliciously, and an injury results, the company is liable. *Kansas City,*



*Fl. S. & G. R. Co. v. Kelly*, 34 *Am. & Eng. R. Cas.* 281, 36 *Kan.* 655, 14 *Pac. Rep.* 172.

Persons who have charge of a switching engine have the implied authority to remove trespassers therefrom, but if in doing so such persons act in a reckless manner, showing indifference as to consequences, the company will be liable. *Carter v. Louisville, N. A. & C. R. Co.*, 22 *Am. & Eng. R. Cas.* 360, 98 *Ind.* 552, 49 *Am. Rep.* 780.—DISTINGUISHING *Towanda Coal Co. v. Heeman*, 86 *Pa. St.* 418; *Marion v. Chicago, R. I. & P. R. Co.*, 59 *Iowa* 428, 44 *Am. Rep.* 687. NOT FOLLOWING *Isaacs v. Third Ave. R. Co.*, 47 *N. Y.* 122, 7 *Am. Rep.* 418. QUOTING *Jeffersonville R. Co. v. Rogers*, 38 *Ind.* 116, 10 *Am. Rep.* 103. RECONCILING *Hoffman v. New York C. & H. R. R. Co.*, 87 *N. Y.* 25, 41 *Am. Rep.* 337; *Benton v. Chicago, R. I. & P. R. Co.*, 55 *Iowa* 496; *Cauley v. Pittsburgh, C. & St. L. R. Co.*, 4 *Am. & Eng. R. Cas.* 533, 98 *Pa. St.* 498. REVIEWING *Rounds v. Delaware, L. & W. R. Co.*, 64 *N. Y.* 129, 21 *Am. Rep.* 597.—DISTINGUISHED IN *Cincinnati, H. & I. R. Co. v. Carper*, 31 *Am. & Eng. R. Cas.* 36, 112 *Ind.* 26, 11 *West. Rep.* 223, 13 *N. E. Rep.* 122.

A street-car company will be liable for the tortious wilful act of its driver in throwing a person off the car and injuring him, where it appears that the driver has the power to expel disorderly persons. *Lyons v. Broadway & S. A. R. Co.*, 32 *N. Y. S. R.* 232, 10 *N. Y. Supp.* 237.—FOLLOWING *Stewart v. Brooklyn & C. T. R. Co.*, 90 *N. Y.* 588.

If the driver of a street-car in ordering a trespasser from the car acts in such a way as to justify the person in believing that the driver means to inflict bodily punishment, it cannot be said to be contributory negligence on the part of such person to jump from the car when in a position of danger, whereby he is injured, and the company will be liable for the injury. *Hogan v. Central Park, N. & E. R. R. Co.*, 33 *N. Y. S. R.* 702, 11 *N. Y. Supp.* 588, 26 *J. & S.* 322; reversed in 124 *N. Y.* 647, *mem.*, 36 *N. Y. S. R.* 352.—APPLYING *McCann v. Sixth Ave. R. Co.*, 117 *N. Y.* 505, 27 *N. Y. S. R.* 834.

**103. — company not liable.**—The act of an employé of a railroad company in removing a trespasser from a train cannot be considered the act of the company unless he was employed generally to remove trespassers, or specifically to remove the

particular trespasser. *Marion v. Chicago, R. I. & P. R. Co.*, 8 *Am. & Eng. R. Cas.* 177, 59 *Iowa* 428, 13 *N. W. Rep.* 415.—REVIEWED IN *Farber v. Missouri Pac. R. Co.*, 32 *Mo. App.* 378.

A street-car company is not liable for the act of its conductor in wilfully putting a boy off a car in such a way as to injure him. *Murphy v. Central Park, N. & E. R. R. Co.*, 16 *J. & S. (N. Y.)* 96.—FOLLOWING *Rounds v. Delaware, L. & W. R. Co.*, 64 *N. Y.* 129.

It cannot be assumed, in the absence of proof, that a brakeman on a freight train was authorized to remove a trespasser. *Farber v. Missouri Pac. R. Co.*, 116 *Mo.* 81, 22 *S. W. Rep.* 631; affirming 32 *Mo. App.* 378.—QUOTING *McGowan v. St. Louis & I. M. R. Co.*, 61 *Mo.* 528.

The burden to show such authority is on plaintiff, and an instruction which casts this burden on the company is erroneous. *International & G. N. R. Co. v. Anderson*, 53 *Am. & Eng. R. Cas.* 59, 82 *Tex.* 516, 17 *S. W. Rep.* 1039.

Where it is not the duty of a brakeman to remove trespassers from trains, the company is not liable to one injured in being removed in a reckless and cruel manner. *Towanda Coal Co. v. Heeman*, 86 *Pa. St.* 418.—DISTINGUISHED IN *Carter v. Louisville, N. A. & C. R. Co.*, 98 *Ind.* 552.

A railroad company is not liable for the tortious act of a brakeman in removing a person from a train without orders from the conductor, where it appears that he was permitted to remove persons only where he had such orders. *Marion v. Chicago, R. I. & P. R. Co.*, 8 *Am. & Eng. R. Cas.* 177, 59 *Iowa* 428, 13 *N. W. Rep.* 415.—DISTINGUISHED IN *Carter v. Louisville, N. A. & C. R. Co.*, 98 *Ind.* 552.

Any liability of a railroad company for the act of its brakeman in forcing from a freight train one who got on to steal a ride is founded on the law of agency, and not on that of common carriers. *Farber v. Missouri Pac. R. Co.*, 116 *Mo.* 81, 22 *S. W. Rep.* 631.—QUOTING *Snyder v. Hannibal & St. J. R. Co.*, 60 *Mo.* 413.

After ordering plaintiff, a boy of 13, and other boys, who were trespassing, to leave a freight train while in motion, the brakeman threatened to kick plaintiff off, and thus acting under the belief that he would be kicked off, he jumped and was injured. Held, that the act of the brakeman was not such a discharge of his duty to remove

trespassers as to make the company liable. *Hughes v. New York & N. H. R. Co.*, 4 *J. & S. (N. Y.)* 222.—APPLYING *Jackson v. Second Ave. R. Co.*, 47 *N. Y.* 277. FOLLOWING *Cosgrove v. Ogden*, 49 *N. Y.* 258; *Isaacs v. Third Ave. R. Co.*, 47 *N. Y.* 137.

**104. — Illustrations.**—Proof that a boy, eight years old, jumped upon the steps of a passenger-car, and was kicked from the car by the conductor or brakeman, while the train was moving ten miles per hour, and injured,—*Held*, to entitle the boy to a verdict against the company. *Hoffman v. New York C. & H. R. R. Co.*, 4 *Am. & Eng. R. Cas.* 537, 87 *N. Y.* 25, 41 *Am. Rep.* 337; *affirming* 14 *J. & S.* 526.—APPLIED IN *Rown v. Christopher & T. S. R. Co.*, 34 *Hun (N. Y.)* 471; *Molloy v. New York C. & H. R. R. Co.*, 10 *Daly (N. Y.)* 453. RECONCILED IN *Carter v. Louisville, N. A. & C. R. Co.*, 98 *Ind.* 552. REVIEWED IN *Hariman v. Pittsburgh, C. & St. L. R. Co.*, 32 *Am. & Eng. R. Cas.* 37, 45 *Ohio St.* 11.

A boy of 11 was stealing a ride on a freight train at a point where boys were in the habit of riding about 6 or 8 blocks to a station. In this case, after telling the boy to get off, the brakeman ran him from one car to the other by throwing coal at him. Finally he rolled a large lump of coal against him and knocked him from the train, which was moving at the rate of 10 miles an hour. *Held*, that the act was sufficiently within the scope of employment of the brakeman to make the company liable. *Lang v. New York, L. E. & W. R. Co.*, 4 *N. Y. Supp.* 565.

**105. Various other tortious acts.**—Where a clerk of a city railway company has assigned to him the general and special duty of looking for and arranging the evidence in cases where the company is sued by persons injured, or claiming to be injured, by the carelessness of those intrusted with the management and operation of its street-cars, and is empowered generally to perform that duty without special directions, with general authority to use his own judgment in the performance of his duties, if he, in looking up the evidence in the case, wrongfully and without authority offers money to a witness to keep him from testifying against the company, or to influence his testimony, the company must be held responsible for his act, and it is proper evidence against the company. *Chicago City R. Co. v. McMahon*, 8 *Am. & Eng. R. Cas.*

68, 103 *Ill.* 485.—APPLIED IN *Evansville & T. H. R. Co. v. McKee*, 22 *Am. & Eng. R. Cas.* 366, 99 *Ind.* 519, 50 *Am. Rep.* 102.

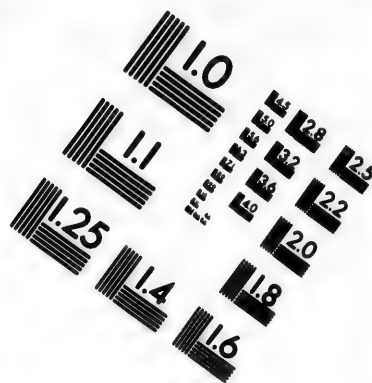
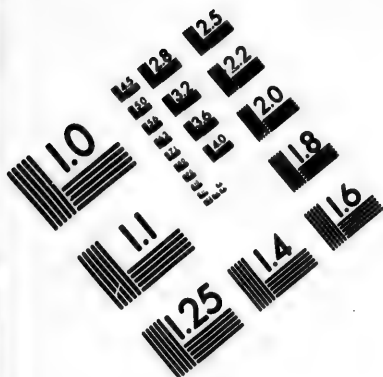
After the wreck of a train carrying cattle, it being necessary to remove them from the cars, some of them escaped, and plaintiff's son was employed by a section foreman, who was instructed to reload the cattle. The son took plaintiff's horse and used it in driving the cattle together without plaintiff's knowledge or consent. *Held*, that the company was liable for an injury to the horse. *Atchison, T. & S. F. R. Co. v. Randall*, 38 *Am. & Eng. R. Cas.* 255, 40 *Kan.* 421, 19 *Pac. Rep.* 783.

A street-car company may be liable for double the amount of damages sustained by a person from the bite of a dog kept by the employes of the company, and where it is sought to charge the company for such damages, evidence tending to show that the dog was kept by an employe about the company's stables, with the knowledge and implied consent of the superintendent, will justify a finding that the dog was kept by the company. *Barrett v. Malden & M. R. Co.*, 3 *Allen (Mass.)* 101.

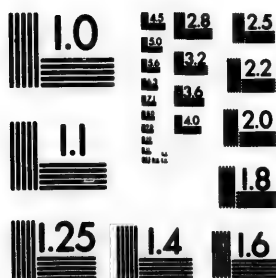
If a third person is injured by an employe while using a derrick in the manner contemplated by the company, the latter is liable. *Conlon v. Eastern R. Co.*, 15 *Am. & Eng. R. Cas.* 99, 135 *Mass.* 195.

A railroad company will be liable for the act of its employes acting under the direction of its general superintendent, for forcibly entering upon premises and expelling the occupant, and threatening him with injury if he returns, as such act will be deemed the official act of the company, and ratified where the company retains possession. *People ex rel. v. New York C. R. Co.*, 51 *N. Y.* 623.

Plaintiff, having been at divers times employed by defendant railroad as a detective in cases of property stolen from its cars, was requested by its agent, duly authorized for that purpose, to go from one station to another, to aid in discovering persons who had stolen property from its cars at the latter station, and the means of conveyance furnished was a hand-car. *Held*, that the company was liable for any injury to plaintiff while riding thereon, caused either by the unfitness of such means of conveyance, or by any negligence of its servants in running the same. *Pool v. Chicago, M. & St. P. R. Co.*, 3 *Am. & Eng. R. Cas.*, 332, 53



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*Wis.* 657, 11 *N. W. Rep.* 15.—DISTINGUISHED *Hoar v. Maine C. R. Co.*, 70 *Me.* 65; *Eaton v. Delaware, L. & W. R. Co.*, 57 *N. Y.* 382.—QUOTED IN *Cincinnati, H. & I. R. Co. v. Carper*, 31 *Am. & Eng. R. Cas.* 36, 112 *Ind.* 26, 11 *West. Rep.* 223, 13 *N. E. Rep.* 122. REVIEWED IN *Dixon v. Chicago & A. R. Co.*, 109 *Mo.* 413.

If a foreman employed by a corporation has authority to employ and discharge workmen, it is within the scope of his authority to use such reasonable force as may be necessary to remove a discharged workman from the shop, and the corporation will be liable if he uses excessive force for that purpose. A complaint which charges the use of excessive force by the foreman, and injury caused thereby to such a workman, states a cause of action against the corporation. *Rogahn v. Moore Mfg. & F. Co.*, 79 *Wis.* 573, 48 *N. W. Rep.* 669.

A cloak-room clerk accustomed to take parcels for passengers to a train when there is no porter, while running back from the train to which he has taken a passenger's parcel, is acting within the scope of his employment, and if he runs against and upsets a woman, causing her death, the company is liable. *Milner v. Great Northern R. Co.*, 50 *L. T.* 367.

#### 4. Ratification.

**106. General rules.**—A contract signed by an authorized agent may be ratified by the company, and for this purpose its acts are sufficient. *Taylor v. Albemarle S. Nav. Co.*, 105 *N. Car.* 484, 10 *S. E. Rep.* 897.

A railway company may ratify the act of its servant in assaulting and imprisoning a passenger to compel him to pay his fare. *Eastern Counties R. Co. v. Broom*, 6 *Exch.* 314, 15 *Jur.* 297, 20 *L. J. Exch.* 196, 6 *Railw. Cas.* 743.—NOT FOLLOWED IN *Goff v. Great Northern R. Co.*, 3 *El. & El.* 672, 30 *L. J. Q. B.* 148, 7 *Jur. N. S.* 286, 3 *L. T.* 850.

The same rule of construction must apply with reference to ratifying contracts made by agents, whether the contract is favorable to the principal or not; so a railway corporation cannot claim the benefit of favorable contracts made by its agents, where a liberal construction does not place such contracts entirely beyond the corporate powers of the company, but shields itself by a more limited construction when the contracts are unfavorable. *Noyes v. Rutland &*

*B. R. Co.*, 27 *Vt.* 110.—FOLLOWED IN *Middlebury Bank v. Rutland & W. R. Co.*, 30 *Vt.* 159; *Sturges v. Knapp*, 31 *Vt.* 1.

**107. What amounts to a ratification, generally.\***—In case of railway corporations the rule is, that to amount to a ratification the adoption or confirmation of the wrongful act of the servant must be shown to be the act of some chief officer, vice-principal, or *alter ego* of the company, who must be proved to possess under the company sufficient authority and discretion to act and speak for the company. *Gulf, C. & S. F. R. Co. v. Reed*, 48 *Am. & Eng. R. Cas.* 423, 80 *Tex.* 362, 15 *S. W. Rep.* 1105.

Where a railroad takes and applies, to its own benefit, ties delivered upon the line of its road, it will be liable in *indebitatus assumpsit* for their value; and it matters not whether the person who procured their delivery was the agent of the company or its contractor. *Toledo, W. & W. R. Co. v. Chew*, 67 *Ill.* 378.

Where a railroad corporation receives railroad material bought upon its credit and for its use by one of its officers, without authority, and uses it for the corporate purposes for which it was designed, this is an adoption and ratification of the act of the officer. The directors using the material so purchased are bound to inquire, and are presumed to know, whether it was paid for or not; it is not, therefore, essential to an adoption of the act of the officer that the directors should know the terms of the contract. *Scott v. Middletown, U. & W. G. R. Co.*, 4 *Am. & Eng. R. Cas.* 114, 86 *N. Y.* 200; *affirming* 21 *Hun.* 231.—DISTINGUISHED IN *Holmes v. Board of Trade*, 81 *Mo.* 137.

Where the general manager of an association of railway companies has notice of the existence and terms of a special contract for transporting grain at a reduced rate, made by an agent of one of the associated companies, and afterward furnishes cars and transports the grain, this is evidence from which a ratification of the special contract may be found. *Erie & P. Dispatch v. Cecil*, 112 *Ill.* 180.

Proof that a committee of the directors of a railroad company had examined certain notes issued by the treasurer and had pronounced them genuine, and that re-

\* Ratification of unauthorized act by corporation, see note, 12 *AM. & ENG. R. CAS.* 651.

ports had been made showing that interest had been made on them, and had been accepted, is sufficient to show a ratification of the act of the treasurer in attaching the corporate seal to the notes. *St. James Parish v. Newburyport & A. H. R. Co.*, 141 Mass. 500, 6 N. E. Rep. 749. — DISTINGUISHING *Kelley v. Newburyport & A. H. R. Co.*, 141 Mass. 496.

If an agent of a railroad company submits a controversy to arbitration, subsequent appearance by the company without objection to the act of the agent in making the references, is a ratification of the act of the agent and estops the company from making objection to the award, so far as the act of the agent, touching the submission, is concerned. *Memphis & C. R. Co. v. Scruggs*, 50 Miss. 284.

Where a municipal corporation is authorized to appoint commissioners to issue its bonds in aid of a railroad, and such commissioners have apparently been appointed, and have issued what purport to be the obligations of the municipality, if such obligations be treated by the municipality as valid through a number of years by both affirmative and negative acts, then both the municipality and its taxpayers cannot raise an objection to the validity of the bonds, based upon an irregularity in the appointment of the commissioners, or in issuing the bonds. *Calhoun v. Delhi & M. R. Co.*, 28 Hun. (N. Y.) 379, 64 How. Pr. 291. — QUOTING *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30. — DISTINGUISHED IN *Craig v. Andes*, 15 Am. & Eng. R. Cas. 662, 93 N. Y. 405.

The managers of a railroad company are presumed to know as much about the conduct of their agents as is known to everybody else; and if they know that their agents are accustomed to pay out illegal notes in making change to passengers, this is an approval of the acts done, and the corporation is responsible. *Commonwealth v. Ohio & P. R. Co.*, 1 Grant Cas. (Pa.) 329.

**108. — Illustrations.**—In an action against a company to recover damages for its failure to deliver cotton, the receipt for which was signed by a subagent, who testified that he was appointed as such subagent by the local agent; that the president and superintendent of the road knew that he was acting as subagent and made no objection; that the officers of the road had frequently given him directions about the

business, and that freight had been delivered on at least two occasions on receipts similar to the one in question, *held*, that the evidence was admissible as tending to prove a ratification of the agency. *Alabama & T. R. R. Co. v. Kidd*, 29 Ala. 221. — QUOTED IN *Alabama G. S. R. Co. v. Hill*, 76 Ala. 303.

Where plaintiff did work for a railroad and the company afterwards made a beneficial use of it, and one claiming to act as an agent of the company made the contract for the work, and where the company's engineer promised to make out a voucher for it, and the chief-engineer laid out the work, and an assistant engineer signed a voucher therefor with plaintiff's name therein as contractor, *held*, that the agency might be presumed and a promise to pay what the work was reasonably worth might be inferred. *Rockford, R. I. & St. L. R. Co. v. Wilcox*, 66 Ill. 417.

Language used by the superintendent of a company admitting and justifying an assault by one of its drivers was held to bind the company. *Malecek v. Tower Grove & L. R. Co.*, 57 Mo. 17, 9 Am. Ry. Rep. 1.

The treasurer of a company notified the company that he would be absent temporarily, and directed that remittances be made to the firm of which he was a member. An account was kept of the corporation funds with the firm, and while the funds were in the firm's hands it appeared that a report had been made to the stockholders that the funds were in the hands of the firm as "financial agents." *Held*, that this was a sufficient ratification of the act of the treasurer in selecting the firm as the proper depositories, and relieved him from liability. *New York, P. & B. R. Co. v. Dixon*, 114 N. Y. 80, 21 N. E. Rep. 110, 22 N. Y. S. R. 684; reversing 47 Hun. 634, 13 N. Y. S. R. 445.

A company when sued for a balance due for constructing its road denied the authority of certain officers to make the contract under which the work was performed. It appeared that after the work was commenced a large number of the directors were present, and in their presence the president, who had made the contract, pointed out plaintiff as the contractor, and that the company recognized him thereafter as the contractor; furnished him with materials and made payments on the work. *Held*, a sufficient ratification of the contract to bind the company.

*Cunningham v. Massena Springs & Ft. C. R. Co.*, 44 N. Y. S. R. 723, 63 Hun 439.

Plaintiff sued defendants, who manufactured apparatus for heating cars, to recover compensation for making sales, claiming that he had a contract with the president, but the company denied the authority of the president to make such contract. It appeared that after plaintiff had procured certain propositions he submitted the same, and that the vice-president and the superintendent marked the same "approved," after some slight changes. *Held*, that this was a sufficient ratification of the services of the plaintiff to make the company liable. *Smith v. Martin A. F. Car Heater Co.*, 47 N. Y. S. R. 26, 64 Hun 639, 19 N. Y. Supp. 285.

The judge charged the jury that if the assumed agent "received the cotton, and the plaintiffs assented to or ratified the act afterwards, the plaintiffs could not recover the value of the cotton; but the proof must satisfy you that he was such agent, or that his act in receiving the cotton was ratified or acquiesced in by the plaintiffs." *Held*, the charge was not accurate, nor full enough under the circumstances. He should have explained what would be considered a ratification, and should have told the jury that if after the acts of the assumed agent were known to the plaintiffs, they did not in a reasonable time repudiate them they would be bound by them. *Western & A. R. Co. v. McElwee*, 6 Heisk. (Tenn.) 208.

**109. What acts do not amount to a ratification.**—Where a party, without authority, signs the name of another as a subscriber to so much corporate stock, the subsequent declaration of the party that he had subscribed to that amount of stock is not a ratification of the act. *Rutland & B. R. Co. v. Lincoln*, 29 Vt. 206.

The fact that a solicitor of a railway company conducts proceedings against a passenger taken into custody and charged with refusing to pay his fare and assaulting the company's inspector, is no evidence of ratification by the company. *Eastern Counties R. Co. v. Broom*, 6 Exch. 314, 15 Jur. 297, 20 L. J. Exch. 196, 6 Railw. Cas. 743.—NOT FOLLOWED IN *Goff v. Great Northern R. Co.*, 3 El. & El. 672, 30 L. J. Q. B. 148, 7 Jur. N. S. 286, 3 L. T. 850.

**110. When ratification may be inferred, generally.**—Where there was evidence tending to show that a party, bargaining for railroad ties, was acting as the

agent of a company, and it appeared that the company when it accepted the road from its contractors used the remaining ties, left by the seller upon the road, *held*, that it might be inferred that the agent's contract was approved by the company. *Toledo, W. & W. R. Co. v. Chew*, 67 Ill. 378.

Where an agent of a railroad contracts to carry goods beyond the initial carrier's line, if it appear that the agent has been making such contracts for several years, then the assent of the railroad thereto may be presumed, and it will be estopped from denying his authority so to contract, though as a matter of fact the agent had no direct authority to do so. *Perkins v. Portland, S. & P. R. Co.*, 47 Me. 573.

An open and notorious custom of all the ticket agents and conductors employed by a railroad company, to pay out illegal notes in making change to passengers, is evidence that should be left to a jury, to enable them to determine whether the custom was authorized by the company. *Commonwealth v. Ohio & P. R. Co.*, 1 Grant Cas. (Pa.) 329.

Where a clerk of a railway engineer agrees for the purchase of ties on special terms, and the ties are afterwards delivered and used by the company, there is evidence from which a jury may infer a special contract by the directors on behalf of the company which would be valid under 8 & 9 Vict. c. 16, s. 97, on the terms agreed to by the clerk. *Pauling v. London & N. W. R. Co.*, 7 Railw. Cas. 816, 8 Exch. 867, 23 L. J. Exch. 105.

**111. —from acquiescence.**—Where a railroad station agent engages a surgeon to attend an employé injured in the service of the company, although such act is unauthorized, yet the company will be liable if, upon due notice given to the general superintendent, the act is not repudiated. *Toledo, W. & W. R. Co. v. Prince*, 50 Ill. 26.—FOLLOWING *Toledo, W. & W. R. Co. v. Rodrigues*, 47 Ill. 188.

Where a railroad company denies the authority of its vice-president to appoint local agents to look after the company's timbered lands, and it is sought to repudiate a contract made by a local agent, a jury is warranted in finding that the company knew of and acquiesced in the authority of the vice-president, and was consequently bound by a contract made by a local agent, upon proof that such agents for a number

of years had acted for the company in selling stumpage and timber; that the company at one time had brought suit on a contract made by one of these agents and had recovered money which was paid to the local agent; that such agents were in the habit of making annual reports to the vice-president and to pay the moneys in their hands into the treasury of the company. *Chicago & N. W. R. Co. v. James*, 24 Wis. 388.

Certain parties went upon the right of way of a railroad company and rented an office and put up a sign, styling it the office of the railroad, and without giving any notice that they were representing other parties than the company, and with the knowledge of the company, bought goods. *Held*, that the company was bound, though it might afterward turn out that such parties were in fact representing a foreign corporation of the same name. *Florida, M. & G. R. Co. v. Varnedoe*, 81 Ga. 175, 7 S. E. Rep. 129.

Where a conductor brought a brakeman, who had received a serious injury while in defendant's service, to plaintiff's house to be cared for, and immediately telegraphed to the officers of the company the facts, and they never notified plaintiff that the company should not be responsible, *held*, that the company was liable to plaintiff what his services were reasonably worth. *Indianapolis & St. L. R. Co. v. Morris*, 67 Ill. 295.

**112. — from silence.** — If local agents of a company have represented it as being a common carrier beyond its own line for a sufficient length of time to raise the presumption that the corporation has knowledge of such representations, and has assented to them, then the company will be estopped from denying the truth of such representations. *Perkins v. Portland, S. & P. R. Co.*, 47 Me. 573. — NOT FOLLOWED IN *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 N. H. 339.

If an agent was entering into contracts for work upon the road, employing men and purchasing supplies in the name of the defendant and upon its credit, and its officers knew of this fact, or had been advised of instances of like conduct, and remained silent, the defendant cannot now be heard to say that the agent was acting without authority, even though the same had been originally limited by secret instructions.

*Hirschmann v. Iron Range & H. B. R. Co.*, 97 Mich. 384.

A master-mechanic for a particular division of the company's road employed a physician to attend an employé who was injured while in the performance of his duties, and while under the immediate order of said master-mechanic, and stated that he would see that the company paid said physician for his services. The physician performed his services, looking to the company for his pay and giving to it the credit (although at the same time he charged upon his books said services to the employé, and made no charge upon his books against the company). While he was so performing his services he made out a bill for the same against the railroad company and inclosed it in a letter which stated his employment by the master-mechanic, and asked that the company pay the bill, and sent the letter and bill to the assistant-superintendent of the company for said division, but neither said division-superintendent nor the company ever paid any attention to the bill or letter. *Held*, sufficient to uphold a finding by the jury that said division-superintendent ratified the employment of the physician by the master-mechanic. *Pacific R. Co. v. Thomas*, 19 Kan. 256, 17 Am. Ry. Rep. 483.

A director of a railroad company employed an attorney, and authorized him to employ local counsel to attend to a suit in which the company was interested. *Held*, that the report of the original attorney, of his employment of the local counsel, to the director, was legal notice to the corporation, and the continued silence of the director amounted, in law, to the ratification by him, and through him by the corporation, of the action of the original attorney in the premises. *Pittsburgh, C. & St. L. R. Co. v. Wooley*, 12 Bush (Ky.) 451.

A director of a railroad, financially embarrassed, to relieve the company, subscribed for additional shares in the name of a non-resident stockholder, and immediately notified him, who made no reply. The dividends on his original stock, for the next seven years, were applied to paying up this new stock, when the stockholder demanded his dividends, claiming that the director was not authorized to make the subscription. *Held*, that the director could not be regarded as an intermeddler in making the subscription, and that the silence of the stockholder for



so long a time was evidence of a ratification. *Philadelphia, W. & B. R. Co. v. Cowell*, 28 Pa. St. 329.

**113. — from retention of employee in service of company.**—Where a company is sued for the misconduct of an employé, and a verified copy of the complaint is served upon it which charges such misconduct, this is notice to the company; and proof that the employé was retained in service, and promoted thereafter, may be given as tending to prove ratification of his act. *Bass v. Chicago & N. W. R. Co.*, 42 Wis. 654, 15 Am. Ry. Rep. 45.

Immediate notice to a conductor that a brakeman has been guilty of misconduct toward a passenger is the same as notice to the company, and though the charge against the brakeman may be disbelieved, yet the company retains him in its service at its peril. *Bass v. Chicago & N. W. R. Co.*, 42 Wis. 654, 15 Am. Ry. Rep. 45.

Where the issue is made as to whether a company has ratified the tortious acts of a brakeman toward a passenger, for which he would be liable in exemplary damages, proof that the brakeman had been retained and promoted is not conclusive as to the question of ratification, but the question may be left to the jury. *Bass v. Chicago & N. W. R. Co.*, 42 Wis. 654, 15 Am. Ry. Rep. 45.

The retention of an employé who has been guilty of negligence is not a sufficient ratification of his act to subject his employer to liability for exemplary damages. *International & G. N. R. Co. v. McDonald*, 42 Am. & Eng. R. Cas. 211, 75 Tex. 41, 12 S. W. Rep. 860. *Dillingham v. Anthony*, 37 Am. & Eng. R. Cas. 1, 73 Tex. 47, 3 L. R. A. 634, 11 S. W. Rep. 139.

The mere retention of a servant after his wilful tort, without proof of knowledge of the tortious quality of the act on the part of the master, is insufficient to authorize an inference of a ratification of the tort. *Donivan v. Manhattan R. Co.*, 1 Misc. (N. Y.) 368, 49 N. Y. S. R. 722, 21 N. Y. Supp. 457.

The retaining of a servant through whose alleged negligence injuries were caused in its service by a railway company, after it has been sued, when the alleged acts of negligence are denied by the servant, does not of itself constitute a ratification of the alleged act. *McGown v. International & G. N. R. Co.*, 85 Tex. 289, 20 S. W. Rep. 80.

Ratification of an unauthorized and unlawful act can only be inferred from acts

which evince clearly and unequivocally the intention to ratify, and not from acts which may be readily and satisfactorily explained without involving such intention. In this case, there being no witness, and plaintiff and the porter giving very different accounts of the affair, ratification of the misconduct imputed by plaintiff cannot be inferred from the retention of the porter, when the defendant so acted because it honestly believed the latter, and thought it just to maintain the *status quo*, at least until judicial determination of the conflict. Nor is the case affected by the fact that the porter was criminally convicted of assault and battery, when, in such a trial, the porter was not heard as a witness in his own defence, and when he might have been so convicted on evidence falling far short of the outrage charged by the plaintiff. *Williams v. Pullman Palace Car Co.*, 33 Am. & Eng. R. Cas. 407, 40 La. Ann. 87, 3 So. Rep. 631.

**114. Principal must know the facts.**—A railroad company will not be held to have ratified an unauthorized contract made by the foreman of a gang of construction men to pay for goods furnished the men, upon proof that it paid for a certain part of the goods in ignorance of the true terms of the contract, and that it was in the habit of collecting accounts against its employés, in favor of third parties, by retaining their wages. *Steunkle v. Chicago, S. F. & C. R. Co.*, 42 Mo. App. 73.

The ratification of an unauthorized contract by an agent of a railroad company, to pay \$50 per day damages for hindering the use of a certain logging road by the construction of the railroad's right of way across same, cannot be shown by proof that the contractors for the railroad raised the tracks of the logging road and put in a crossing, in the absence of any showing that the work was done in pursuance of such agreement, and with knowledge thereof by the party and its agents sought to be charged. *Haynes v. Tacoma, O. & G. H. R. Co.*, 7 Wash. 211, 34 Pac. Rep. 922.

The agent of a railroad company agreed with a landowner that a railroad should be located across his lands on a particular location, where the damages would be less than where the surveyors had located it, which agreement was ratified by the managing officers of the company; but by some oversight the road was not located as agreed upon, and the landowner filed a bill in

equity to have the location reformed to correspond to the agreement. It appeared that such managing officers and the agent had no power to enter into such an agreement. *Held*, that the bill could not be sustained unless it appeared that the directors had had notice of the agreement. *Central Mills v. New York & N. E. R. Co.*, 127 Mass. 537.

In an action against a railway company for a breach of contract in failing to receive stone it appeared that the company's foreman was authorized to contract for 400 yards of stone to be used at a certain place, which was delivered and paid for. Plaintiff claimed that the foreman contracted for 1200 yards additional, to be used at another place, which he was ready to deliver, and which the company refused to receive, claiming that such amount had never been contracted for. Plaintiff's evidence tended to show that the foreman did contract for 1200 yards in the name of the company. The evidence on behalf of the company tended to show that the foreman was only authorized to contract for the 400 yards; the chief engineer and other officers had no knowledge that he had undertaken to contract for any other stone. *Held*, that the question of the foreman's authority to contract for the 1200 yards should have been left to the jury. *Gano v. Chicago & N. W. R. Co.*, 49 Wis. 57, 5 N. W. Rep. 45.

**115. Effect of ratification, generally.**—Where a railroad company has recognized a person as its agent by adopting and ratifying his acts in dealing with third persons, then the company is estopped from denying the agency of the party, so far as it would tend to injure the parties that he had dealt with. *Summerville v. Hannibal & St. J. R. Co.*, 62 Mo. 391.

If a party who has contracted with a person representing a proposed corporation, ratifies a portion of the contract, it binds him to a performance of all other material parts of the contract. *Titus v. Catawissa R. Co.*, 5 Phila. (Pa.) 172.

One will be bound by the contract made in his name by another, as his agent, when such other has been accustomed to make similar contracts for him, as his agent, with his knowledge and approbation, and which have been recognized and ratified by him. *Texas Pac. R. Co. v. Nicholson*, 21 Am. & Eng. R. Cas. 133, 61 Tex. 491.

Where the superintendent of a railroad

company has formerly directed an undertaker to look after employes who had been killed, and the company had paid for such services, the authority of the superintendent to make further orders cannot be disputed by the company. *Missouri Pac. R. Co. v. Turner*, 2 Tex. App. (Civ. Cas.) 720.

While the Alabama Code provides that an answer for a corporation as garnishee cannot be made by any person unless he shall make affidavit that he is the duly authorized agent of the corporation, yet the defect of such answer without the prescribed affidavit is waived by a subsequent appearance of the corporation, and recognizing the authority of the agent to answer, and any recitals in the record to the effect that the parties appeared by attorney and consented to continuances, is sufficient to show appearance by the corporation. *Merritt & C. R. Co. v. Whorley*, 74 Ala. 264.

Ratification by a railroad company of the act of its agent in selling and conveying lands, where such ratification is only claimed to result from the company having knowledge of the acts of the agent, will only operate as an equitable estoppel, and is not available in a court of law where the legal title to the land is involved. *Standifer v. Swann*, 78 Ala. 88.

A corporation is liable as for conversion, where its agent receives property from a debtor to the company and sells it toward payment of the debt, if the company receives and retains the proceeds of the sale, though it appear that the agent acted in his own name and without authority. *Dunn v. Hartford & W. H. R. Co.*, 43 Conn. 434.

Where the keeper of a boarding-house of a railroad company has been in the habit of purchasing provisions from the plaintiff, for the use of the boarding-house, and the bills for such provisions had been, from time to time, paid by the company, the plaintiff might properly regard him as an agent *pro tanto* of the company, and would be justified, in the absence of any notice to the contrary, in dealing with him as such. *Philadelphia, W. & B. R. Co. v. Weaver*, 34 Md. 431.

**116. Retroactive effect.**—A ratification of an act, done by one assuming to be an agent, relates back, and is equivalent to a prior authority. When, therefore, the adoption of any particular form or mode is necessary to confer the authority in the first instance, there can be no valid ratification,

except in the same manner. *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205.

Where a corporation has recognized and ratified the acts of its agents, it cannot afterward impeach their authority by showing that they were not regularly appointed under a vote of the directors. *Flynn v. Des Moines & St. L. R. Co.*, 63 Iowa 490, 19 N. W. Rep. 312.

Where a person employs an attorney to represent a railroad company, the power of the person so employing the attorney will be implied from the subsequent act of the company in adopting or recognizing the employment. *Southgate v. Atlantic & P. R. Co.*, 61 Mo. 89.

The agent of corporation contracted with the Secretary of the Treasury to manufacture and furnish the department a large number of seal-locks for cars carrying merchandise through the United States and Canada. The department refused to accept the goods, and, when sued, set up the defence that the agent, not being formally authorized to contract, his act could not be considered the contract of the corporation. *Held*, that the previous authority of the agent was a matter of no consequence after the corporation accepted the contract and manufactured the goods; that it was not a matter that the government could take advantage of. *International S. & R. Supply Co. v. United States*, 13 Ct. of Cl. 209.

#### IV. PUBLIC AGENTS.

**117. Power to contract.**—Where, by certain work done by the government railway authorities in the city of St. John the pipes for the water supply of the city were interfered with, the claimants are entitled to recover for the cost reasonably and properly incurred by their engineer in good faith, to restore their property to its former safe and serviceable condition, under an arrangement made with the chief engineer of the government railway, and upon his undertaking to indemnify the claimants for the cost of said work. *Reg. v. St. John Water Com'rs*, 19 Can. Sup. Ct. 125; *affirming* 2 Can. Exch. 78.

Where the suppliant contracted with the Crown for the construction of certain public works, to be done in a certain manner to the satisfaction of the proper officer of the department of railways and canals, the con-

tract stipulating that the express covenants contained therein should be the only ones binding upon the Crown, *held*, that said officer had no power to vary or add to the terms of the contract so as to bind the Crown by any new promises. *Mayes v. Reg.*, 2 Can. Exch. 403.

A person who had a contract to grade the station grounds on the line of a government road that was being constructed, was told by one of the commissioners having charge of the construction to fill a cellar which was on the railway grounds, but which was not included in the contract for grading the grounds. It appeared that it was necessary to have the filling done at once. The commissioner said that he would pay for the extra work, and being applied to afterward said that he would see the engineer and have the amount put in the estimates, to be paid by the government. On the failure of the government to pay, suit was brought against the commissioner for the amount. A nonsuit was allowed, and a rule to set aside the nonsuit was dismissed by a divided court. *Sumner v. Chandler*, 18 New Brun. 175.

**118. — to waive forfeitures.**—While the law is that the Crown is not bound by estoppels, and no laches can be imputed to it, and there is no reason why it should suffer by the negligence of its officers, yet forfeitures may be waived by the acts of ministers and officers of the Crown. *Peter-son v. Reg.*, 2 Can. Exch. 67.

**119. Liability for negligence of.**—The Crown is liable for an injury to the person received on a public work resulting from negligence of which its officer or servant, while acting within the scope of his duty or employment, is guilty. *Martin v. Reg.*, 2 Can. Exch. 328.

#### AGREEMENT.

**Between connecting lines, see CONNECTING LINES, 4, 5.**

**— connecting passenger carriers, see CARRIAGE OF PASSENGERS, IV, 2.**

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**What necessary to give right to conventional subrogation, see SUBROGATION, 1.**

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**ALABAMA.**

Aid to railroads by the state, see **STATE AID**, 1.

**ALEXANDRIA & WASHINGTON R. CO.**

1. **Comprises two distinct corporations.**—The Alexandria & Washington R. Co., incorporated by the act of Feb. 27, 1854, of the Legislature of Virginia, though the same in name with the company incorporated by the act of Congress of March 3, 1863, is another and distinct company. *Washington, A. & G. R. Co. v. Martin*, 7 D. C. 120.

The Virginia Company can exercise no control or ownership over that portion of the road which extends north of the Virginia line. *Washington, A. & G. R. Co. v. Martin*, 7 D. C. 120.

The railroad which extends from the depot of the Baltimore & Ohio Railroad in Washington to Alexandria, Va., is made up of two roads, each owned by a different company, though both companies may have the same name and style in both jurisdictions, and consist of the same natural persons. *Washington, A. & G. R. Co. v. Martin*, 7 D. C. 120.

2. **Privileges conferred by act of Congress.**—The act of Congress of 1863 may have intended to confer the privileges it contains upon the Virginia corporation known as the Alexandria & Washington R. Co., yet that company never accepted the act, nor did it construct either the bridge or the road extending from Washington to the boundary line of Virginia. *Washington, A. & G. R. Co. v. Martin*, 7 D. C. 120.

Whatever doubt there may have been as to what company the act of 1863 was intended to benefit, all doubt was removed by the act of Congress of July 26, 1866, where it was expressly affirmed that the Washington, Alexandria and Georgetown R. Co. was the company intended to be referred to. *Washington, A. & G. R. Co. v. Martin*, 7 D. C. 120.

**ALTERATION.**

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- by-laws, see **BY-LAWS**, 1.
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**AMOUNT.**

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Of compensation for carrying the mails, see **CARRIAGE OF MAILS**, 15.

— damage, competency of witnesses to testify to, see **WITNESSES**, V, 1.

— goods carried, discrimination as to, see **DISCRIMINATION**, III.

Right to costs as dependent upon, see **COSTS**, 1.

Statutory limit of, in actions for causing death, see **DEATH BY WRONGFUL ACT**, XIII, 1.

What necessary to make tender, see **TENDER**, 4.

**ANDROSCOGGIN R. CO.**

1. **Construction of charter—Obstruction of highway.**—A provision in the charter to the effect that the railroad shall be so constructed as not to obstruct the safe and convenient use of a highway, imposes a continuing obligation upon the company, requiring it not only to construct but to keep its road in a condition so as not to obstruct the use of the highway. *Wellcome v. Leeds*, 51 Me. 313.

2. **Power to mortgage—Extension of road.**—Under the Maine Statutes of 1860, chs. 450 and 475, which authorize the railroad to extend from Leeds to Topshan, the original road and the extension are treated as distinct roads, and while the statutes authorize a mortgage of both, they are to be mortgaged as distinct roads, with distinct franchises, and do not authorize a mortgage of both the original line and the extension as a unit. *Bath v. Miller*, 51 Me. 341.

**ANIMALS.**

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#### I. STATUTES.\*

##### 1. Constitutionality.

1. Generally.—The provisions of the Indiana act of March 4, 1863 (Acts 1863, p. 25), for the enforcements of judgments against railroad companies for stock killed, are not repugnant to sections 22 and 23 of article 4 of the constitution of Indiana. *Toledo, L. & B. R. Co. v. Nordyke*, 27 Ind. 95.

Chapter 94 of the Kansas laws of 1874, relating to the killing or wounding of stock

\* Statutes making railroad companies *prima facie* liable for killing stock, see 56 AM. & ENG. R. CAS. 143, *abstr.*

by railroads, is valid. *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573, 9 Am. Ry. Rep. 400.

The legislature of Indiana did not transcend its powers or violate private rights in enacting that railroad companies shall fence their roads, or pay for the cattle they kill or injure. *Madison & I. R. Co. v. Whiteneck*, 8 Ind. 217.\*

Texas Rev. St. Art. 4245, providing that a railroad company failing to fence its track shall pay for stock killed, is constitutional, as a valid exercise of the police power of the state. *Texas C. R. Co. v. Childress*, 64 Tex. 346.—APPROVING *Zeigler v. South & N. Ala. R. Co.*, 58 Ala. 594.—FOLLOWED IN *Gulf, C. & S. F. R. Co. v. Hudson*, 77 Tex. 494, 14 S. W. Rep. 158.

**2. Special or local laws.**—Section 2835 of the Rev. Stat. of Missouri is not in violation of article 4, section 53, subdivision 17, of the constitution of Missouri, prohibiting the general assembly from passing "any local or special law regulating the jurisdiction of justices of the peace," nor is it a special act because directed against railroads alone. *Phillips v. Missouri Pac. R. Co.*, 24 Am. & Eng. R. Cas. 368, 86 Mo. 540.—QUOTING *Humes v. Missouri Pac. R. Co.*, 82 Mo. 221.

The Tennessee act of 1891, ch. 101, making unfenced railroads liable for all damages to owners of live stock injured by trains in motion is not unconstitutional, as being class legislation, on account of applying only to unfenced railroads, since the end sought by this act is the prevention of accidents on railroads by compelling the inclosure of the track in such manner as to prevent live stock from going on the roads, the duty being imposed not so much in the interest of the owners of the animals as in the interest of the general public, under the police power of the state. *Illinois C. R. Co. v. Crider*, 56 Am. & Eng. R. Cas. 157, 91 Tenn. 489, 19 S. W. Rep. 618.

**3. Recitals in caption or title of the act.**—The Tennessee act of 1891, ch. 101, making railroads liable for all damages to live stock caused by moving trains is not invalid because it amends in part another statute without reciting or otherwise mentioning the amended law, since the provision of the constitution requiring such recital does not apply to repeals or amend-

ments resulting from necessary implication. *Illinois C. R. Co. v. Crider*, 56 Am. & Eng. R. Cas. 157, 91 Tenn. 489, 19 S. W. Rep. 618.

**4. Inconsistency between act and title.**—Where the subject expressed in the title of a statute is the provision of "a means for the collection of claims for cattle and other stock destroyed by railroad," and the body of the statute declares or creates an absolute liability which did not exist prior to its passage, such new liability is not within the subject expressed in the title, and to this extent the statute is inoperative under section 14 of article 4 of the Constitution of Florida. *Savannah, F. & W. R. Co. v. Geiger*, 29 Am. & Eng. R. Cas. 274, 21 Fla. 669, 58 Am. Rep. 697.

The Indiana act of March 1, 1853, entitled "an act to provide compensation to the owners of animals killed or injured by the cars of any railroad company," is not void for inconsistency with its title, on the ground that it excepts railroads that are fenced, nor because the act is special; but the third section is unconstitutional, so far as it inflicts a penalty for appealing a suit and failing to reduce the judgment 20 per cent. *Madison & I. R. Co. v. Whiteneck*, 8 Ind. 17.—DISTINGUISHED IN *Jeffersonville R. Co. v. Martin*, 10 Ind. 416. FOLLOWED IN *Lafayette & I. R. Co. v. Martin*, 8 Ind. 251; *Madison & I. R. Co. v. Burnett*, 8 Ind. 277; *Jeffersonville R. Co. v. Hardy*, 9 Ind. 495.

**5. Embracing more than one subject.**—The Kentucky act to amend the charter of the Louisville and Frankfort Railroad Company, approved Feb. 23, 1856, provided in section 6 that for all damages done to stock or other property injured or killed by its locomotives or trains of cars running on its road, when the same is done by its carelessness or the carelessness of its agents and employes, and in section 7, that "actions for injuries to stock and other property on said road by the company or its agents must be brought within six months after such injury." Said act, defining the liability and limitation, is constitutional, and relates to but one subject, and that is clearly expressed in the title. *O'Bannon v. Louisville, C. & L. R. Co.*, 8 Bush (Ky.) 348.

When the object of an act is to subject railroad companies operating unfenced tracks to absolute liability for all damages resulting from their unfenced condition, there can be no constitutional objection to

\* Constitutionality of fence law, see note, 22 AM. & ENG. R. CAS. 564.

embodying in the same act the means by which this liability may be ascertained and enforced, and if the means are in themselves valid their inclusion in the act would not subject it to the inhibition of the constitution concerning bills containing more than one subject. *Illinois C. R. Co. v. Crider*, 56 Am. & Eng. R. Cas. 157, 91 Tenn. 489, 19 S. W. Rep. 618.

The title of the Washington act of 1883, being "An act to secure to the owners of live stock payment of the full value of all animals killed or maimed by railroad trains," sections 1 and 8 are not invalid, as embracing more than one object not sufficiently expressed in the title. *Dacres v. Oregon R. & N. Co.*, 1 Wash. 525, 20 Pac. Rep. 601.

#### **B. Imposing absolute liability.\*—**

(1) *Generally.*—The Indiana statute making railroad companies absolutely liable for injuries to animals, without proof of negligence, where the road is not fenced, is in the nature of a police regulation for the security of the public and the preservation of human life. *Indianapolis & C. R. Co. v. Parker*, 29 Ind. 471.

(2) *What have been held constitutional.*—The fact that the statute makes railroad companies liable for losses not resulting from their negligence, and thus imposes upon them a liability that is not imposed upon other citizens, does not render it unconstitutional. Since extraordinary rights and privileges are granted such corporations, they cannot complain of the liabilities which attach. *Louisville & N. R. Co. v. Belcher*, 40 Am. & Eng. R. Cas. 228, 89 Ky. 193, 12 S. W. Rep. 195.

Act of Tennessee, 1891, ch. 101, fixing upon unfenced railroads absolute liability for injuries done to live stock by their moving trains, is constitutional and valid, both as a whole and in its details, when its scope and purpose are ascertained by a correct construction. This act should not be treated as a mere scheme for the speedy collection of damages for injuries to live stock, although that is incidentally provided for. Its chief purpose is to prevent accidents on railroads, and, viewed from this higher ground, it is a proper and legitimate exercise of the police power of the state.

\* Constitutionality of statute imposing absolute liability for killing stock, see 38 AM. & ENG. R. CAS. 279, *abstr.*; 56 Id. 228, *abstr.* See also *post* 29, 31, 120, 238, 239, 281.

*Illinois C. R. Co. v. Crider*, 56 Am. & Eng. R. Cas. 157, 91 Tenn. 489, 19 S. W. Rep. 618.

It is competent for the Legislature of Utah to prescribe certain things that shall be done by railroad companies to prevent injuries to stock, a failure to do which will make the company absolutely liable. *Stimpson v. Union Pac. R. Co.*, 9 Utah 123, 33 Pac. Rep. 369.

A statute imposing an absolute liability for injuries resulting from a failure to fence a railroad, and excluding the defence of contributory negligence, is within the police power, and is constitutional. *Quackenbush v. Wisconsin & M. R. Co.*, 62 Wis. 411, 22 N. W. Rep. 519.—DISTINGUISHED IN *Holum v. Chicago, M. & St. P. R. Co.*, 80 Wis. 299. *Indianapolis & C. R. Co. v. Parker*, 29 Ind. 471.

(3) *What have been held unconstitutional.*—The Alabama act of 1877 (§§ 1710-1715, Code of 1876), leaving to the jury to determine whether damage to stock caused by trains is chargeable to negligence on the part of the railroad employes, repeals §§ 1704-1709 of the same Code, making corporations absolutely liable for stock killed, which is unconstitutional, as taking property without due process of law. *Zeigler v. South & N. Ala. R. Co.*, 58 Ala. 594.—APPROVED IN *Denver & R. G. R. Co. v. Outcalt*, 2 Colo. App. 395; *Texas C. R. Co. v. Childress*, 64 Tex. 346. CRITICISED AND DISTINGUISHED IN *Grissell v. Housatonic R. Co.*, 32 Am. & Eng. R. Cas. 349, 54 Conn. 447, 9 Atl. Rep. 137. DISTINGUISHED IN *Sullivan v. Oregon R. & N. Co.*, 19 Oreg. 319. FOLLOWED IN *South & N. Ala. R. Co. v. Morris*, 65 Ala. 193; *Cateril v. Union Pac. R. Co.*, 2 Idaho 540, 21 Pac. Rep. 416; *Bielenberg v. Montana Union R. Co.*, 38 Am. & Eng. R. Cas. 275, 8 Mont. 271; *Jensen v. Union Pac. R. Co.*, 6 Utah 253.

Section 3712, Mills Ann. St. of Colorado, fixing upon railroad companies absolute liability for damages for all stock killed or injured, is unconstitutional. *Denver & R. G. R. Co. v. Outcalt*, 2 Colo. App. 395, 31 Pac. Rep. 177. *Denver & R. G. R. Co. v. Davidson*, 2 Colo. App. 443, 31 Pac. Rep. 181.

The Montana Comp. St. § 713, making railroad companies liable for injuring or killing live stock, is unconstitutional, so far as it attempts to make such companies absolutely liable, without regard to any actual



negligence, and in the absence of any law requiring such roads to fence their tracks. *Bielenberg v. Montana Union R. Co.*, 38 *Am. & Eng. R. Cas.* 275, 8 *Mont.* 271, 2 *L. R. A.* 813, 20 *Pac. Rep.* 314.—**DISTINGUISHING** *Thorpe v. Rutland & B. R. Co.*, 27 *Vt.* 140, 62 *Am. Dec.* 625; *Rudemacher v. Milwaukee & St. P. R. Co.*, 41 *Iowa* 302; *Ohio & M. R. Co. v. McClelland*, 25 *Ill.* 123; *Diamond v. Northern Pac. R. Co.*, 6 *Mont.* 580. **FOLLOWING** *Cairo & F. R. Co. v. Parks*, 32 *Ark.* 131; *Zeigler v. South & N. Ala. R. Co.*, 58 *Ala.* 595; *Ohio & M. R. Co. v. Lackey*, 78 *Ill.* 55, 20 *Am. Rep.* 259.—**FOLLOWED IN** *Jensen v. Union Pac. R. Co.*, 6 *Utah* 253.

*Utah Comp. Laws of 1888*, § 2349, making railroad companies absolutely liable for all live stock killed, is in conflict with the fifth amendment of the constitution of the United States, as taking property without due process of law. *Jensen v. Union Pac. R. Co.*, 6 *Utah* 253, 21 *Pac. Rep.* 994.—**FOLLOWING** *Zeigler v. South & N. Ala. R. Co.*, 58 *Ala.* 594; *Bielenberg v. Montana Union R. Co.*, 8 *Mont.* 271, 20 *Pac. Rep.* 314; *Cateril v. Union Pac. R. Co.*, 2 *Idaho* 540, 21 *Pac. Rep.* 416. **REVIEWING** *East Kingston v. Towle*, 48 *N. H.* 57.—**APPROVED IN** *Denver & R. G. R. Co. v. Outcalt*, 2 *Colo. App.* 395. **DISTINGUISHED IN** *Sullivan v. Oregon R. & N. Co.*, 19 *Oreg.* 319.

The act of Washington Territory, approved Nov. 28, 1883 (*Laws of 1883*, p. 51), making railroad companies liable for stock killed where their tracks have not been fenced, regardless of any questions of negligence on the part of the companies, is unconstitutional because it imposes a penalty where no duty to fence is imposed, and would be taking property without due process of law. *Oregon R. & N. Co. v. Smalley*, 42 *Am. & Eng. R. Cas.* 550, 1 *Wash.* 206, 23 *Pac. Rep.* 1008.—**APPROVING** *Bielenberg v. Montana Union R. Co.*, 8 *Mont.* 271. **FOLLOWING** *Dacres v. Oregon R. & N. Co.*, 1 *Wash.* 195, 525, 20 *Pac. Rep.* 601.

Sections 1 and 8 of the Washington Territory act of 1883 (*Laws of 1883*, p. 51) are interdependent with sections 2 and 7 of the same act, which have been declared unconstitutional and must fall with them. *Oregon R. & N. Co. v. Smalley*, 42 *Am. & Eng. R. Cas.* 550, 1 *Wash.* 206, 23 *Pac. Rep.* 1008.—**OVERRULING** *Dacres v. Oregon R. & N. Co.*, 1 *Wash.* 525, 20 *Pac. Rep.* 601; *Oregon R. & N. Co. v. Dacres*, 1 *Wash.* 195.

Sections 1 & 8 of the Washington Terri-

tory act (*Laws 1883*, p. 51), making railroad companies liable for all stock killed upon track unless it is fenced, are constitutional and not so connected with the rest of the act as to become invalid therewith. *Dacres v. Oregon R. & N. Co.*, 1 *Wash.* 195, 525; 20 *Pac. Rep.* 601.—**DISTINGUISHING** *Timm v. Northern Pac. R. Co.*, 3 *Wash. T.* 299.—**OVERRULED IN** *Oregon R. & N. Co. v. Smalley*, 1 *Wash.* 206, 23 *Pac. Rep.* 1008.

**7. Providing for the collection of claims, generally.**—By the Colorado stock-killing statute of 1885, §§ 13 and 14, relating to the collection of claims for stock killed by railroad trains, a railway company might be denied "the equal protection of the laws," and deprived of its property "without due process of law." Such a statute is unconstitutional. *Wadsworth v. Union Pac. R. Co.*, 56 *Am. & Eng. R. Cas.* 145, 18 *Colo.* 600; 33 *Pac. Rep.* 515.—**REVIEWING** *Denver & R. G. R. Co. v. Henderson*, 10 *Colo.* 1.

The meaning of sections 1 and 2 of "An act to provide a means for the collection of claims for cattle and other stock destroyed by railroads" (chapter 2060, Acts of Florida, 1875), is that the "affidavit of the owner or some other person acquainted with the stock killed or maimed" shall be conclusive evidence of the amount of damages sustained by the owner, and such provision is void as not providing due process of law. *Savannah, F. & W. R. Co. v. Geiger*, 29 *Am. & Eng. R. Cas.* 274, 21 *Fla.* 669, 58 *Am. Rep.* 697.

**8. — appraisement of damages without a jury.**—Where the failure to fence a railroad is made conclusive evidence of negligence whenever live stock is killed upon such unfenced road, the statute is not unconstitutional by reason of making the valuation fixed by a board of appraisers *prima facie* evidence of the value of the stock killed, since the report of the appraisers might be contradicted and set aside. *Illinois C. R. Co. v. Crider*, 56 *Am. & Eng. R. Cas.* 157, 91 *Tenn.* 489, 19 *S. W. Rep.* 618.

But a statute making such an appraisement conclusive evidence as to damages is unconstitutional. *Graves v. Northern Pac. R. Co.*, 19 *Am. & Eng. R. Cas.* 436, 5 *Mont.* 556, 51 *Am. Rep.* 81.

A law which imposes a liability for stock killed provides for notice of the claim, the appraisal of damages and action for the amount awarded, contains conditions which are not



separable, the right conferred being dependent upon notice and appraisal, and when such statute violates the constitution by denying a trial by jury the whole act must fall, and the provisions of the statute conferring a cause of action for the killing of stock cannot be enforced. *Oregon R. & N. Co. v. Smalley*, 42 Am. & Eng. R. Cas. 550, 1 Wash. 206, 23 Pac. Rep. 1008.—OVERRULING *Dacres v. Oregon R. & N. Co.*, 1 Wash. 525, 20 Pac. Rep. 601.

Act Washington Territory 1883, §§ 2-7, providing that when stock is killed on a railroad the value shall be ascertained by appraisers in a prescribed manner, and the amount shall thereupon become due and payable, are unconstitutional as denying the right of jury trial. *Dacres v. Oregon R. & N. Co.*, 1 Wash. 525, 20 Pac. Rep. 601.

**9. Allowing a reasonable attorney's fee.**—(1) *What have been held constitutional.* Statutes allowing such fees are constitutional. *Peoria, D. & E. R. Co. v. Duggan*, 20 Am. & Eng. R. Cas. 489, 109 Ill. 537, 50 Am. Rep. 619. *Perkins v. St. Louis, I. M. & S. R. Co.*, 103 Mo. 52, 15 S. W. Rep. 320.—NOT FOLLOWING *Wilder v. Chicago & W. M. R. Co.*, 70 Mich. 382; *Rinear v. Grand Rapids & I. R. Co.*, 70 Mich. 620.—*Wabash, St. L. & P. R. Co. v. Lavieux*, 14 Ill. App. 469.—FOLLOWED IN *Wabash, St. L. & P. R. Co. v. Murphy*, 14 Ill. App. 472.

A provision making a company liable for an increase of damages to the extent of all reasonable attorneys' fees, in the event that it shall unsuccessfully litigate its liability for such "*prima facie* value established by the said appraisers," is not unconstitutional as imposing a burden upon one class of litigants in favor of another, since this legislation is intended to compel railroad companies to fence their tracks and is within the police power of the state. *Illinois C. R. Co. v. Crider*, 56 Am. & Eng. R. Cas. 157, 91 Tenn. 489, 19 S. W. Rep. 618.

Texas act of 1889, ch. 107, § 1, providing that where a claim not exceeding \$50 for stock killed by a railway is not paid within 30 days after being presented, the plaintiff may recover, in addition to the damages, an attorney fee not exceeding \$10, if an attorney be employed, does not violate the state constitution (art. 3, § 56) prohibiting special laws relating to the collection of debts, or in all cases where a general law is applicable; nor does it violate the provision of the constitution, that property, etc., shall not be

taken without due process of law. *Gulf, C. & S. F. R. Co. v. Ellis (Tex.)*, 49 Am. & Eng. R. Cas. 509, 18 S. W. Rep. 723.—REVIEWING *International & G. N. R. Co. v. Cocke*, 64 Tex. 151; *International & G. N. R. Co. v. Dunham*, 68 Tex. 231.

Neither is such law so opposed to the principles of republican government, and so discriminating in its character, as to take away from the legislature the power to pass it. *Gulf, C. & S. F. R. Co. v. Ellis (Tex.)*, 49 Am. & Eng. R. Cas. 509, 18 S. W. Rep. 723.

Texas act of April 5, 1889, allowing the recovery of an attorney's fee, not to exceed \$10, in addition to the other damages, in actions against railroads for the killing of live stock, where the claim does not exceed \$50, is not unconstitutional, as discriminating unjustly against railroads; neither is it unconstitutional as discriminating between litigants. *Gulf, C. & S. F. R. Co. v. Ellis (Tex. Civ. App.)*, 21 S. W. Rep. 933.—EXPLAINING *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. Rep. 207.

(2) *What have been held unconstitutional.*—The Alabama act of Feb. 3, 1877, § 6, allowing an attorney fee not to exceed \$20, to be taxed as part of the costs against the unsuccessful appellant in every suit against a railroad for stock killed, is unconstitutional. *South & N. Ala. R. Co. v. Morris*, 65 Ala. 193.—REVIEWED IN *Chicago, St. L. & N. R. Co. v. Moss*, 20 Am. & Eng. R. Cas. 555, 60 Miss. 641.

An act of the legislature providing that where stock is killed or injured by railroads the damages shall be assessed by arbitration, and if either party refuses to abide by the award, and takes the case before the courts, and shall not recover a more favorable judgment than the award, such party shall be assessed a reasonable attorney's fee for the opposing litigant, is unconstitutional. *St. Louis, I. M. & S. R. Co. v. Williams*, 49 Ark. 492, 31 Am. & Eng. R. Cas. 555, 5 S. W. Rep. 883.—DISTINGUISHED IN *Illinois C. R. Co. v. Crider*, 91 Tenn. 489.

A law which provides for recovery of a reasonable attorney's fee in case of failure to pay the appraised value within the time prescribed, is void. *Denver & R. G. R. Co. v. Outcall*, 2 Colo. App. 395, 31 Pac. Rep. 177.—APPROVING *Ziegler v. Alabama R. Co.*, 58 Ala. 594; *Rinear v. Grand Rapids & I. R. Co.*, 70 Mich. 620; *Cairo & F. R. Co. v. Parks*, 32 Ark. 131; *Ohio & M. R. Co. v.*

Lackey, 78 Ill. 55; *Jensen v. Union Pac. R. Co.*, 6 Utah 253, 21 Pac. Rep. 994; *Bielenburg v. Montana Union R. Co.*, 8 Mont. 271. DISTINGUISHING *Union Pac. R. Co. v. De Busk*, 12 Colo. 294. QUOTING *Denver & R. G. R. Co. v. Henderson*, 10 Colo. 1.—*Denver & R. G. R. Co. v. Davidson*, 2 Colo. App. 443, 31 Pac. Rep. 181. *Lafferty v. Chicago & W. M. R. Co.*, 71 Mich. 35. *Schut v. Chicago & W. M. R. Co.*, 70 Mich. 438. *Wilder v. Chicago & W. M. R. Co.*, 35 Am. & Eng. R. Cas. 162, 70 Mich. 382.—DISTINGUISHED IN *Illinois C. R. Co. v. Crider*, 91 Tenn. 489. NOT FOLLOWED IN *Perkins v. St. Louis, I. M. & S. R. Co.*, 103 Mo. 52.

The Railroad Stock Killing act of Colorado (Gen. Sts. §§ 13 & 14, ch. 93) and the amendments thereto, allowing an attorney's fee in actions for live stock killed or injured by railroad trains is unconstitutional. *Rio Grande & N. R. Co. v. Vaughn*, 3 Colo. App. 465.

**10. Allowing double damages.**—Statutes allowing double damages for killing or injuring stock are void. *Atchison & N. R. Co. v. Baty*, 6 Neb. 37.—DISTINGUISHED IN *Cairo & St. L. R. Co. v. Peoples*, 92 Ill. 97; *Barnett v. Atlantic & P. R. Co.*, 68 Mo. 56. REFERRED TO IN *Burlington & M. R. Co. v. Webb*, 22 Am. & Eng. R. Cas. 617, 18 Neb. 215. *Denver & R. G. R. Co. v. Outcall*, 2 Colo. App. 395, 31 Pac. Rep. 177.—APPROVING *Zeigler v. Alabama R. Co.*, 58 Ala. 594; *Cairo & F. R. Co. v. Parks*, 32 Ark. 131; *Ohio & M. R. Co. v. Lackey*, 78 Ill. 55; *Jensen v. Union Pac. R. Co.*, 6 Utah 253, 21 Pac. Rep. 994; *Bielenburg v. Montana Union R. Co.*, 8 Mont. 271; *Schut v. Chicago & W. M. R. Co.*, 70 Mich. 433; *Rinear v. Grand Rapids & I. R. Co.*, 70 Mich. 620. DISTINGUISHING *Union Pac. R. Co. v. DeBusk*, 12 Colo. 294. QUOTING *Denver & R. G. R. Co. v. Henderson*, 10 Colo. 1. REVIEWING *Wilder v. Chicago & W. M. R. Co.*, 70 Mich. 382. *Denver & R. G. R. Co. v. Davidson*, 2 Colo. App. 443, 31 Pac. Rep. 181.—FOLLOWING *Denver & R. G. R. Co. v. Outcall*, 2 Colo. App. 395, 31 Pac. Rep. 177. *Rio Grande & N. R. Co. v. Vaughn*, 3 Colo. App. 465.

A statute requiring all railroads to maintain fences and cattle-guards along the line of their roads, and making them liable for double damages for stock killed by reason of a failure to do so, does not deprive a company of its property without due process of law, nor deny it the equal protection of the law, within the meaning of the 14th amend-

ment of the U. S. Constitution. *Missouri Pac. R. Co. v. Humes*, 22 Am. & Eng. R. Cas. 557, 115 U. S. 512, 6 Sup. Ct. Rep. 110.—APPLIED IN *Goodridge v. Union Pac. R. Co.*, 35 Fed. Rep. 35; *Marshall v. Wabash R. Co.*, 46 Fed. Rep. 269. APPROVED IN *Illinois C. R. Co. v. Crider*, 91 Tenn. 489.

It is competent for a legislature to make railroads liable to owners of stock killed by reason of the company's failing to fence, in damages double the value of the stock. The damages above the actual value of the stock are regarded as a penalty, and it rests in the discretion of the legislature to say that they shall go to the property owner instead of the state. *Missouri Pac. R. Co. v. Humes*, 22 Am. & Eng. R. Cas. 557, 115 U. S. 512, 6 Sup. Ct. Rep. 110.—FOLLOWING *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489.

Such laws held constitutional. *Memphis & L. R. Co. v. Horsfall*, 36 Ark. 651; *Mackie v. Central R. Co.*, 54 Iowa 540.—FOLLOWED IN *Mundhenk v. Central R. Co.*, 11 Am. & Eng. R. Cas. 463, 57 Iowa 718. *Welsh v. Chicago, B. & Q. R. Co.*, 53 Iowa 632, 6 N. W. Rep. 13. *Tredway v. Sioux City & St. P. R. Co.*, 43 Iowa 527. *Jones v. Galena & C. U. R. Co.*, 16 Iowa 6. *Phillips v. Missouri Pac. R. Co.*, 24 Am. & Eng. R. Cas. 368, 86 Mo. 540. *Hines v. Missouri Pac. R. Co.*, 28 Am. & Eng. R. Cas. 382, 86 Mo. 629. *Humes v. Missouri Pac. R. Co.*, 82 Mo. 221.—FOLLOWED IN *Meyers v. Union Trust Co.*, 82 Mo. 237; *Burkholder v. Union Trust Co.*, 82 Mo. 572; *Steele v. Missouri Pac. R. Co.*, 84 Mo. 57. *Speelman v. Missouri Pac. R. Co.*, 71 Mo. 43. *Cummings v. St. Louis, I. M. & S. R. Co.*, 70 Mo. 570. *Kaes v. Missouri Pac. R. Co.*, 6 Mo. App. 397. *Barnett v. Atlantic & P. R. Co.*, 68 Mo. 56. *Minneapolis & St. L. R. Co. v. Beckwith*, 38 Am. & Eng. R. Cas. 267, 129 U. S. 26, 9 Sup. Ct. Rep. 207.

**11. Imposing a criminal liability for killing stock.**—The North Carolina Code, §§ 2327-2330, making killing of live stock by railroads in certain counties a crime, and subjecting the president and other officers of roads to indictment, for a refusal to pay for or arbitrate claims for stock killed, is unconstitutional. *State v. Divine*, 31 Am. & Eng. R. Cas. 574, 98 N. Car. 778, 4 S. E. Rep. 477.—QUOTING *San Mateo v. Southern Pac. R. Co.*, 8 Am. & Eng. R. Cas. 10, 13 Fed. Rep. 145.

## 2. Interpretation and Effect.

**12. Legislative intent.**—In the en-

actment of the statute touching animals at large (1 R. S. of Indiana, p. 102), the legislature contemplated the promotion of agricultural interests rather than the protection of railroad property. *New Albany & S. R. Co. v. Tilton*, 12 Ind. 3.—QUOTING *United States v. Brig Neurea*, 19 How. (U. S.) 95.—FOLLOWED IN *New Albany & S. R. Co. v. Mead*, 13 Ind. 258.

The Indiana statute, making railroad companies liable for animals killed or injured by reason of a track not being properly fenced, is a police regulation, and is not intended merely for the protection of owners of live stock along the line of the road, but is intended also as a security to the persons and property being transported over the road. *Jeffersonville, M. & I. R. Co. v. Nichols*, 30 Ind. 321.

The Indiana act of March 1, 1853 (Acts, p. 113), providing compensation to the owners of animals killed or injured by the cars, etc., of railroad companies, is more for the benefit of the public—to guard against injury to passengers—than for the benefit of the owners of the animals. *New Albany & S. R. Co. v. Maiden*, 12 Ind. 10.—APPLIED IN *Indianapolis, P. & C. R. Co. v. Thomas*, 11 Am. & Eng. R. Cas. 491, 84 Ind. 194. FOLLOWED IN *Hart v. Indianapolis & C. R. Co.*, 12 Ind. 478; *Indianapolis & C. R. Co. v. McAhren*, 12 Ind. 552; *Baltimore, P. & C. R. Co. v. Johnson*, 59 Ind. 188. NOT FOLLOWED IN *Locke v. St. Paul & P. R. Co.*, 15 Minn. 350. RECONCILED IN *Terre Haute & R. R. Co. v. Smith*, 16 Ind. 102.

The Indiana act of 1863, relating to the liability of railroads for stock killed, where the road is not fenced, must be construed as having been passed with reference to the decisions of the courts construing the act of 1853 upon the same subject, and the court must construe the latter act with reference to the construction placed upon the former, and therefore hold that the act extends to cases where the owner of the stock killed contributes to the injury by permitting his stock to wander upon the track, unless it appear that the owner desired the injury to happen. *Jeffersonville, M. & I. R. Co. v. Dunlap*, 29 Ind. 426.

**13. Construing entire statute together.**—The liabilities of railroad companies in Alabama for the killing or injury of stock by their cars or locomotives are governed by the statute on "Railroads" found in the Revised Code. (Rev. Code, §§

1399-1416, both inclusive.) This statute is to be taken and construed as one law. *Nashville & D. R. v. Comans*, 45 Ala. 437.—RECONCILED IN *Nicholson v. Mobile & M. R. Co.*, 49 Ala. 205.

Under this law a railroad company, in order to exonerate itself from such liabilities as are imposed by the statute, must show that the injury complained of did not result from the failure on the part of its servants to comply with the requirements of § 1399 of the Revised Code, or from any negligence on the part of the company or its agents. Rev. Code, § 1401. *Nashville & D. R. Co. v. Comans*, 45 Ala. 437.—DISTINGUISHING *Nashville & C. R. Co. v. Peacock*, 25 Ala. 229.

**14. Statutes in pari materia.**—What are known as the stock laws, embodied in Georgia Code, §§ 1449-54, are not in *pari materia* with §§ 3033-4, and do not modify or alter the rule of diligence to be observed in the running of trains; but the existence of a stock law in any locality is a fact which the jury may consider, in ascertaining the amount of care and diligence exercised by each of the parties to the transaction, and in apportioning the extent of the liability of the company, if any. *Central R. Co. v. Hamilton*, 23 Am. & Eng. R. Cas. 207, 71 Ga. 461.

**15. Retrospective statutes.**—The Georgia act of 1843, amending the act of Dec. 3, 1840, defining the liability of the railroad companies of the state for damages for stock killed or injured, and to regulate the mode of proceedings in such cases, is prospective in its operation, and cannot be applied to cases arising before its passage. *Girtman v. Central R. & B. Co.*, 1 Ga. 173.

The Indiana act of 1853, providing for actions against railroads for killing stock, authorized suit to be brought before a justice of the peace only, which limited the recovery to \$100, but by the amendatory act of 1859, if the damage exceeds \$50, suit may be brought in the circuit or common pleas court to recover the value of the stock killed or the amount of the injury thereto; but the act of 1859 only applies to suits for animals killed or injured after its passage. *Indianapolis & C. R. Co. v. Kercheval*, 16 Ind. 84.—QUOTING *Indianapolis & C. R. Co. v. Kinney*, 8 Ind. 402.

The Indiana act of 1859 (Acts 1859, p. 105) is prospective only in its operation, and ap-

plies to animals killed or injured after the taking effect of the law. *Indianapolis & C. R. Co. v. Elliott*, 20 Ind. 430.

In Wisconsin, prior to 1860, railroads were not required to fence, but the cost of fencing was to be assessed as part of the damages when the right of way was taken; and the act of 1860, ch. 268, making it the duty of railroads to fence, did not change the liability of railroads as to those whose lands were taken prior thereto, and such owner cannot recover for stock killed by reason of a failure of the company to fence. *Johnson v. Milwaukee & St. P. R. Co.*, 19 Wis., 137.

The Indiana act of 1853, making railroads liable for stock killed, and the amendment thereto of March 4, 1859, are constitutional and binding as to corporations chartered before the passage of the acts. *Indianapolis & C. R. Co. v. Kercheval*, 16 Ind. 84.—FOLLOWED IN Toledo, W. & W. R. Co. v. Brown, 17 Ind. 353.

New York Laws 1854, ch. 282, amending the general railroad act, which requires every railroad corporation whose line is open for use to erect and maintain fences on the sides of its road, and declaring it liable for damages to cattle in case its fences are not made or are out of repair, applies to a foreign corporation which had, prior to the passage of said act, under and by virtue of an act of the legislature wherein was reserved a right to alter or repeal, extended its road within this state, so far as such road is opened for use within the state; and it is liable for cattle killed which came upon its track through a defective fence, although trespassing. *Purdy v. New York & N. H. R. Co.*, 61 N. Y. 353, 12 Am. Ry. Rep. 138.

**16. Extraterritorial effect.**—The statute of Arkansas, which changed the common law rule by providing that the mere fact of injury or killing of stock by a railroad company shall be *prima facie* evidence of negligence, was not put in force in the Indian Territory by Act Congress, May 2, 1890, § 31 (26 St. p. 81). *Eddy v. Lafayette*, 49 Fed. Rep. 798, 4 U. S. App. 243, 1 C. C. 4. 432.

The Kansas act of Feb. 27, 1874, entitled "An act relating to killing or wounding stock by railroads," is in force within the territory of the Ft. Leavenworth military reservation, notwithstanding the act of Feb. 22, 1875, ceding to the United States jurisdiction over said reservation for military purposes. *Chicago, R. I. & P. R. Co. v.*

*McGlinn*, 11 Am. & Eng. R. Cas. 435, 28 Kan. 274; affirmed in 19 Am. & Eng. R. Cas. 522, 114 U. S. 542, 5 Sup. Ct. Rep. 1005.

**17. Particular words construed.**—A statute giving a remedy for horses and cattle killed by a railroad construed to include mules. *Toledo, W. & W. R. Co. v. Cole*, 50 Ill. 184.—FOLLOWING Ohio & M. R. Co. v. Brubaker, 47 Ill. 462.

Where the statute declares that the said reasonable attorney's fees "shall be fixed by the court trying the case," the word "court" must be construed to mean judge and jury. *Illinois C. R. Co. v. Crider*, 56 Am. & Eng. R. Cas. 157, 91 Tenn. 489, 19 S. W. Rep. 618.

**18. Particular statutes—Alabama.**

—The Alabama act of April 23, 1873, providing a method of selecting three disinterested citizens to appraise the value of live stock killed on any railroad, and the method of payment of the damages assessed is not binding on either the railroads or the owners of stock, and does not increase the liability; and if that mode of ascertaining the value is not pursued the statute is inoperative.\* *South & N. Ala. R. Co. v. Hagood*, 53 Ala. 647, 13 Am. Ry. Rep. 161.

The Alabama act of Feb. 3, 1877, making railroad companies absolutely liable for stock killed, which was declared unconstitutional in 58 Ala. 594, did not apply to stock injured through negligence.† *Simpson v. Memphis & C. R. Co.*, 66 Ala. 85.

**19. — California.**—The California act of 1861, p. 169, § 30, providing that railroad companies shall not be compelled to fence until the owner has fenced his lands abutting the road, does not exempt the company from liability for animals killed on unfenced portions of its road, as provided by § 40 of the act. *Fontaine v. Southern Pac. R. Co.*, 1 Am. & Eng. R. Cas. 159, 54 Cal. 645.—QUOTING *Tracy v. Troy and B. R. Co.*, 38 N. Y. 437.

**20. — Florida.**—The act of 1887, ch. 3740. Laws of Florida, making the killing of live stock by a railroad company *prima facie* evidence of negligence, operates upon the remedy and does not change the basis of liability in such cases. *Jacksonville, T. & K. W. R. Co. v. Garrison*, 30 Fla. 557, 11 So. Rep. 929.

**21. — Georgia.**—Section 2972, Georgia Code, is limited in terms to personal injuries and does not apply to stock killing cases.

\* See ante, 8.    † See ante, 6.

*Georgia R. & B. Co. v. Neely*, 56 Ga. 540.

**22. — Indiana.**—The sections of the Indiana statutes concerning decedents' estates relating to appeals are applicable only to appeals from decisions rendered in proceedings provided for in that statute, and have no relation to a case prosecuted to recover damages for injury to stock. *Louisville, N. A. & C. R. Co. v. Etzler*, 4 Ind. App. 31, 34 N. E. Rep. 669.

The Indiana act of 1853, in relation to the liability of railroad companies, whose roads are not fenced, for killing stock, does not apply to actions in the courts of common pleas and circuit courts, but only to such as are brought in justices' courts. *Evansville & C. R. Co. v. Ross*, 12 Ind. 446. *Toledo, W. & W. R. Co. v. Hibbert*, 14 Ind. 509.—DISTINGUISHING *Whiteneck v. Madison & I. R. Co.*, 8 Ind. 217. *Jeffersonville R. Co. v. Martin*, 10 Ind. 416. *Indianapolis, P. & C. R. Co. v. Fisher*, 15 Ind. 203.—FOLLOWING *Jeffersonville R. Co. v. Martin*, 10 Ind. 416.

The Indiana act of 1859 extended the rule established by the act of 1853 for the decision of causes brought in justices' courts against railroad companies for killing stock, to actions of the same class brought in courts of common pleas and circuit courts. *Evansville & C. R. Co. v. Ross*, 12 Ind. 446.

**23. — Maryland.**—By Maryland acts of 1838 and 1846, relating to stock injured or killed by train, the legislature did not intend to interfere with the *time-tables* of the company, or to limit the rate of speed for the trains; while the act leaves the company in the full exercise of its rights in this respect, it imposes upon them the duty of exercising the highest degree of care and caution. *Keech v. Baltimore & W. R. Co.*, 17 Md. 32.

**24. — Tennessee.**—An association to secure to its members compensation for their live stock killed by railroad companies, where the members are to share jointly all expenses of litigation, including attorneys' fees, is not illegal under Tennessee Code, § 2450, to the effect that a plaintiff shall not agree to give any greater sum of money, or any greater or less portion of the property in litigation, upon any contingency based on the result of the suit. *Mobile & O. R. Co. v. Etheridge*, 16 Lea (Tenn.) 398.

**25. — Texas.**—Under the Texas

statutes the liability of a railroad company for killing or injuring stock in operating their trains is *prima facie* absolute.\* *Houston & T. C. R. Co. v. Loughbridge*, 1 Tex. App. (Civ. Cas.) 754.

**26. — Washington.**—Section 1 of the Washington act, which makes the railroad company liable for stock killed on the railroad, is not merely declaratory of the common law, but, as shown by § 8, which removes the liability if a proper fence is maintained, the statute makes failure to fence evidence of negligence. *Dacres v. Oregon R. & N. Co.*, 1 Wash. 525, 20 Pac. Rep. 601.

### 3. Repeal.

**27. What operate as repealing statutes.**—(1) *Alabama.*—The Alabama Code of 1876, §§ 1704-1709, relating to the liability of railroads for damages for injuries to live stock, are repealed by a later statute embraced in §§ 1710-1715. *Georgia Pac. R. Co. v. Fullerton*, 79 Ala. 298.

(2) *Georgia.*—The Georgia act of 1847, § 5, defining the liability of the various railroad companies of the state for injuries to live stock, is repealed by the act of 1854. *Jones v. Central R. & B. Co.*, 21 Ga. 104.

(3) *Missouri.*—The Missouri act of 1879 (Rev. Stat. ch. 159), provides for the restraining of swine. In 1883 (Laws of Mo. 1883, p. 26), the legislature adopted an act which provides for the restraining "of an animal of the species of horse, mule, ass, swine, sheep, or goat." This latter act was intended to regulate the whole subject; and, on the principle that "a subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must operate to repeal the former," it repealed the act of 1879. *Berkshire v. Missouri Pac. R. Co.*, 28 Mo. App. 225.—QUOTED IN *Crumley v. Kansas City, C. & S. R. Co.*, 32 Mo. App. 505.

(4) *Tennessee.*—The provisions of the Tennessee Code declaring the liability of railroads for injury to live stock by moving trains are modified, if not superseded, by the provisions of the Acts of 1891, ch. 101. *Cincinnati, N. O. & T. P. R. Co. v. Russell*, 92 Tenn. 108, 20 S. W. Rep. 784.

**28. What do not operate as repealing statutes.**—(1) *Illinois.*—The Illinois act of 1867 "to prevent domestic

\* See ante 6.

animals from running at large in certain counties" is not so far inconsistent with and repugnant to the general railroad law, requiring railroad companies to fence their roads, as by necessary implication to repeal the latter; and where animals escape from their inclosure within such counties, without the fault or knowledge of the owner, and stray upon a railroad track at a point where the company have failed to comply with the law requiring them to fence, and are killed by collision with trains, the company are responsible. *Ohio & M. R. Co. v. Jones*, 63 Ill. 472, 7 Am. Ry. Rep. 477.

(2) *Indiana*.—The Indiana acts of April 8 and 13, 1885, relating to the fencing of railroad rights of way, do not assume to remove the pre-existing liability of railroad corporations for the failure to fence their roads, and, except so far as farm crossings and gates are concerned, the liability of railroad companies for injuring animals on account of the unfenced condition of the track remains as it was before said acts of 1885 were passed. *Louisville, E. & St. L. R. Co. v. Hart*, 2 Ind. App. 130, 28 N. E. Rep. 218.—QUOTING *Jeffersonville, M. & I. R. Co. v. Dunlap*, 112 Ind. 93.—QUOTED IN *Toledo, St. L. & K. C. R. Co. v. Jackson*, 5 Ind. App. 547.—*Jeffersonville, M. & I. R. Co. v. Dunlap*, 31 Am. & Eng. R. Cas. 512, 112 Ind. 93, 13 N. E. Rep. 403.—FOLLOWED IN *Pennsylvania Co. v. McCarty*, 112 Ind. 322. QUOTED IN *Louisville, E. & St. L. R. Co. v. Hart*, 2 Ind. App. 130; *Wabash R. Co. v. Williamson*, 3 Ind. App. 190.

The act of April 8, 1885 (Indiana Acts 1885, p. 148), providing for the construction and maintenance of farm crossings by the owners of tracts of land separated by a railroad, and the erection and maintenance of gates if the road is fenced, does not repeal the law rendering railroad companies liable for stock killed or injured by their cars where they do not securely fence in their railroads. *Louisville, N. A. & C. R. Co. v. Hughes*, 2 Ind. App. 68, 28 N. E. Rep. 158.—QUOTED IN *Wabash R. Co. v. Williamson*, 3 Ind. App. 190.

The Indiana acts of 1885 do not repeal the law rendering railroad companies liable for stock killed or injured by their locomotives and cars, where they do not securely fence in their railroads and properly maintain the fences. *Louisville, N. A. & C. R. Co. v. Consolidated Tank Line Co.*, 4 Ind. App. 40, 30 N. E. Rep. 159.

1 D. R. D.—7.

(3) *Missouri*.—The Missouri stock law (Rev. Stats. 1879, p. 1550) does not repeal the statute which requires railroad companies to fence their roads. *Holland v. West End N. G. R. Co.*, 16 Mo. App. 172.

(4) *Wisconsin*.—The Wisconsin act of 1872, ch. 119, §§ 30 & 31, requiring railroads to be fenced, and prescribing liabilities for injuries to live stock by reason of a failure to fence, are not repealed by the act of 1875, ch. 248, the remedy under the latter act being cumulative. *Curry v. Chicago & N. W. R. Co.*, 43 Wis. 665.—QUOTING *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.—DISTINGUISHED IN *Heller v. Abbot*, 79 Wis. 409.

## II. LIABILITY IRRESPECTIVE OF COMPANY'S DUTY TO FENCE.

### 1. In General.\*

**29. Necessity of showing negligence on part of company.**—In a common-law action there can be no recovery against a railroad company for injuring or killing live stock unless there is proof of negligence. *Turner v. St. Louis & S. F. R. Co.*, 76 Mo. 261. *Joyner v. South Carolina R. Co.*, 29 Am. & Eng. R. Cas. 258, 26 So. Car. 49, 1 S. E. Rep. 52.

There can be no recovery against a railroad company on mere proof of the killing of cattle, without proof of negligence. *Brown v. Hannibal & St. J. R. Co.*, 33 Mo. 309.—APPROVED IN *Atchison, T. & S. F. R. Co. v. Walton*, 3 N. Mex. 319. FOLLOWED IN *Dyer v. Pacific R. Co.*, 34 Mo. 127; *Calvert v. Hannibal & St. J. R. Co.*, 38 Mo. 467.

The leading principle of the numerous cases in reference to the liability of railroad companies for injuries to domestic animals, is that such liability is founded only upon negligence or omission of duty on the part of the company. *Walsh v. Virginia & T. R. Co.*, 8 Nev. 110.

Where the owner of live stock sues a railroad company for an injury thereto, and the issue is made whether the injury is the result of the carelessness or negligence of the company, there must be sufficient evidence to establish this issue before the jury can find a verdict for the plaintiff. *New Orleans*.

\* See important notes on injuries to animals on track, 19 AM. & ENG. R. CAS. 465; 31 Id. 496.

Negligence of railroad company in killing live stock generally, see 56 AM. & ENG. R. CAS. 221, *abstr.*; see also note, 49 AM. DEC. 261.

*J. & G. N. R. Co. v. Enochs*, 42 Miss. 603.—APPROVED IN *Atchison, T. & S. F. R. Co. v. Walton*, 3 N. Mex. 319.

A company is not liable for stock killed on the track unless the evidence shows that they were there through some fault or neglect of the company, and that the company was wanting in care at the time they were killed. *Lyndsay v. Connecticut & P. R. R. Co.*, 27 Vt. 643.—APPROVED IN *Atchison, T. & S. F. R. Co. v. Walton*, 3 N. Mex. 319.

In an action for a cow killed, it not appearing that the engineer, from the time he first saw the cow, neglected his duty, there should be no recovery. *Johnson v. Minneapolis & St. L. R. Co.*, 43 Minn. 207, 45 N. W. Rep. 152.

**30. — or of company's agents.\*—** In order to recover from a railroad company for killing live stock, the owner must show affirmatively that the injury resulted through the carelessness, mismanagement or gross neglect of the company or its agents. *Georgia R. & B. Co. v. Anderson*, 33 Ga. 110.

Where stock get upon a track without the fault of the company, the law requires evidence beyond mere proof that they were injured by the engine of the company; there must be proof of negligence on the part of the agents and servants of the company in charge of the train at the time the injury occurred. *Chicago & N. W. R. Co. v. Barrie*, 55 Ill. 226, 2 Am. Ry. Rep. 451.—DISTINGUISHED IN *Quincy, A. & St. L. R. Co. v. Wellhoener*, 72 Ill. 60.

In order to recover damages from a railroad company for injuries to live stock while on the track, under the Mississippi Rev. Code, it must appear that the injury was the result of mismanagement or negligence of the railroad company or its agents. *Memphis & C. R. Co. v. Blakeney*, 43 Miss. 218.—FOLLOWED IN *Memphis & C. R. Co. v. Orr*, 43 Miss. 279.

In the absence of fault or negligence on the part of the plaintiff, the exemption of the company depends upon its being proved that the collision with the animal took place without any fault or negligence on the part of its agents. *Keech v. Baltimore & W. R. Co.*, 17 Md. 32.—DISTINGUISHED IN *Baltimore & O. R. Co. v. Mulligan*, 45 Md. 486.

**31. Necessity of showing negligence under the statutes.\*—**To entitle the plaintiff to a recovery against a railroad company under the Alabama act of 1852, it is only necessary for him to prove property in the stock or cattle killed, their value, and that they were killed by defendant's cars or locomotives. *Nashville & C. R. Co. v. Peacock*, 25 Ala. 229.

In order to render a railroad company liable for killing stock on the track, there must be proof of negligence, unless the action be under the Illinois act of 1855. *Great Western R. Co. v. Morthland*, 30 Ill. 451.

Section 2 of the Indiana act of 1853 to provide compensation to the owners of animals killed or injured by the cars, etc., of any railroad company, etc., excludes from the consideration of the jury, in a suit against any such company for the destruction of stock by their cars, any consideration of the question whether the injury was the result of wilful misconduct or negligence, or of unavoidable accident. *Lafayette & I. R. Co. v. Shriner*, 6 Ind. 141.—DISTINGUISHING *Marsh v. New York & E. R. Co.*, 14 Barb. (N. Y.) 364.—DISTINGUISHED IN *Indiana C. R. Co. v. Leamon*, 18 Ind. 173. FOLLOWED IN *Smith v. Terre Haute & R. R. Co.*, 7 Ind. 553.

The statutory liability for killing live stock in Kansas is independent of negligence. *Hopkins v. Kansas Pac. R. Co.*, 18 Kan. 462, 16 Am. Ry. Rep. 41.—LIMITED IN *Central Branch R. Co. v. Lea*, 20 Mo. 183.

A railroad company, under § 22 of the Missouri railroad act, is liable for a failure to perform statutory duties, regardless of any other proof of negligence. *Colins v. Atlantic & P. R. Co.*, 65 Mo. 230.

**32. Necessity of showing negligence in the absence of statutory duties.**—Prior to the Indiana act of 1859 railroad companies were not liable for killing stock, except where the killing was through negligence and without immediate fault on the part of the plaintiff. *Wright v. Indianapolis & C. R. Co.*, 18 Ind. 168.

In the absence of laws requiring railroad companies to fence their tracks, there must be proof of negligence in order to charge the company for injuries to live stock. *Robinson v. St. Louis, I. M. & S. R. Co.*, 21 Mo. App. 141.



**33. — or where statutory duties have been performed.**—If the company or its agents are not guilty of any negligence, and comply with the requirements of section 1399 of Ala. Rev. Code, then the company will not be liable for stock killed or injured by its trains or locomotives while engaged in its legitimate business. *Nashville & D. R. Co. v. Comans*, 45 Ala. 437.—**OVERRULED IN** *Gothard v. Alabama G. S. R. Co.*, 67 Ala. 114.

Two of plaintiff's horses having by some means got on defendants' track were killed by a locomotive, for which plaintiff brought his action. *Held*, that the legislature having appointed certain measures to be adopted for the protection of property from the locomotives of defendants, and those measures having been fulfilled by defendants, they were not liable for the damage done without showing something more than ordinary in the running of the train. *Auger v. Ontario, S. & H. R. Co.*, 9 U. C. C. P. 164.

**34. Proximate cause, generally.\***—

(1) *Company's negligence must be the cause.*—A railroad company is not liable for injuring live stock, on proofs showing that those in charge of the train were guilty of some negligence, if it appear that such negligence did not in any way contribute to the injury. *East Tenn., V. & G. R. Co. v. Bayliss*, 22 Am. & Eng. R. Cas. 596, 75 Ala. 466.—**ADHERED TO IN** *Alabama G. S. R. Co. v. McAlpine*, 80 Ala. 73.

The owner of live stock killed by a train cannot recover on mere proof that the brakemen at the time were not at their proper places on the train, unless it appears that this contributed to the injury. *Vicksburg & M. R. Co. v. Hart*, 19 Am. & Eng. R. Cas. 521, 61 Miss. 468.

To authorize a recovery for the loss of cattle alleged to have resulted from such negligence, it is incumbent upon the plaintiff to show by substantial evidence that the negligence was the cause of the injury sued for, though such evidence may be circumstantial. *Burger v. St. Louis, K. & N. W. R. Co.*, 52 Mo. App. 119.

The bare fact that a railway is uninclosed, there being no statute requiring it to be fenced, does not, in general, render the company liable to pay for animals straying upon the track and killed by a train—such want

of fencing being in general only a remote cause of the loss. *Blaine v. Chesapeake & O. R. Co.*, 9 W. Va. 252.—**FOLLOWED IN** *Layne v. Ohio River R. Co.*, 35 W. Va. 438, 14 S. E. Rep. 123.

At the trial of an action against a railroad company for killing a cow between the signal-posts, required by the Georgia Code, § 708, and the railroad crossing, it is proper to instruct the jury, after repeating the language of the section, that the company is not liable because the train might be running in a manner forbidden by law, but that the injury might be shown to have been caused by a failure to comply with the law. *Western & A. R. Co. v. Main*, 64 Ga. 649.—**DISTINGUISHED IN** *Smith v. Central R. & B. Co.*, 41 Am. & Eng. R. Cas. 490, 82 Ga. 801, 10 S. E. Rep. 111.

(2) *Illustrations.*—The death of cattle is the proximate result of the negligence of a railway company if, owing to such negligence, they are separated from the drovers, become frightened, and rush down a road through a defective fence into an orchard, and from thence on to the track, although it was the duty of a third person to keep the orchard fence in repair. *Sneesby v. Lancashire & Y. R. Co.*, L. R. 1 Q. B. Div. 42, 33 L. T. N. S. 372, 45 L. J. Q. B. 1; *affirming* L. R. 9 Q. B. 263, 43 L. J. Q. B. 69, 30 L. T. N. S. 492.

Where a train wrongfully obstructed a street-crossing and thereby prevented live stock from passing, such obstruction was not the proximate cause of the injury which resulted from another train which injured the stock, standing on another track. *Brown v. Wabash, St. L. & P. R. Co.*, 20 Mo. App. 222.—**REVIEWING** *Schmidt v. Chicago & N. R. Co.*, 83 Ill. 405.

In the absence of any statute requiring any railroad company to fence its track, the fact that the track is unenclosed is not such an immediate cause of killing of cattle on the track as to make the company liable, in the absence of anything to show negligence in the management of the train. *Cleveland, C. & C. R. Co. v. Elliott*, 4 Ohio St. 474.—**FOLLOWED IN** *Central Ohio R. Co. v. Lawrence*, 13 Ohio St. 66.

A team of horses was killed by a moving locomotive on a railroad track about a mile from the highway and about five miles from where they took fright, by the sleigh to which they were hitched being overturned by an ash-heap in the highway. In an action

\*See post 65, 136, 188, 194, 277-279.

by the owner of the horses against the township to recover the value of the horses,—held, that the negligence of the township, if any, was not the proximate but the remote cause of the killing of the horses, and therefore there could be no recovery. *Township of West Mahanoy v. Watson*, 112 Pa. St. 574, 3 Atl. Rep. 866.

The frightening of a horse at large in a highway, so that he jumps over the cattle-guards and runs along a railroad track, gets tangled in a bridge, and is thereby injured, is not the proximate cause of the injury or a basis of recovery. *Lynch v. Northern Pac. R. Co.*, 84 Wis. 348, 54 N. W. Rep. 610.

**35. Failure to give signals as the proximate cause.\***—The liability of a railroad company for stock killed cannot be established by proof that the whistle was not sounded and the bell not rung, unless it appear that the killing was caused by such failure. *Peoria, D. & E. R. Co. v. Aten*, 43 Ill. App. 68. *St. Louis, V. & T. H. R. Co. v. Hurst*, 25 Ill. App. 181. *Chicago, B. & Q. R. Co. v. Jones*, 19 Ill. App. 648. *Terre Haute & I. R. Co. v. Jenuine*, 16 Ill. App. 209. *Terre Haute & I. R. Co. v. Tulerwiler*, 16 Ill. App. 197. *Quincy, A. & St. L. R. Co. v. Wellhoener*, 72 Ill. 60.—DISTINGUISHING *Chicago & N. W. R. Co. v. Barrie*, 55 Ill. 226.—*Leavitt v. Terre Haute & I. R. Co.*, 5 Ind. App. 513, 31 N. E. Rep. 860, 32 N. E. Rep. 866.—FOLLOWING *Pennsylvania Co. v. Hensil*, 70 Ind. 569; *Stoneman v. Atlantic & P. R. Co.*, 58 Mo. 503.

**36. Illegal rate of speed as the proximate cause.†**—It is not enough to constitute negligence that the speed of a running train should be greater than the prohibited rate, unless it also appears that such illegal and negligent speed was the cause of the injury complained of. *Harlan v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 483.—DISTINGUISHING *Goodwin v. Chicago, R. I. & P. R. Co.*, 75 Mo. 73; *Alexander v. Hannibal & St. J. R. Co.*, 76 Mo. 494; *Apitz v. Missouri Pac. R. Co.*, 17 Mo. App. 419. FOLLOWING *Holman v. Chicago, R. I. & P. R. Co.*, 62 Mo. 562; *Stoneman v. Atlantic & P. R. Co.*, 58 Mo. 503.

**37. Effect of negligence of company's servants‡—Wilful acts.—A**

\* See post, 65, 192, 208, 209.

† See post, 69-72.

‡ See post, 50, 60.

Liability of company for killing live stock through negligence of engineer, see note, 1 L. R. A. 449.

railroad company is responsible for cattle killed by its trains through the negligence and carelessness of its employés. *Day v. New Orleans Pac. R. Co.*, 35 La. Ann. 694.

A company is not liable for the wilful act of those in charge of its trains in injuring or killing live stock. *Cooke v. Illinois C. R. Co.*, 30 Iowa 202.—FOLLOWING *De Camp v. Mississippi & M. R. Co.*, 12 Iowa 348.—FOLLOWED IN *Porter v. Chicago, R. I. & P. R. Co.*, 41 Iowa 358. NOT FOLLOWED IN *Marion v. Chicago, R. I. & P. R. Co.*, 64 Iowa 568.

**38. Duty as carrier distinguished from duty to animals on or near track.\***—As a choice between an injury to passengers, and live stock on the track, those in charge of the train owe the greater duty to the passengers. *Witherell v. Milwaukee & St. P. R. Co.*, 24 Minn. 410.—APPROVING *Locke v. First Div. St. Paul & P. R. Co.*, 15 Minn. 350. DISTINGUISHING *Donaldson v. Milwaukee & St. P. R. Co.*, 21 Minn. 293.—DISTINGUISHED IN *Watier v. Chicago, M. & St. P. R. Co.*, 13 Am. & Eng. R. Cas. 582, 31 Minn. 91. FOLLOWED IN *Palmer v. Northern Pac. R. Co.*, 31 Am. & Eng. R. Cas. 544, 37 Minn. 223, 33 N. W. Rep. 707, 5 Am. St. Rep. 839; *O'Connor v. Chicago, M. & St. P. R. Co.*, 27 Minn. 166, 36 Am. Rep. 829, note.

The law recognizes and makes a clear distinction between the care required of railroad companies with respect to persons or property in course of transportation, and with respect to persons or property coming upon the railroad track without the intervention of the companies. *Central M. T. R. Co. v. Rockafellow*, 17 Ill. 541.

Necessary efforts made by the agents of a railroad after the discovery of cattle on the track, to save the train and passengers from threatened danger, would not render the railroad company liable even though they might result in injury to the cattle. *Owens v. Hannibal & St. J. R. Co.*, 58 Mo. 386.—DISTINGUISHED IN *Drew v. Red Line Transit Co.*, 3 Mo. App. 495.—*Carlton v. Wilmington & W. R. Co.*, 40 Am. & Eng. R. Cas. 178, 104 N. Car. 365, 10 S. E. Rep. 516.

The first and paramount object of the attention of the agents of a company is due regard for the safety of the persons and property in their charge on the train, for which they are held to a high degree of

\* See post, 66, 67.

care; and, so far as consistent with this paramount duty, they are bound to the exercise of what, in that peculiar business, would be ordinary and reasonable care to avoid unnecessary injury to animals casually coming upon the uninclosed road; and for any injury to animals arising from a neglect of such care the company is liable in damages to the owner. *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172.

The first duty that an engineer has to consider when observing trespassing stock on the track is the safety of the passengers and property that he may be transporting, and the next is to secure the property of the company from damage, and subordinate to these duties he is required to use ordinary means to prevent injuries to the stock; but the owner of trespassing stock has no right to expect that it will be protected, unless it can be done consistently with these higher obligations. *Bemis v. Connecticut & P. R. Co.*, 42 Vt. 375.

The employés of a railroad company in charge of a passenger train have the legal right to pursue such a course, in respect to cattle found on the track, without right, as a proper regard for the safety and protection of the persons and property in their charge may require. The owner has no right to expect his property to be protected, unless it can be done consistently with the higher obligations resting on the company; and that railroad companies may be left to a full and proper discretion in pursuing the course which will best fulfil their important duties to the public, their acts in this respect should receive a favorable construction. *Cranston v. Cincinnati, H. & D. R. Co.*, 1 Handy (Ohio) 193.

In the running of a railroad train, the employés must regard the safety of the passengers and the property of the company, as well as dangers to cattle and persons on the track, and the question of negligence is influenced by these considerations; but it cannot be said that a railroad company is liable only for gross negligence in the killing of a horse on its track by a train of cars, or for wanton negligence or wilful misconduct. *Sinkins v. Columbia & G. R. Co.*, 19 Am. & Eng. R. Cas. 467, 20 So. Car. 258.—QUOTED IN *Harmon v. Columbia & G. R. Co.*, 32 So. Car. 127, 10 S. E. Rep. 877.

In an action against a railroad company for killing live stock, an instruction is erroneous which exacts the same degree of care

from railroads to avoid injuries to live stock that they are required to exercise in the protection of passengers. Railroad companies are only bound to exercise ordinary care as toward live stock, but are bound to extraordinary care for the protection of passengers. *Sandham v. Chicago, R. I. & P. R. Co.*, 38 Iowa, 88.

The operators of a railroad train have an unqualified right to carry a headlight upon the train at night, when necessary for the safety of the lives and property embarked upon the train, and it is error to instruct a jury that such right depends upon its exercise not endangering cattle that stray upon the track. *Bellefontaine & I. R. Co. v. Schruyhart*, 10 Ohio St. 116.—REVIEWED IN *Pittsburgh, Ft. W. & C. R. Co. v. Maurer*, 21 Ohio St. 421.

**39. Duty with respect to machinery, appliances, etc.**—(1) *Generally*.—Railroad companies are only held to reasonable care for a prevention of injuries to live stock, and an instruction is erroneous which tells the jury that such companies are liable for stock killed through lack of the "best appliances" for the management of trains. *Natches & J. R. Co. v. McNeil*, 19 Am. & Eng. R. Cas. 518, 61 Miss. 434.

(2) *Brakes*.—A failure on the part of a company to provide its cars with proper brakes will make it liable for stock killed, by reason of the use of such brakes. *Forbes v. Atlantic & N. C. R. Co.*, 76 N. Car. 454, 14 Am. Ry. Rep. 313.—FOLLOWED IN *Winston v. Raleigh & G. R. Co.*, 19 Am. & Eng. R. Cas. 516, 90 N. Car. 66.

A railroad company is not liable for killing live stock while a train is on a descending grade, where the employés use all proper diligence to avoid it, by reason of the company failing to have air-brakes. *Bartley v. Georgia R. Co.*, 60 Ga. 182.

Railroad companies are only required to use that reasonable care that a prudent man would use under the same circumstances to avoid injuring animals; therefore companies are not required to provide air-brakes and a larger corps of employés and to exercise the "utmost care" to prevent injuries to the animals. *Cantrell v. Kansas City, M. & B. R. Co.*, 69 Miss. 435, 10 So. Rep. 580.—FOLLOWING *Mississippi C. R. Co. v. Miller*, 40 Miss. 45.

The fact that a train which ran over and killed stock had no air-brakes is not of itself sufficient proof of negligence to make the

company liable. *Grundy v. Louisville & N. R. Co. (Ky.)*, 2 S. W. Rep. 899.

The plaintiff's cow was killed by defendant's freight train, and in a suit for damages for the injury the engineer testified that the train was running fifteen miles an hour, at night, and by means of the headlight a cow could be seen seventy-five yards in advance; that he discovered the animal at that distance, blew on brakes, but could not possibly stop the train and avoid the accident. The judge charged the jury that the company should provide such appliances as would enable the engineer to stop the train within the distance mentioned; and if not furnished, then it was the defendant's duty to so slacken the speed that the train could be stopped within that distance.

*Held, error.* The company cannot be held to so rigid a rule of accountability where, as here, every reasonable precaution was used. *Winston v. Raleigh & G. R. Co.*, 19 Am. & Eng. R. Cas. 516, 90 N. Car. 66.—FOLLOWING *Montgomery v. Wilmington & W. R. Co.*, 6 Jones 464; *Proctor v. Wilmington & W. R. Co.*, 72 N. Car. 579; *Forbes v. Atlantic & N. C. R. Co.*, 76 N. Car. 454. QUOTING *Doggett v. Richmond & D. R. Co.*, 81 N. Car. 459.—FOLLOWED IN *Seawell v. Raleigh & A. R. Co.*, 105 N. Car. 272, 10 S. E. Rep. 1045.

(3) *Number and skill of men in charge of train.*—Trains should be provided with men of reasonable skill and judgment, and they are required to exercise that skill and judgment to avoid injuring cattle on the track, but they are always to act with reference to the safety of the train and passengers. *Parker v. Dubuque S. W. R. Co.*, 34 Iowa 399, 5 Am. Ry. Rep. 513.

But companies are only required to man and equip their trains with trainmen in such a manner and by the use of such care as a prudent man would use under like circumstances. *Cantrell v. Kansas City, M. & B. R. Co.*, 69 Miss. 435, 10 So. Rep. 580.

**40. Effect of leaving cotton seed, salt, etc., on or near track.**—(1) *Cotton seed.*—If a railroad company permits cotton seed to accumulate about its track it must use ordinary care to prevent injuring stock that may be attracted to the track by the seed. *Little Rock & Ft. S. R. Co. v. Dick*, 42 Am. & Eng. R. Cas. 591, 52 Ark. 402, 12 S. W. Rep. 785.

(2) *Hay.*—A railroad company loaded a car with hay in the afternoon and left it standing on a side-track until the next

morning. Plaintiff's cow was seen eating from the hay in the evening, and was afterward found dead, the presumption being that she had been run over by a passing train while eating the hay. *Held*, that it was not negligence *per se* to leave the hay that length of time. *Harlan v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 483.

(3) *Molasses.*—Where the hogs of the plaintiff were attracted to the warehouse of the defendants by the drippings of molasses from defendants' cars, and were killed by the trains of defendants, which were suddenly started without the usual alarm,—*held*, that this was such negligence as entitled the plaintiff to damages. *Page v. North Carolina R. Co.*, 71 N. Car. 222.

(4) *Salt.*—It is negligence for a railway company to permit salt to remain exposed on its tracks, or on its right of way near them, so as to attract cattle, after it has become chargeable with notice that salt is thus exposed; and this, though it did not place the salt there, it being held guilty of negligence in such cases on the theory that its duty is to so police its right of way as to prevent and remove all attractive dangers placed on its tracks or right of way by its servants or others. *Burger v. St. Louis, K. & N. W. R. Co.*, 52 Mo. App. 119.—FOLLOWING *Crafton v. Hannibal & St. J. R. Co.*, 55 Mo. 580.—*Schooling v. St. Louis, K. C. & N. R. Co.*, 75 Mo. 518. *Brown v. Hannibal & St. J. R. Co.*, 27 Mo. App. 394. *Morrow v. Hannibal & St. J. R. Co.*, 29 Mo. App. 432. *Crafton v. Hannibal & St. J. R. Co.*, 55 Mo. 580.

Where salt has been left exposed under a warehouse on the right of way of a railway company and near its tracks, the company cannot avoid liability in consequence thereof by mere proof that the warehouse belongs to a third party. *Burger v. St. Louis, K. & N. W. R. Co.*, 52 Mo. App. 119.

**41. Liability where wounded animal is killed by its owner.**—A railroad company is liable as for killing an animal, where it is wounded so badly by the train that it cannot recover, and the owner kills it to put it out of suffering. *Atchison, T. & S. F. R. Co. v. Ireland*, 19 Kan. 405.

**42. Liability where company is itself a trespasser.**—Where a railroad company, without acquiring the right of way, constructs and operates its road

\* See post, 43-60, 134, 152, 159.

through the land of another, and one of its engines runs against and injures one of his cows on such land, it is *prima facie* a trespasser, and liable for killing the cow. *Mathews v. St. Paul & S. C. R. Co.*, 18 Minn. 434.

2. *Animals Trespassing or Straying upon Track.\**

a. Irrespective of Owner's Duty to Inclose Stock.

**43. What animals are considered as trespassing.**†—A vote of a town in pursuance of statutory authority, making live stock free commoners, does not authorize the grazing of such stock on the grounds of a railway company, such grounds not being a public highway nor a public common. *Williams v. Michigan C. R. Co.*, 2 Mich. 259.

Where cattle enter from a highway, where it crosses a railroad, on to the track of such railroad, such entry is a trespass, although there is no obstacle to prevent such entry, and the town has made regulations requiring fences of a particular kind, and allowing cattle to run at large on the highways. *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255.

A railroad company is not liable for negligently running an engine upon and killing the cattle of the plaintiff, which had come from the highway upon the track of the railroad, though there was no physical obstacle to prevent their entry, such entry being held to be a trespass. *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255.—DISTINGUISHED IN *Bostwick v. Minneapolis & P. R. Co.*, 2 N. Dak. 440. FOLLOWED IN *Louisville & F. R. Co. v. Ballard*, 2 Metc. (Ky.) 177; *Williams v. Michigan C. R. Co.*, 2 Mich. 259; *Corwin v. New York & E. R. Co.*, 13 N. Y. 42; *Clark v. Syracuse & U. R. Co.*, 11 Barb. (N. Y.) 112. NOT FOLLOWED IN *Washington v. Baltimore & O. R. Co.*, 17 W. Va. 190. QUOTED IN *Chicago, B. & Q. R. Co. v. Johnson*, 8 Am. & Eng. R. Cas. 225, 103 Ill. 512; *Pittsburgh, C.*

& St. L. R. Co. v. Stuart, 71 Ind. 500; *Louisville & N. R. Co. v. McCoy*, 81 Ky. 403. REVIEWED IN *Terry v. New York C. R. Co.*, 22 Barb. (N. Y.) 574; *Bowman v. Troy & B. R. Co.*, 37 Barb. (N. Y.) 516; *Tower v. Providence & W. R. Co.*, 2 R. I. 404.

When animals get upon the track away from any public crossing, and at a point where defendant's servants were not required to anticipate the presence of stock, they are mere trespassers, and defendant is only bound to use ordinary care to protect them after discovering their perilous condition, and the burden of proving want of such care rests upon the plaintiff. *Jewett v. Kansas City, C. & S. R. Co.*, 50 Mo. App. 547.

Railroad companies are not required to fence where their tracks pass through unoccupied lands, and cattle entering the track from such unoccupied lands are trespassers, and the company will not be liable for an injury, where it was without negligence on the part of those in charge of the trains. *McMillan v. Manitoba & N. W. R. Co.*, 4 Man. 220.

In the absence of recklessness a railroad company is not liable for a horse killed which has gone from a highway to the track by reason of there not being a cattle-guard, though the corporation is bound to maintain one at the place, as such horse is a trespasser. *Darling v. Boston & A. R. Co.*, 121 Mass. 118.—DISTINGUISHED IN *Bostwick v. Minneapolis & P. R. Co.*, 2 N. Dak. 440. QUOTED IN *Boyle v. New York, L. E. & W. R. Co.*, 39 Hun (N. Y.) 171.

Where a railroad maintains proper fences and cattle-guards the owner of cattle that go upon the track from adjoining lands will be charged with negligence, and the cattle treated as trespassing, though there is no actual carelessness on the part of the owner in allowing them to go upon the track. *Fisher v. Farmers' L. & T. Co.*, 21 Wis. 73.—DISTINGUISHING *Dunnigan v. Chicago & N. W. R. Co.*, 18 Wis. 28; *Brown v. Milwaukee & P. du C. R. Co.*, 21 Wis. 39.

**44. — and what are not.**—The owner of cattle is not rendered liable for trespass by allowing them to go upon a railroad where it is unfenced, at private crossings or at other places where such right arises by a general use, with the implied assent of the company resulting from the clear knowledge of such use and the failure to

\* Obligation of company to avoid injuring and liability for killing stock trespassing on track, see notes, 40 AM. & ENG. R. CAS. 173; 1 L. R. A. 449; 49 AM. DEC. 261.

† Liability for trespasses of animals at common law, and as affected by agreement, by prescription, and by statutes requiring fences, see very full note, 49 AM. DEC. 248.

† See post, 54, 134, 152-159.

object. *Evans v. Burlington & M. R. R. Co.*, 21 Iowa 374.—FOLLOWING *Alger v. Mississippi & M. R. Co.*, 10 Iowa 268; *Bartlett v. Dubuque & S. C. R. Co.*, 20 Iowa 188; *Russell v. Hanley*, 20 Iowa 219.—DISTINGUISHED IN *Connyers v. Sioux City & P. R. Co.*, 78 Iowa 410, 43 N. W. Rep. 267.

In Mississippi cattle pasturing upon uninclosed lands are not trespassing by going upon an unfenced railroad track, so as to deprive the owner from recovering from a railroad company which kills them. *Vicksburg & J. R. Co. v. Patton*, 31 Miss. 156.

A horse found upon a railroad track in South Carolina is not a trespasser, not even under the terms of the stock law, where the horse is in its owner's inclosed pasture, through which the railroad has only a right of way. *Simkins v. Columbia & G. R. Co.*, 19 Am. & Eng. R. Cas. 467, 20 So. Car. 258.

According to the laws of South Carolina cattle should be fenced out, and not fenced in. The entry, therefore, of cattle or a horse on an uninclosed railroad track is no trespass. *Murray v. South Carolina R. Co.*, 10 Rich. (So. Car.) 227.

The owners of domestic animals straying on an uninclosed road of a railroad company are not trespassers, and such company has no right to presume the owners will not suffer them to roam on the track of a railway. *Johnson v. Baltimore & O. R. Co.*, 25 W. Va. 570.—FOLLOWING *Blaine v. Chesapeake & O. R. Co.*, 9 W. Va., 252; *Baylor v. Baltimore & O. R. Co.*, 9 W. Va., 270; *Washington v. Baltimore & O. R. Co.*, 17 W. Va. 190.—FOLLOWED IN *Layne v. Ohio River R. Co.*, 35 W. Va. 438.

**45. Right to use track, and how exercised.**—The right of a railroad company to the use of its track is nothing more than the right of every other land proprietor in the actual use and occupancy of his land, and does not exempt the company from the duty enjoined by law upon every person so to use his own property as not to do any unnecessary injury to another. *Savannah, F. & W. R. Co. v. Geiger*, 29 Am. & Eng. R. Cas. 274, 21 Fla. 669, 58 Am. Rep. 697.

A railroad company maintaining and operating a railway upon plaintiff's land, by his consent, is nevertheless bound to prevent such permissive use of the land to work injury to the plaintiff's cattle; and it is immaterial that the company was not bound to fence its track, or that it could not have avoided striking the animal after it

was seen. *Mathews v. St. Paul & S. C. R. Co.*, 18 Minn. 434 (Gil. 392).—DISTINGUISHED IN *Day v. New Orleans Pac. R. Co.*, 36 La. Ann. 244.

Where a railroad runs through a farm and so divides it that it is necessary for the owner to pass from one side to the other, to drive his live stock across the track, an instruction, in a suit to recover damages from the railroad for injuries to such live stock, correctly states the law, which is to the effect that the company held its easement subject to the plaintiff's right to cross and recross the track from the different parts of his farm, provided the same was reasonably exercised; that it was the duty of the jury to ascertain if either party had been guilty of negligence. If the plaintiff saw his cow on the track about train time, or if his cattle were turned upon the lands adjoining the track and were loitering along when near the track, such facts might be evidence of negligence which it was proper for them to consider; and it was proper for the court to refuse to instruct the jury that the company had the exclusive right to use and occupy its track through the farm. *Housatonic R. Co. v. Waterbury*, 23 Conn. 101.—REVIEWED IN *Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351.

The rule that railroad companies have a right to a clear track and the exclusive use of their property is subject to the qualification which rests upon all property owners, that they may so use it as not to injure other persons or their property, if it can be avoided by the exercise of reasonable care. *New Orleans & N. E. R. Co. v. Bourgeois*, 66 Miss. 3, 5 So. Rep. 629.

The rule that railroad companies are entitled to the exclusive use of their tracks must be taken subject to the qualification that they are required to use reasonable skill and care to avoid injuring stock that may go upon the track. *Vicksburg & J. R. Co. v. Patton*, 31 Miss. 156.—FOLLOWED IN *Memphis & C. R. Co. v. Orr*, 43 Miss. 279.

The rule that railroad companies are entitled to the exclusive use of their tracks is subject to the qualification that they are liable for any wanton injury that may occur to trespassing cattle thereon, or through gross negligence of their servants. *Pritchard v. La Crosse & M. R. Co.*, 7 Wis. 232.

**46. Respective risks assumed by company and owner.**—When at the date of the suit there was no law in Ohio requir-



ing railroad companies to fence their tracks, the company takes the risk of animals getting upon the road without any remedy against the owner, and the owner of the animals takes the risk of their loss. *Kerwacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172.—DISTINGUISHED IN *Sinram v. Pittsburgh, F. W. & C. R. Co.*, 28 Ind. 244.—*Blaine v. Chesapeake & O. R. Co.*, 9 W. Va. 252.—FOLLOWED IN *Johnson v. Baltimore & O. R. Co.*, 25 W. Va. 570; *Layne v. Ohio River R. Co.*, 35 W. Va. 438, 14 S. E. Rep. 123. QUOTED IN *Moses v. Southern Pac. R. Co.*, 42 Am. & Eng. R. Cas. 555, 18 Ore. 385.

While an owner of live stock is not required to keep them on his own premises, yet if he permits them to go at large, and they stray upon the railroad track and are injured, with no want of care on the part of the company or its agents, the owner cannot recover from the company. *Gorman v. Pacific R. Co.*, 26 Mo. 441.—APPROVING *Cincinnati, H. & D. R. Co. v. Waterson*, 4 Ohio St. 430; *Kerwacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172; *Danner v. South Carolina R. Co.*, 4 Rich. (So. Car.) 334.

The ordinary rules as to trespassing stock have been modified as to railroads, so that while the owners may lawfully permit their cattle to run at large, they assume the risk of the killing or injuring of the cattle by a train, while trespassing upon the track. *Headen v. Rust*, 39 Ill. 186.

**47. Liability for negligence, generally.\***—Where stock intrudes upon a railroad track and is injured, the liability of the company depends upon whether the injury was the result of mismanagement or negligence. *Mobile & O. R. Co. v. Hudson*, 50 Miss. 572.—APPROVED IN *Atchison, T. & S. F. R. Co. v. Walton*, 3 N. Mex. 319.

If cattle go upon the track at points where the company has no right to fence, and are injured, the liability of the company depends upon whether there was negligence or not. *Indianapolis, C. & L. R. Co. v. Warner*, 35 Ind. 515, 4 Am. Ry. Rep. 537.—FOLLOWED IN *Indianapolis, C. & L. R. Co. v. Johnson*, 36 Ind. 267.

Railroad companies that knowingly run their trains under conditions rendering it impossible for those in charge to prevent injuring stock straying on their tracks, are accountable for the loss when injury results.

\* See ante, 29-32; post, 57, 187, 200, 204.

*Birmingham Mineral R. Co. v. Harris*, 98 Ala. 326.

Where a domestic animal, running at large by the sufferance of the owner, gets upon a track where the company is not required to fence, and is injured, the company is not, in general, liable, unless its servants, after they discover the animal, might, by the exercise of proper care and prudence, have prevented the injury. *Toledo, W. & W. R. Co. v. Barlow*, 71 Ill. 640.—QUOTED IN *Illinois C. R. Co. v. Noble*, 142 Ill. 578; *Chicago & A. R. Co. v. Hill*, 24 Ill. App. 619; *Chicago & A. R. Co. v. Legg*, 32 Ill. App. 218.

The fact that the cattle injured were permitted to run at large will not shield the company from the consequences of the failure of its agents to observe proper care and vigilance. *Kentucky C. R. Co. v. Lebus*, 14 Bush (Ky.) 518.—FOLLOWING *Paducah & M. R. Co. v. Hoehl*, 12 Bush (Ky.) 43.

If cattle on the roadbed of a railway were trespassers, and while so trespassing are negligently injured, nevertheless the owner of such cattle would be entitled to recover from the railroad company damages for the injury so done. *Jones v. Columbia & G. R. Co.*, 19 Am. & Eng. R. Cas. 459, 20 So. Car. 249; to the contrary, see *Talmadge v. Rensselaer & S. R. Co.*, 13 Barb. (N. Y.) 493.

**48. Degree of care required of company.\***—(1) *Generally.*—Where stock are properly running at large upon commons, and this fact is known to operatives of trains, they must be held to a higher degree of care than when they have their road fenced and have no reason to expect stock will be found on their track. *Chicago & A. R. Co. v. Engle*, 84 Ill. 397, 16 Am. Ry. Rep. 490.

The fact that defendant's track was not fenced, the law not requiring it, did not impose on it, as to cattle unlawfully on its track, the duty of any greater care than if it had been fenced. *Locke v. First Div. St. Paul & P. R. Co.*, 15 Minn. 350, (Gil. 283).—NOT FOLLOWING *New Albany & S. R. v. Maiden*, 12 Ind. 10.

Though railroad companies do not owe the same care to trespassing stock that they owe to others, yet they are liable where such

\* See post, 58, 62, 116, 141, 186.

Measure of care required for animals on the track, see note, 19 AM. & ENG. R. CAS. 480.

Servants must use ordinary care to prevent injury, see note, 19 AM. & ENG. R. CAS. 500.



stock is killed through the negligence of their agents. *Walker v. Columbia & G. R. Co.*, 25 So. Car. 141.

The law exacts of railroad companies, and other common carriers, in their use of steam power, extraordinary diligence, or "that degree of diligence which very careful and prudent men take of their own affairs;" and while there are authorities which confine this rule of diligence to the transportation of passengers, such is not the law in Alabama. *Alabama G. S. R. Co. v. McAlpine*, 15 Am. & Eng. R. Cas. 544, 71 Ala. 545.—FOLLOWED IN Alabama G. S. R. Co. v. McAlpine, 22 Am. & Eng. R. Cas. 602, 75 Ala. 113.

(2) *Ordinary and reasonable care.*—The servants of a railroad company, in operating its trains, are bound to use ordinary care to avoid injury to domestic animals trespassing on their railroad. *Cincinnati & Z. R. Co. v. Smith*, 22 Ohio St. 227.

The want of ordinary care and diligence will make a railroad company liable for killing live stock on the track, and it is not necessary to show that the killing was wilful or wanton. *Shuman v. Indianapolis & St. L. R. Co.*, 11 Ill. App. 472.

In order to make railroad companies liable for injuries to stock, the facts must show either gross negligence or wilfulness or maliciousness. Railroad companies are not held to the highest possible degree of care to avoid injuring stock trespassing on the track. *Great Western R. Co. v. Thompson*, 17 Ill. 131.

A railroad company will be liable to the owner of live stock killed on the track if it appears that those in charge of the train could have avoided the accident by the exercise of reasonable vigilance and care. *Kendig v. Chicago, R. I. & P. R. Co.*, 19 Am. & Eng. R. Cas. 493, 79 Mo. 207.

Railroad companies are required to exercise ordinary care in the management of their trains, so as to prevent injuring stock though it may be trespassing on the track. *Bostwick v. Minneapolis & P. R. Co.*, 49 Am. & Eng. R. Cas. 527, 2 N. Dak. 440, 51 N. W. Rep. 781.—DISTINGUISHING *Tonawanda R. Co. v. Munger*, 5 Den. 255; affirmed, 4 N. Y. 349; *Van Horn v. Burlington, C. R. & N. R. Co.*, 59 Iowa 33, 12 N. W. Rep. 752; *Eames v. Salem & L. R. Co.*, 98 Mass. 560; *Darling v. Boston & A. R. Co.*, 121 Mass. 118; *Wright v. Boston & M. R. Co.*, 2 Am. & Eng. R. Cas. 121, 129 Mass. 440;

*Pittsburgh, C. & St. L. R. Co. v. Stewart*, 71 Ind. 500; *Schittenhelms v. Louisville & N. R. Co. (Ky.)*, 19 Am. & Eng. R. Cas. 111; *Maynard v. Boston & M. R. Co.* 115 Mass. 458; *Cincinnati, W. & M. R. Co. v. Stanley (Ind.)*, 27 N. E. Rep. 316; *Bennett v. Chicago & N. W. R. Co.*, 19 Wis. 145; *Vandegrift v. Rediker*, 22 N. J. L. 189. QUOTING *Isbell v. New York & N. H. R. Co.*, 27 Conn. 393; *Needham v. San Francisco & S. J. R. Co.*, 37 Cal. 409. REVIEWING *Davis v. Mann*, 10 Mees. & W. 549.

In California, where cattle are permitted to run at large, railroad companies are only required to use reasonable exertions to prevent injuring them if they stray upon the track. *Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351.—QUOTING *Beers v. Housatonic R. Co.*, 19 Conn. 566. REVIEWING *Corwin v. New York & E. R. Co.*, 13 N. Y. 42; *Housatonic R. Co. v. Waterbury*, 23 Conn. 101.

Those in charge of moving trains are required to exercise ordinary care and prudence to avoid injuring stock on the tracks, but if the track is properly enclosed, then the company will only be liable for gross negligence. *Alger v. Mississippi & M. R. Co.*, 10 Iowa 268.—REVIEWING *Bee's v. Housatonic R. Co.*, 19 Conn. 566.—DISTINGUISHED IN *Bartlett v. Dubuque & S. C. R. Co.*, 20 Iowa 188.

Railroad companies are required to use reasonable and ordinary care to avoid injuries to live stock on the portions of their tracks which cannot be fenced, and if they fail in such care they are liable to the owner of the stock, if it be injured without negligence on his part. *Whitbeck v. Dubuque & P. R. Co.*, 21 Iowa 103.—REVIEWED IN *Davis v. Burlington & M. R. Co.*, 26 Iowa 549; *Moses v. Southern Pac. R. Co.*, 42 Am. & Eng. R. Cas. 555, 18 Oreg. 385.

In an action to recover the value of a cow alleged to have been killed by an engine on defendant's road,—held, that although the accident occurred at a place where the company were not bound to fence their track, and defendants were not guilty of any wanton or wilful neglect, yet if, by the exercise of ordinary care and skill upon their part, they could have prevented the injury, they were, nevertheless, liable for the damages sustained. *Rockford, R. I. & St. L. R. Co. v. Lewis*, 58 Ill. 49.

A railroad company is liable for any damage done to persons, stock, or other

property by the running of its trains, unless the company shall make it appear that their agents exercised all ordinary and reasonable care and diligence to prevent such damage; but where, in an action for killing a horse, the court, after charging this principle, added, "that is, I might say, a full measure of care and diligence—all that could be expected," such charge was error, the effect of it being to require extraordinary diligence of the company. *Western & A. R. Co. v. King*, 19 *Am. & Eng. R. Cas.* 255, 70 *Ga.* 261.

The employés of a railroad company are bound to use ordinary care and diligence, so as not unnecessarily to injure the property of others on the track. *Coyle v. Baltimore & O. R. Co.*, 11 *W. Va.* 94, 18 *Am. Ry. Rep.* 487.

(3) *The care which would be used by a prudent man.*—The only thing that will justify an injury to cattle by moving trains is proof that the company, at the time, was engaged in its ordinary and lawful business, and that the injury could not have been avoided by the use of such skill, prudence and care as a discreet man would have used under the same circumstances. *New Orleans, J. & G. N. R. Co. v. Field*, 46 *Miss.* 573.

Railroad companies are required to use that reasonable care to prevent injuries to live stock on the track that a prudent man would exercise under the same circumstances in the management of his own property. *Mississippi C. R. Co. v. Miller*, 40 *Miss.* 45.—FOLLOWED IN *Cantrell v. Kansas City, M. & B. R. Co.*, 69 *Miss.* 435.

Railroad companies are only held to such diligence to avoid killing stock as a prudent man would bestow on his own business. The absence of such diligence is negligence which will render a company liable. *Molair v. Port Royal & A. R. Co.*, 35 *Am. & Eng. R. Cas.* 135, 29 *So. Car.* 152, 7 *S. E. Rep.* 60.

In considering the question of negligence of the agents of a railroad company, all their duties must be considered—their first and higher duties to the passengers and property in their charge, and their subordinate duties to avoid injury to live stock straying on the road in front of them; and such agents and employés will be guilty of actionable negligence whenever the injury complained of is the result of their failure to observe that care, vigilance, and foresight that ordinarily prudent men, skilled and en-

gaged in a like perilous service, should or ought to observe. *Kentucky C. R. Co. v. Lebus*, 14 *Bush (Ky.)* 518.

**49. Degree of care required after discovery of animal.\***—(1) *Generally.*—If live stock is seen on the track at such places as would make it impossible for it to get off, as in cuts, or where the track is fenced on either side, it is the duty of the company to use necessary care to prevent injuries thereto, and, failing in this, it is liable for any injury. *Nashville & C. R. Co. v. Anthony*, 1 *Lea (Tenn.)* 516.—EXPLAINING *Memphis & C. R. Co. v. Smith*, 9 *Heisk. (Tenn.)* 860.—FOLLOWED IN *East Tenn., V. & G. R. Co. v. Selcer*, 7 *Lea (Tenn.)* 557.

(2) *Ordinary and reasonable care.*—Ordinary care in the management of their trains is the measure of vigilance which the law exacts of railroad companies to avoid injury to domestic animals; and this means, practically, that the company's servants are to use all reasonable efforts to avoid harming an animal after it is discovered, or might, by proper watchfulness, be discovered, on or near the track. *Little Rock & Ft. S. R. Co. v. Holland*, 19 *Am. & Eng. R. Cas.* 479, 40 *Ark.* 336.—APPROVED IN *Atchison, T. & S. F. R. Co. v. Walton*, 3 *N. Mex.* 319. FOLLOWED IN *Gulf, C. & S. F. R. Co. v. Johnson*, 54 *Fed. Rep.* 474, 10 *U. S. App.* 629, 4 *C. C. A.* 447. QUOTED IN *Gulf, C. & S. F. R. Co. v. Washington*, 49 *Fed. Rep.* 347, 4 *U. S. App.* 121, 1 *C. C. A.* 286.

Those in charge of a train must use ordinary or reasonable care to prevent injury to trespassing stock on the track after the same is discovered. *St. Louis, I. M. & S. R. Co. v. Ferguson*, 57 *Ark.* 16, 20 *S. W. Rep.* 545.—FOLLOWING *St. Louis, I. M. & S. R. Co. v. Roberts*, 56 *Ark.* 387, 19 *S. W. Rep.* 1055; *Atlanta & W. P. R. Co. v. Hudson*, 62 *Ga.* 679.

After stock is discovered on a railroad track it is the duty of those in charge of trains to use reasonable care to prevent injuring the same, but it cannot be said to be the duty of the company's employés to keep a lookout for stock. *Kansas City, Ft. S. & M. R. Co. v. Shaver*, (Ark.) 14 *S. W. Rep.* 864.—FOLLOWING *Memphis & L. R. R. Co. v. Kerr*, 52 *Ark.* 162, 12 *S. W. Rep.* 329.

While by the use of extraordinary diligence the company might have saved the

\* See *ante*, 48; *post*, 55, 62, 116, 141, 186.

life of a horse by adopting different means of releasing him from his confinement in the trestle, yet the evidence showing clearly that the company used all ordinary and reasonable diligence, both to avoid driving him upon the trestle and to release him therefrom after he fell and became confined between the cross-ties, the court erred in not granting a new trial for this reason. *Richmond & D. R. Co. v. Buice*, 88 Ga. 180, 14 S. E. Rep. 205.

A railroad company is liable only for a failure on the part of its employes to make reasonable exertion to avoid injuries to animals that may be trespassing on the track, after discovering the stock in a perilous condition. *Memphis & L. R. R. Co. v. Kerr*, 40 Am. & Eng. R. Cas. 171, 52 Ark. 162, 5 L. R. A. 429, 12 S. W. Rep. 329.

It is the duty of those in charge of moving trains to use reasonable diligence to avoid injuring cattle as soon as they are discovered to be in a position of danger, whether they be on the track or near to it. *Cleveland, C. & St. L. R. Co. v. Ahrens*, 42 Ill. App. 434.

Persons in the management of a train, after discovering a horse on the track, are only required to use ordinary care and prudence to avoid injuring the horse, and the burden is on the owner suing for damages to show such want of care or proof of negligence. An engineer is not required to stop his train and send a man ahead to prevent a frightened horse from running on a bridge and injuring himself. *Chicago & N. W. R. Co. v. Taylor*, 8 Ill. App. 108.—QUOTING *Peoria, P. & J. R. Co. v. Camp*, 75 Ill. 577. REVIEWING *Toledo, P. & W. R. Co. v. Bray*, 57 Ill. 514.

It is the duty of persons in charge of trains to avoid injuring cattle seen on the track, if this can be done with ordinary care, and failing in this the company is liable for any injury, regardless of the condition of the fences or gates. *Baker v. Chicago, B. & Q. R. Co.*, 73 Iowa 389, 35 N. W. Rep. 460.

In an action against a railroad company for injuries to live stock, an instruction to the jury to the effect that if the company's employes saw the stock so near the track as to justify the reasonable inference that it was in danger, and by the exercise of ordinary care they could have avoided the injury and did not do so, they were negligent; but if after discovering the stock they were unable to avoid the injury by the exercise of

ordinary care, they were not negligent, correctly states the law. *Edson v. Central R. Co.*, 40 Iowa 47, 8 Am. Ry. Rep. 412.

Where an animal, through no fault of the railroad company, gets upon the track at a point where the defendant is not required to anticipate its presence, the company's liability is confined to a failure on the part of its servants to use ordinary care to avoid the injury after discovering the peril in which the animal is. *Brooks v. Hannibal & St. J. R. Co.*, 27 Mo. App. 573.—FOLLOWING *Wallace v. St. Louis, I. M. & S. R. Co.*, 74 Mo. 594.

Where stock are trespassing, and come upon the defendant's track neither at a public nor private crossing, but at a point where defendant's servants were not required to anticipate the presence of stock, defendant is only required to use ordinary care to protect them after in fact discovering their peril; and it is error to instruct the jury that defendant was required to use such care, after it might have discovered such peril by the exercise of reasonable diligence. *Jewett v. Kansas City, C. & S. R. Co.*, 38 Mo. App. 48.

Where a horse got upon defendant's track through no fault of defendant, and at a point where defendant was not required to anticipate the presence of live stock, the railroad company's liability is confined to a failure on the part of its servants to use ordinary care to avoid the injury after having discovered the peril in which the animal was. The defendant's servants were not bound, at all hazards and in any event, to avoid an injury to the horse. *Hoffman v. Missouri Pac. R. Co.*, 24 Mo. App. 546.—NOT FOLLOWED IN *Hill v. Missouri Pac. R. Co.*, 49 Mo. App. 520.

Having left its railroad uninclosed through a country where domestic animals are allowed to be at large, and thus exposed to the casualties of the animals accidentally getting upon the railway track, it is the duty of the railroad company, acting through its agents, to use at least ordinary and reasonable care and diligence to avoid unnecessary injury to the animals when found in the way of a train on the road. *Kerwacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172.—QUOTING *Trow v. Vermont C. R. Co.*, 24 Vt. 488. REVIEWING *Quimby v. Vermont C. R. Co.*, 23 Vt. 388.

A railroad company cannot justify either recklessness or want of common care at the time and after cattle are discovered, or wanton injury thereto; but short of that it is

not liable. *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150.—DISAPPROVING *Clark v. Syracuse & U. R. Co.*, 11 Barb. (N. Y.) 112; *Williams v. Michigan C. R. Co.*, 2 Mich. 259; *New York & E. R. Co. v. Skinner*, 1 Am. Law Reg. 97. QUOTING *Ricketts v. East & W. India Docks & B. J. R. Co.*, 12 Eng. Law & Eq. 520.—QUOTED IN *Trout v. Virginia & T. R. Co.*, 23 Gratt. (Va.) 619.

(3) *The degree of care which is used by a prudent man.*—Where the railroad company discovered an animal on the track, it was bound to make the same effort to avoid injuring it as a prudent person would do if he owned both cow and train. *Locke v. First Div. St. Paul & P. R. Co.*, 15 Minn. 350, (Gil. 283).—APPROVED IN *Witherell v. Milwaukee & St. P. R. Co.*, 24 Minn. 410. FOLLOWED IN *Palmer v. Northern Pac. R. Co.*, 31 Am. & Eng. R. Cas. 544, 37 Minn. 223, 33 N. W. Rep. 707, 5 Am. St. Rep. 839; *O'Connor v. Chicago, M. & St. P. R. Co.*, 27 Minn. 166, 36 Am. Rep. 829, note.

**50. Effect of gross negligence of company—Wilful acts.**\*—At common law railroad companies were not liable for injuries committed by their trains upon stock straying upon the road, unless the injuries were the result of wilful and reckless negligence on the part of the company or those in its employ. *O'Bannon v. Louisville, C. & L. R. Co.*, 8 Bush (Ky.) 348.—FOLLOWING *Louisville & F. R. Co. v. Ballard*, 2 Metc. (Ky.) 183.

Mere proof of killing of stock upon the railroad track will not make the company liable. It must appear that it was wantonly done, or that there was wilful or gross negligence. *Chicago & M. R. Co. v. Patchin*, 16 Ill. 198.—APPROVED IN *Atchison, T. & S. F. R. Co. v. Walton*, 3 N. Mex. 319. DISTINGUISHED IN *Toledo, W. & W. R. Co. v. Fergusson*, 42 Ill. 449. FOLLOWED IN *Great Western R. Co. v. Thompson*, 17 Ill. 131; *Illinois C. R. Co. v. Reedy*, 17 Ill. 580; *Louisville & F. R. Co. v. Ballard*, 2 Metc. (Ky.) 177. OVERRULED IN *Illinois C. R. Co. v. Middlesworth*, 46 Ill. 494. QUOTED IN *Galena & C. U. R. Co. v. Jacobs*, 20 Ill. 478.

Railroad companies are not liable for injuries to cattle unless they be wilfully or maliciously done, or done under circumstances exhibiting gross negligence. These

companies are not bound to use the highest possible degree of care towards animals coming in the way of their trains. *Great Western R. Co. v. Thompson*, 17 Ill. 131.—DISTINGUISHED IN *Toledo, W. & W. R. Co. v. Fergusson*, 42 Ill. 449. OVERRULED IN *Illinois C. R. Co. v. Middlesworth*, 46 Ill. 494. QUOTED IN *Galena & C. U. R. Co. v. Jacobs*, 20 Ill. 478.

If an animal is wrongfully on the track of a railroad, but is injured while on the same by the gross negligence or wilful misconduct of the company's agents, the company is liable. *Lafayette & I. R. Co. v. Shriner*, 6 Ind. 141.

In such a case the company cannot avoid liability by showing that the animals were at large, where the law made them trespassers, or where they were running at large by the fault of the owner. *Leavenworth, T. & S. W. R. Co. v. Forbes*, 31 Am. & Eng. R. Cas. 522, 37 Kan. 445, 15 Pac. Rep. 595.—FOLLOWED IN *St. Louis & S. F. R. Co. v. Sanders*, 40 Kan. 469.

In an action brought to recover the value of cattle killed on a railroad track by the cars, the plaintiff is as much bound to prove the fact of gross negligence and want of care on the part of the company or its agents, as he is to prove the fact of the killing. *Knight v. New Orleans, O. & G. W. R. Co.*, 15 La. Ann. 105.

Proof that stock was killed through mere want of those in charge of the train to use ordinary care, is not sufficient to make the company liable; it must appear, where the animals were trespassing upon the track, that the injury was the result of either recklessness or wantonness. *Maynard v. Boston & M. R. Co.*, 115 Mass. 458.—DISTINGUISHING *Eames v. Salem & L. R. Co.*, 98 Mass. 560.—DISTINGUISHED IN *Bostwick v. Minneapolis & P. R. Co.*, 2 N. Dak. 440. REVIEWED IN *Boyle v. New York, L. E. & W. R. Co.*, 39 Hun (N. Y.) 171; *Moses v. Southern Pac. R. Co.*, 42 Am. & Eng. R. Cas. 555, 18 Ore. 385.

The owners of cattle that are killed while trespassing upon a railroad track cannot recover, even where the killing is due to the gross negligence of those in charge of the train. *Clark v. Syracuse & U. R. Co.*, 11 Barb. (N. Y.) 112. *Stucke v. Milwaukee & M. R. Co.*, 9 Wis. 202.—FOLLOWING *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255.—DISAPPROVED IN *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150.

\*See ante, 37; post, 60, 187, 200, 217, 284.

Liability of railroads for wilfully or negligently killing or injuring stock trespassing on track, see note, 96 Am. Dec. 681.

Railroad companies having the fee in the lands on which their roads are built are only liable for damages to cattle trespassing on the track where the injury is wilful or malicious. *Chicago & M. R. Co. v. Patchin*, 16 Ill. 198—QUOTED IN *Illinois C. R. Co. v. Houghton*, 126 Ill. 233, 18 N. E. Rep. 301, 1 L. R. A. 213. REVIEWED IN *Vermilya v. Chicago, M. & St. P. R. Co.*, 66 Iowa 606.

In an action to recover the value of cattle alleged to have been killed on defendants' road by their locomotive and train, it appeared the cattle could have been seen on the track by the engineer, if he had been on the lookout, for a distance of more than half a mile, yet he made no effort to slacken the speed of the train. Held, it was gross negligence, for which the company should be held responsible, even though the cattle were upon the track without the fault of the company. *Chicago & N. W. R. Co. v. Barrie*, 55 Ill. 226, 2 Am. Ry. Rep. 451.

Where a railroad company is not bound to fence its track, it will only be liable for injuries to live stock that stray upon the track, where the injury is the result of recklessness or wantonness. *Louisville & F. R. Co. v. Ballard*, 2 Metc. (Ky.) 177.—CHANGED BY STATUTE IN *Kentucky C. R. Co. v. Lebus*, 14 Bush (Ky.) 518. DISTINGUISHED IN *Robinson v. Flint & P. M. R. Co.*, 45 Am. & Eng. R. Cas. 496, 79 Mich. 323. FOLLOWED IN *O'Bannon v. Louisville, C. & L. R. Co.*, 8 Bush (Ky.) 348. QUOTED IN *Washington v. Baltimore & O. R. Co.*, 17 W. Va. 190.

A railroad company is not liable for an animal killed on the track at a point where the company was not bound to fence, unless it was killed by the gross negligence or wilful misconduct of the company's agents. *Indianapolis & C. R. Co. v. McClure*, 26 Ind. 370.

It is the duty of owners of live stock to keep them off railroad tracks, and if they fail to do so, companies will only be liable for injuries thereto which result from the reckless, wanton, and wilful acts of their agents. *Louisville & F. R. Co. v. Ballard*, 2 Metc. (Ky.) 177.—FOLLOWING *Louisville & F. R. Co. v. Milton*, 14 B. Mon. (Ky.) 61.

Where hogs are killed while on a railroad track, at places where the Texas stock law is in force, which prohibits hogs and other stock from running at large, in order to recover from the company there must be evidence that the killing was the result of gross

negligence. *Missouri Pac. R. Co. v. Lawler*, 3 Tex. App. (Civ. Cas.) 38.—QUOTING *International & G. N. R. Co. v. Cocke*, 64 Tex. 151.

**51. Unavoidable accidents, generally.\***—(1) *Company need not attempt the impossible.*—It is not necessary that the company's employes shall attempt the impossible; and hence, if, without fault of such employes, a danger is not and cannot be discovered until all appliances known to the best-regulated railroad motive power are clearly powerless to avert or mitigate the injury, then a failure to apply such useless agencies imposes no liability; and particularly would this be the case if, by attempting the impossible, the chances of another or greater peril would be increased. *East Tenn., V. & G. R. Co. v. Bayliss*, 22 Am. & Eng. R. Cas. 596, 75 Ala. 466.

The law does not require that those charged with the management of railroad trains should attempt the impossible in order to prevent injuries to live stock, yet so long as there is hope of avoiding an accident they must use the necessary appliances to do so; and when the company is sued for damage to live stock, the burden is on it to show that any attempt to avoid injury that might have been made would have been fruitless. *Alabama G. S. R. Co. v. McAlpine*, 22 Am. & Eng. R. Cas. 602, 75 Ala. 113.—DISTINGUISHING *South & N. Ala. R. Co. v. Jones*, 56 Ala. 507.

(2) *Accident notwithstanding use of care.*—A railroad company is not liable for killing live stock in a cut where it could be seen only a short distance ahead, where the evidence shows that every precaution that could have been exercised was taken to prevent a collision. *Gay v. Fremont, E. & M. V. R. Co.*, 5 Dak. 514, 41 N. W. Rep. 757.

A railroad company has the undoubted right to the free, unmolested, and exclusive use of its road for the purposes for which it is appropriated; and if under all the circumstances ordinary and reasonable care and diligence are exercised to avoid injury to domestic animals found upon the road, the duty to which it is subject is performed; and for injuries which are unavoidable it cannot be made liable. *Alabama G. S. R. Co. v. Jones*, 15 Am. & Eng. R. Cas. 549, 71 Ala. 487.—QUOTED IN *Alabama G. S. R.*

\* Liability for killing stock where accident was unavoidable, see note, 45 AM. & ENG. R. CAS. 527.

**Co. v. McAlpine**, 22 Am. & Eng. R. Cas. 602, 75 Ala. 113.

Where under the circumstances of the killing or injury it could have been avoided by the exercise of ordinary or reasonable care upon the part of the agents operating the train, and such care has not been exercised, the company will be liable; but if, notwithstanding the exercise of such care, the killing or injury would be unavoidable, the company is not liable. *Savannah, F. & W. R. Co. v. Geiger*, 29 Am. & Eng. R. Cas. 274, 21 Fla. 669, 58 Am. Rep. 697.—DISAPPROVING *Danner v. South Carolina R. Co.*, 4 Rich. (So. Car.) 329.

A railroad company is not liable for killing a mule by a train running 23 miles an hour, where the engineer did not see it till within 30 feet, when he blew the alarm and did all in his power to avoid a collision. *Louisville, N. O. & T. R. Co. v. Smith*, 67 Miss. 15, 7 So. Rep. 212.

A railroad company is not liable for killing stock on the track, where it admits the killing, but shows that there was no negligence on the part of those in charge of the train and that the killing was unavoidable. *Chicago, St. L. & N. O. R. Co. v. Packwood*, 7 Am. & Eng. R. Cas. 584, 59 Miss. 280.—FOLLOWING *Young v. Wilson*, 24 Miss. 694.—APPROVED IN *Volkman v. Chicago, St. P., M. & O. R. Co.*, 35 Am. & Eng. R. Cas. 204, 5 Dak. 69, 37 N. W. Rep. 731. DISTINGUISHED IN *New Orleans, M. & T. R. Co. v. Toulouse*, 59 Miss. 34; *Mobile & O. R. Co. v. Gunn*, 68 Miss. 366. LIMITED IN *Tyler v. Illinois C. R. Co.*, 19 Am. & Eng. R. Cas. 519, 61 Miss. 445.

A railway company is not liable for cattle killed where it appears that the night of the accident was dark and foggy; that the engineer did not see the animals on the track until a collision was inevitable, and then did everything in his power to avert the accident. *New Orleans & N. E. R. Co. v. Burkett*, (Miss.) 2 So. Rep. 253.

(3) *Where care could not have prevented accident.*—Under statutory provisions, it is made the duty of the engineer of a railroad train, on perceiving any obstruction on the track, to use all means in his power to stop the train, and, if any stock is killed or injured, the *onus* is on the company to show a compliance with this requirement; but this duty does not arise unless the obstruction is on the track and is perceived by the engineer; and a compliance with it is not re-

quired when it is shown that the animal was not discovered in time to avoid the injury, and that this was not owing to any want of due care and watchfulness. *Savannah & W. R. Co. v. Jarvis*, 95 Ala. 149.—QUOTING *Nashville, C. & St. L. R. Co. v. Hembree*, 85 Ala. 481. To nearly same effect, see *Hawker v. Baltimore & O. R. Co.* 15 W. Va. 628.

If a proper lookout were kept, and the animal was, when discovered, so near the engine that the accident could not be prevented by the prompt use of all proper appliances, the presumption of negligence is overcome, and no liability for damages is incurred; nor can negligence be imputed to the engineer, as matter of law, because he did not sound the cattle-alarm, if he promptly signalled the brakeman, and could not at the same time sound the cattle-alarm; but the sufficiency of this excuse for the failure, as disclosed by the facts in evidence, is a question for the jury. *Mobile & G. R. Co. v. Caldwell*, 83 Ala. 196, 3 So. Rep. 445.

Under the Maryland statutes railroad companies are liable for stock killed that stray upon the track without fault on the part of the owner, unless it appear to the satisfaction of the jury that the injury was entirely due to unavoidable accident on the part of the company. *Keech v. Baltimore & W. R. Co.*, 17 Md. 32.

A railroad company is not liable for killing animals on the track if it appears that they are first discovered so near the engine that a collision could not have been prevented by the use of all proper train appliances. *New Orleans & N. E. R. Co. v. Bourgeois*, 66 Miss. 3, 5 So. Rep. 629.

Unless it appears that those in charge of the train could, after discovering the animal in front of the engine, by reasonable exertion have checked the train, having regard to the safety of the cars and passengers, in time to have avoided the collision, there can be no recovery on the ground of negligence. *Judd v. Wabash, St. L. & P. R. Co.*, 23 Mo. App. 56. *Savannah, F. & W. R. Co. v. Gray*, 77 Ga. 440, 3 S. E. Rep. 158.—DISTINGUISHING *Gainesville, J. & S. R. Co. v. Wall*, 75 Ga. 282; *East Tenn., V. & G. R. Co. v. Culler*, 75 Ga. 704; *Davis v. Central R. Co.*, 75 Ga. 645.

In an action against a railroad company for killing stock, an instruction to the jury correctly states the law which, in effect, tells them that if the train was running at a lawful speed and had the customary force of

men and appliances, and the stock was so close that the train could not be stopped in time to avoid a collision when it was first seen by the engineer, or might with due care have been seen, then the company was not liable. *Joyner v. South Carolina R. Co.*, 29 *Am. & Eng. R. Cas.* 258, 26 *So. Car.* 49, 1 *S. E. Rep.* 52.

The court committed no error in refusing to charge the jury "that if it appear that a horse killed or injured by a train was first discovered or was first discoverable on the track at such a short distance from the place where he was killed or injured that the train could not have been stopped in time to prevent running over or against the horse, it was not necessary that the persons running the train should have seen the horse, or, having seen him, that they should have attempted to stop the train." *Simkins v. Columbia & G. R. Co.*, 19 *Am. & Eng. R. Cas.* 467, 20 *So. Car.* 258.

(4) *Illustrations.*—A railroad company is not liable for the loss or injury of live stock on the track, if it appears that by reason of the weather the animal was not seen until it was too late to save it by using the appliances provided for stopping the train, and that the train at the time was provided with a proper headlight, good brakes, and was properly officered, and running at a moderate rate of speed, and those in charge were guilty of no negligence. *Alabama G. S. R. Co. v. McAlpine*, 22 *Am. & Eng. R. Cas.* 602, 75 *Ala.* 113.—MODIFYING *Memphis & C. R. Co. v. Lyon*, 62 *Ala.* 71. QUOTING *Alabama G. S. R. Co. v. Jones*, 71 *Ala.* 487.—FOLLOWED IN *Alabama G. S. R. Co. v. Moody*, 92 *Ala.* 279.

The engineer saw the mule which was killed as it came upon the track, about sixty yards in front of the engine, and immediately caused the brakes to be put on, reversed his engine, and sounded the alarm whistle, but it was impossible in so short a distance to stop the train and avoid the collision. *Held*, no negligence. *Little Rock & Ft. S. R. Co. v. Turner*, 19 *Am. & Eng. R. Cas.* 491, 41 *Ark.* 161.—EXPLAINING *Davis v. Mann*, 10 *Mees. & W.* 545. QUOTING *Kentucky C. R. Co. v. Talbot*, 78 *Ky.* 621.—FOLLOWED IN *St. Louis & S. F. R. Co. v. Basham*, 47 *Ark.* 321.

A railroad will not be liable for the killing of a mule, at night, in a field which was a common inclosure of the plaintiff's land and the railroad track, where there was no neg-

ligence in running the train, but the killing was an unavoidable accident. *Macon & A. R. Co. v. Vaughn*, 48 *Ga.* 464.—FOLLOWED IN *Woolfolk v. Macon & A. R. Co.*, 56 *Ga.* 457.—QUOTED IN *Little Rock & Ft. S. R. Co. v. Payne*, 33 *Ark.* 816.

Where a team of horses ran away from their driver and got upon a railroad track, where the company was not required to fence, and ran along the track until they fell into a cattle-guard and were injured by a freight train after the engine-driver did all that he could to stop his train,—*held*, that there was no negligence on the part of the company, and that a recovery could not be maintained. *Chicago & A. R. Co. v. Rice*, 71 *Ill.* 567.

A train, having just left the station, moving at the rate of 4 miles per hour, against the headlight of which the rain was beating so as to hinder the light from being properly thrown forward upon the track, ran upon and killed a horse on a bridge where the tracks were properly fenced and the cattle-guard was such as in ordinary use. A verdict for defendant was proper. *Vincent v. Chicago & N. W. R. Co.*, 29 *Iowa* 592.

Where the engine running on a railroad killed a steer, under such circumstances as showed that the killing was accidental,—*held*, that the company were not responsible for the loss. *Garris v. Portsmouth & R. R. Co.*, 2 *Ired. (N. Car.)* 324.

Where a horse feeding near a railroad track became frightened at the noise of an approaching train, and jumping upon the track ran along ahead of the train until he fell into an open culvert over which the road passed, and was killed, and all proper means were used by the engineer to prevent a collision,—*held*, that the company was not liable. *Brothers v. South Carolina R. Co.*, 5 *So. Car.* 55.—QUOTING *Murray v. South Carolina R. Co.*, 10 *Rich. (So. Car.)* 232.

The owner of a horse cannot recover from a railroad company where it appears that the horse is trespassing on the track in the night-time, and where it is run over within 100 yards of the place where it is first seen. *Campbell v. Atlantic, M. & O. R. Co.*, 4 *Hughes (U. S.)* 170.

**52. Unavoidable accident where animal comes suddenly upon track.**—(1) *Generally.*—Under *Ala. Code*, § 1144, the engineer, seeing an animal on the track, is required to use all the means in his power known to skilful engineers, in order to stop



the train; and when he sees an animal in dangerous proximity to the track, or by proper care and diligence could have seen it, the common-law duty rests on him to use proper efforts to frighten it away, and, if necessary, to stop the train; but, when the animal, though near the track, is not discovered in fact, nor discoverable by the use of proper care and attention until it suddenly leaps on the track in front of the engine, so near that no appliances can stop the train in time to prevent a collision, the engineer is not required to attempt to do so. *Kansas City, M. & B. R. Co. v. Watson*, 91 Ala. 483, 8 So. Rep. 793.

It is a complete defence to an action against a railroad company for killing or injuring a horse or cow that the animal was not, and could not be seen, until it sprang on the track about fifty yards ahead of the engine, and that all the appliances known to skillful engineers could not then stop the train in time to prevent the injury. *Alabama G. S. R. Co. v. Smith*, 35 Am. & Eng. R. Cas. 150, 85 Ala. 208, 3 So. Rep. 795.

An action cannot be maintained against a railroad company to recover for live stock killed, where the evidence shows that the engineer was keeping a sharp lookout but did not see the stock in time to stop the train and avert a collision. *Moye v. Wrightsville & T. R. Co.*, 83 Ga. 669, 10 S. E. Rep. 441.

An engineer seeing an animal upon the track cannot presume that it will get out of danger as he might if it was a human being, but must take such measures as are necessary to avoid injury thereto; but this rule applies only to cases where the danger is apparent, and if an animal comes suddenly upon the track, so near the train as to make it impossible to stop before reaching it, the company will not be liable for killing it. *Terre Haute & I. R. Co. v. Jenuine*, 16 Ill. App. 209.

A railroad company is not liable for injuries to stock suddenly coming upon the track at a point where no fence is required, where the engineer could not be charged with negligence in failing to avoid a collision. *Judd v. Wabash, St. L. & P. R. Co.*, 23 Mo. App. 56.

A railroad company will not be liable for failing to comply with all the provisions of Tennessee Code, § 1166, as to whistle, brakes, etc., where a person or animal so suddenly appears on the track as to make it impossi-

ble, for want of time, to comply with the statute. *East Tenn., V. & G. R. Co. v. Scales*, 2 Lea (Tenn.) 688.—DISAPPROVING *Nashville & C. R. Co. v. Thomas*, 5 Heisk. (Tenn.) 262; *Memphis & C. R. Co. v. Smith*, 9 Heisk. (Tenn.) 860.—APPLIED IN *Holder v. Chicago, St. L. & N. O. R. Co.*, 11 Lea (Tenn.) 176. APPROVED IN *East Tenn. & V. R. Co. v. Swancy*, 5 Lea (Tenn.) 119.

(2) *Illustrations*.—A railroad company will not be liable for killing a horse that suddenly comes upon the track so near the engine as to make it impossible to check the train in time to avoid the injury, where it is shown that the engineer kept a proper lookout and could not have seen the horse, even by the exercise of the diligence exacted by his situation; and in determining whether the engineer kept a proper lookout, the jury must take into consideration his other duties which prevent his constantly looking. *East Tenn., V. & G. R. Co. v. Bayliss*, 19 Am. & Eng. R. Cas. 480, 74 Ala. 150.

Where the evidence in an action against a railroad company for injuring stock tends to show that the engineer was keeping a proper lookout, but did not know that stock was near until his fireman warned him that the stock was coming near the track, and immediately one of the animals jumped upon the track too near the engine to make it possible for the engineer to have averted a collision, but that he did put on the air-brakes and reversed his engine and did what he could to avoid injury, the company is entitled to an instruction to the jury to the effect that the jury must return a verdict in favor of the company if they believe the evidence. *Nashville, C. & St. L. R. Co. v. Hembree*, 38 Am. & Eng. R. Cas. 300, 85 Ala. 481, 5 So. Rep. 173.—QUOTED IN *Savannah & W. R. Co. v. Jarvis*, 95 Ala. 149.

In an action against a railroad company for killing a horse it appeared that the horse suddenly jumped on the track from underbrush and immediately the engineer used all means in his power to stop the train, but it appeared that the horse entered the track so near the train that it could not have been stopped in time to avoid a collision by any known appliances. *Held*, that there was no negligence which would make the company liable. *Little Rock & Ft. S. R. Co. v. Holland*, 19 Am. & Eng. R. Cas. 479, 40 Ark. 336.

Where an animal came suddenly upon the

railroad track and was killed by a train, which was running through a town and within the depot grounds at the usual rate of speed with its bell ringing, and the evidence shows that it came upon the track so near a building alongside the road that the engineer could not see it in time, by the use of ordinary and reasonable care, to prevent the accident,—*held*, that the company was not liable, notwithstanding the fact that the track was not fenced at that place. *Galena & C. U. R. Co. v. Griffin*, 31 Ill. 303.

The owner of a trespassing hog cannot recover from a railroad company for killing it on a switch where the company was not required to fence, where it appears that the train was being slowly backed in a careful manner, and that the hog stepped in front of the train and was killed. *Ohio & M. R. Co. v. Gross*, 41 Ill. App. 561.

If a horse is killed by a train at a public road crossing, and the evidence shows that the train was running at the rate of twelve miles an hour, and the horse walked on to the track twenty-five or thirty yards in front of the approaching train, and the engineer at once gave two sharp whistles, and the evidence further shows that it was impossible to stop the train, considering its speed, after the horse got on the track, the killing of the horse must be regarded under the circumstances as an inevitable accident, and the railroad company is not responsible therefor. *Toudy v. Norfolk & W. R. Co.*, 38 W. Va. 694, 18 S. E. Rep. 896.

#### b. As Dependent upon Owner's Duty to Inclose Stock.

**53. Duty of owner to keep his stock within inclosures.\***—(1) *At common law*.—The common law imposes on the owner of domestic animals the duty of keeping them on his own lands, or within inclosures, and he becomes a wrongdoer if any of them escape or stray off upon the lands of another; but this common-law rule is not in force in West Virginia, it being inconsistent with the legislation of the state, subject to the qualifications, however, that animals which are unruly or dangerous are required to be restrained. *Baylor v. Baltimore & O. R. Co.*, 9 W. Va. 276.—FOLLOWED IN *Johnson v. Baltimore & O. R. Co.*, 25 W. Va. 570.

\* Obligations of owner to keep stock confined, see note, 1 L. R. A. 450.

In Maryland owners of live stock are required to keep them on their own lands, and are responsible if they trespass upon lands in the possession of the railroad company, as well as upon lands of private persons. *Baltimore & O. R. Co. v. Lamborn*, 12 Md. 257.

The common-law rule is in force in Indiana, and the owner must keep up his cattle, in the absence of an order from the county commissioners permitting them to run at large. *Michigan S. & N. I. R. Co. v. Fisher*, 27 Ind. 96.

The owner of cattle is bound to keep them in an inclosure or in custody at his peril, for every entry by them on another's possession is a trespass, and this principle applies as well to the intrusion of cattle and horses upon the land over which a railroad company is entitled to its franchise as to the property of a private owner. *Baltimore & O. R. Co. v. Lamborn*, 12 Md. 257.

It is the duty of the owners of cattle to keep them within inclosures, so as to prevent them from trespassing upon the lands of others. *Laws v. North Carolina R. Co.*, 7 Jones (N. Car.) 468.—DISTINGUISHING *Aycock v. Wilmington & W. R. Co.*, 6 Jones (N. Car.) 231.

(2) *Under statute or ordinance*.—The statute prohibiting stallions from running at large was not intended to apply to colts until they were of such an age as to be troublesome to mares or dangerous to be at large. *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30 Iowa 459.

An ordinance of an incorporated city prohibiting stock from running at large within its corporate limits cannot be held to prevent the citizen from turning his stock out on the commons, beyond the limits of the city. *Vail v. Kansas City, C. & S. R. Co.*, 28 Mo. App. 372.

**54. Animals escaping from owner's control are trespassers.\***—In an action against a railroad company to recover for injuries to a horse it appeared that the horse escaped from the owner's stable and passed over intermediate lands which belonged to plaintiff, but which were in the possession of a city for the purpose of making certain improvements, and passed upon a railroad track through an opening made by the city. *Held*, that it was error in the trial court to refuse to rule, that the railroad company

\* See ante, 43, 44.

was not liable for an injury to the horse, and in holding that the horse was not trespassing on the land in the possession of the city, as it only had an easement therein. *Conklin v. Old Colony R. Co.*, 154 Mass. 155, 28 N. E. Rep. 143.

A railroad corporation is not liable for damages done to the cattle which escape to the railroad from the highway, or through fences between the railroad and land of the owner, such cattle being considered as trespassing. *Woolson v. Northern R. Co.*, 19 N. H. 267.

It seems that a railroad corporation, by proceedings duly taken under its charter, acquires the title to lands appropriated for the use of the road. And, therefore, where cattle escape from the inclosure of the owner and stray upon the track of a railroad, they are to be regarded as trespassing upon the lands of the railroad company. *Munger v. Tonawanda R. Co.*, 4 N. Y. 349. —REVIEWED IN *Vermilya v. Chicago, M. & St. P. R. Co.*, 66 Iowa 606.

The plaintiff, as constable, seized a horse under a distress warrant, and put him in the stable of an inn. The horse escaped to the road, and having got upon the railway owing to defects in the cattle-guards, was killed some distance from the point of intersection. Held, that under the 20 Vic. ch. 12 the horse was unlawfully upon the highway, and having got thence upon the track the company were not responsible, notwithstanding the defect in the cattle-guards. Although the horse was upon the road without the plaintiff's knowledge or permission, yet he was nevertheless there unlawfully, for the statute obliged the plaintiff to prevent him from being there. *Simpson v. Great Western R. Co.*, 17 U. C. Q. B. 57. —QUOTING *Sharrod v. London & N. W. R. Co.*, 4 Exch. 580. —FOLLOWED IN *Cooley v. Grand Trunk R. Co.*, 18 U. C. Q. B. 96.

**55. Right to allow stock to run at large.\***—The common-law rule requiring the owner of live stock to keep them on his own lands, and making them trespassers if they go upon the lands of another, whether such lands are inclosed or not, has never been recognized in Arkansas, Florida, Mississippi, Missouri or Oregon. *Little Rock & Ft. S. R. Co. v. Finley*, 11 Am. & Eng. R. Cas. 469, 37

*Ark.* 562. —FOLLOWED IN *Gulf, C. & S. F. R. Co. v. Johnson*, 54 Fed. Rep. 474, 10 U. S. App. 629, 4 C. C. A. 447. QUOTED IN *Gulf, C. & S. F. R. Co. v. Washington*, 49 Fed. Rep. 347, 4 U. S. App. 121, 1 C. C. A. 286. REVIEWED IN *Moses v. Southern Pac. R. Co.*, 42 Am. & Eng. R. Cas. 555, 18 *Oreg.* 385. —*Savannah, F. & W. R. Co. v. Geiger*, 29 Am. & Eng. R. Cas. 274, 21 *Fla.* 669, 58 *Am. Rep.* 697. —DISTINGUISHED IN *Jacksonville, T. & K. W. R. Co. v. Garrison*, 30 *Fla.* 557. —*McPheeters v. Hannibal & St. J. R. Co.*, 45 *Mo.* 22. —APPLIED IN *Miller v. Wabash R. Co.*, 47 *Mo. App.* 630. —*Moses v. Southern Pac. R. Co.*, 42 Am. & Eng. R. Cas. 555, 18 *Oreg.* 385, 23 *Pac. Rep.* 498. —REVIEWING *Munger v. Tonawanda R. Co.*, 4 N. Y. 349. —*New Orleans, J. & G. N. R. Co. v. Field*, 46 *Miss.* 573, 2 *Am. Ry. Rep.* 439.

Though owners of cattle and other live stock in Florida have the legal right to turn them out to range, yet in doing so they assume the risk of any danger which may result to the stock from their going upon the railroad track and being run upon by a train, when the circumstances are such as to render running upon them unavoidable, notwithstanding the use of reasonable care by the persons operating the train to avoid it. *Savannah, F. & W. R. Co. v. Geiger*, 29 Am. & Eng. R. Cas. 274, 21 *Fla.* 669, 58 *Am. Rep.* 697.

Persons in Mississippi may permit their stock to run at large on uninclosed lands of railroad companies, as well as others, without incurring any liability as trespassers, and this is so if they go upon enclosed lands without breaking a lawful fence. *New Orleans, J. & G. N. R. Co. v. Field*, 46 *Miss.* 573, 2 *Am. Ry. Rep.* 439.

In Missouri the owners of stock are not required to keep them up or restrain them from going about railroad tracks. *Davis v. Hannibal & St. J. R. Co.*, 19 *Mo. App.* 425.

A by-law enacting that certain animals shall not run at large does not impliedly allow others not named to do so, contrary to the common law. *Jack v. Ontario, S. & H. R. Co.*, 14 U. C. Q. B. 328.

**56. When stock are deemed to be running at large.\***—(1) Generally.—Cattle are not to be presumed as lawfully going at large. There must be proof that the town

\* Generally, the common-law rule requiring owners of stock to keep them on their own ground not in force in United States, see note, 22 L. R. A. 55.

\* A steer temporarily separated from rest of herd is running at large, see 35 Am. & Eng. R. Cas. 134, *abstr.* See also *post*, 152-159, 187, 205, 206.

gave permission. *Perkins v. Eastern R. Co.*, 29 Me. 307.

When the owner of a farm, by an arrangement with the occupant of an adjoining farm, allows his stock, with which is a bull more than a year old, to run across the line on the latter farm to graze, and both farms are otherwise inclosed, such bull is not running at large within the meaning of p. 6725, Gen. Stat. of Kansas, 1889. *Missouri Pac. R. Co. v. Shumaker*, 46 Kan. 769, 27 Pac. Rep. 126.

Plaintiff's colt, 5 weeks old, was following its dam, which was being led, when it ran against a barb-wire fence maintained by a railroad company and was killed. *Held*, that it being the universal custom to allow colts of that age to follow their dams, the colt could not be said to be "running at large" within the meaning of the statute. *Hillyard v. Grand Trunk R. Co.*, 23 Am. & Eng. R. Cas. 154, 8 Ont. 583.—DISTINGUISHING *Markham v. Great Western R. Co.*, 25 U. C. Q. B. 572; *Cooley v. Grand Trunk R. Co.*, 18 U. C. Q. B. 96.

Plaintiff's son, as it was getting dark, was taking three horses along a road which crossed defendant's railway, riding one, leading another, and driving the third. This last horse, being from sixty to one hundred feet in front, attempted to cross the track as a train approached, and was killed. *Held*, that the horse was not "in charge of" any person within Consol. Stat. ch. 66, § 147, and that the plaintiff could not recover. *Markham v. Great Western R. Co.*, 25 U. C. Q. B. 572.—REVIEWING *Thompson v. Grand Trunk R. Co.*, 18 U. C. Q. B. 94.—DISTINGUISHED IN *Hillyard v. Grand Trunk R. Co.*, 8 Ont. 583.

In the following cases animals have been held not to be "running at large," within the meaning of the statutes:

Cows left in a highway for the temporary purpose of milking them, and with the intent to put them within inclosures. *Bulkley v. New York & N. H. R. Co.*, 27 Conn. 479.—APPROVED IN *Rehman v. The Railroad Co.*, 5 Phila. (Pa.) 450. DISAPPROVED IN *North Pennsylvania R. Co. v. Rehman*, 49 Pa. St. 101. FOLLOWED IN *Pearson v. Milwaukee & St. P. R. Co.*, 45 Iowa 497.

Cattle grazing upon inclosed lands which have a railroad track running through them. *Gooding v. Atchison, T. & S. F. R. Co.*, 20 Am. & Eng. R. Cas. 466, 32 Kan. 150, 4 Pac. Rep. 136.—DISTINGUISHING *Kansas*

*Pac. R. Co. v. Landen*, 24 Kan. 406. FOLLOWING *Atchison, T. & S. F. R. Co. v. Riggs*, 31 Kan. 632.

Stock in charge of a herder subject to his control. *Keeney v. Oregon R. & N. Co.*, 42 Am. & Eng. R. Cas. 619, 24 Pac. Rep. 233, 19 Oreg. 291.

A cow escaping from a boy who was driving her. *Phillips v. Canadian Pac. R. Co.*, 1 Man. 110.

(2) In Iowa.—The words "running at large," as applied to live stock, imply that the stock so at large is not under the control of the owner. *Hammond v. Chicago & N. W. R. Co.*, 43 Iowa 168, 14 Am. Ry. Rep. 412.—FOLLOWING *Hinman v. Chicago, R. I. & P. R. Co.*, 28 Iowa 491.

A sucking colt which left its mother, who was being led by her owner, and wandered upon the track at the depot grounds and was injured, was running at large within the meaning of the Iowa statutes. *Smith v. Kansas City, St. J. & C. B. R. Co.*, 58 Iowa 622, 12 N. W. Rep. 619.

Within the meaning of § 1289 of the Iowa Code, a horse which has escaped from his owner's control and still has a bridle upon it is "running at large." *Welsh v. Chicago, B. & Q. R. Co.*, 53 Iowa 632, 6 N. W. Rep. 13.

Cattle escaping while being driven in charge of their owner along a highway and running on to a railroad track are running at large, within the meaning of the Iowa statutes. *Smith v. Chicago, R. I. & P. R. Co.*, 34 Iowa 96.—QUOTING *Hinman v. Chicago, R. I. & P. R. Co.*, 28 Iowa 491.

A team of horses which are harnessed to a wagon, and which have escaped from the control of their owner or driver, are "live stock running at large," as used in § 1289 of the Iowa Code. *Inman v. Chicago, M. & St. P. R. Co.*, 60 Iowa, 459.—REVIEWING *Welsh v. Chicago, B. & Q. R. Co.*, 53 Iowa 632.

Horses hitched to a sleigh in charge of a driver who is intoxicated and in a drunken stupor, are not running at large. *Grove v. Burlington, C. R. & N. R. Co.*, 75 Iowa, 163, 39 N. W. Rep. 248.

(3) In Minnesota.—*Missouri*.—The court erred in charging that cattle, when on a highway upon their owner's premises, are not going at large within the purview of the statute. *Johnson v. Minneapolis & St. L. R. Co.*, 43 Minn. 207, 45 N. W. Rep. 152.

Under the Missouri statutes providing that any county may by a vote render oper-

ative a law to prevent cattle from running at large, and making it the duty of the county clerk to give notice thereof, when the people have voted in favor of enforcing the law, a railroad company is liable for stock killed between the date of the vote and the date of the publication of such notice by the clerk. *Welch v. Hannibal & St. J. R. Co.*, 26 Mo. App. 358.

**57. Company's liability for negligence, generally.\***—In Alabama, where the owner of live stock has a right to permit them to run at large, a company is liable if stock is killed through negligence while on the track. *Mobile & O. R. Co. v. Williams*, 53 Ala. 595, 13 Am. Ry. Rep. 153.

In Alabama, where it is lawful for the owner of stock to permit them to run at large, such owner is not thereby precluded from recovering injuries done to the stock by trains while stock may be trespassing on the track. *Alabama G. S. R. Co. v. Powers*, 19 Am. & Eng. R. Cas. 502, 73 Ala. 244.—**DISTINGUISHING** *Munger v. Tonawanda R. Co.*, 4 N. Y. 349; *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150; *Pittsburg, C. & St. L. R. Co. v. Stuart*, 71 Ind. 500; *Price v. New Jersey R. & T. Co.*, 31 N. J. L. 229, 32 N. J. L. 19; *South & N. Ala. R. Co. v. Williams*, 65 Ala. 74; *Alabama G. S. R. Co. v. McAlpine*, 71 Ala. 545.

The fact that the "stock law" makes it unlawful for the plaintiff to permit his cow to run at large affords, no excuse for an injury to her resulting from the defendant's negligence. *Roberts v. Richmond & D. R. Co.*, 20 Am. & Eng. R. Cas. 473, 88 N. Car. 560.

**58. Degree of care required of company, generally.†**—If a person permits his stock to run in a field through which an unfenced railroad runs, the company is only required to exercise ordinary care and prudence to prevent injuring the cattle. *Peoria, D. & E. R. Co. v. Dugan*, 10 Ill. App. 233.

If those in charge of a moving train fail to exercise ordinary care to avoid injuring live stock on the track, the company will be liable, though the stock has escaped from the owner's premises and gone on the track,

\* See ante, 29-32, 47; post, 187, 200, 204.

Injury to cattle running at large in violation of statute, see notes, 20 Am. & Eng. R. Cas. 480, 23 Id. 210, 49 Id. 594, abstr.

† See ante, 48, 49; post, 62, 116, 141, 186.

if it appears that it escaped without his fault. *Atchison, T. & S. F. R. Co. v. Davis*, 15 Am. & Eng. R. Cas. 521, 31 Kan. 645, 3 Pac. Rep. 301.—**DISTINGUISHING** *Union Pac. R. Co. v. Rollins*, 5 Kan. 167.

It is the duty of a railroad company to exercise reasonable care to avoid injury to cattle or stock found on its road, though such cattle and stock may be there through the negligence of the owner. *Baltimore & O. R. Co. v. Mulligan*, 45 Md. 486.—**APPLIED IN** *Central R. Co. v. Smith*, 74 Md. 212.

A railroad company is entitled to the exclusive and unmolested use of its road, and it is the duty of owners to keep cattle within their inclosures; but the failure to do so will not justify persons in the charge and management of a railway train in running over them if by the exercise of ordinary care this can be avoided. *Baltimore & O. R. Co. v. Mulligan*, 45 Md. 486.

**59. — under the South Carolina stock law.**—Railroad companies in South Carolina are not required to use the same care as to live stock that may go upon the tracks where the stock law is in force, as in other localities where it is not in force. *Harley v. Eutawville R. Co.*, 31 So. Car. 151, 9 S. E. Rep. 782.—**APPLYING** *Simkins v. Columbia & G. R. Co.*, 20 So. Car. 258; *Joiner v. South Carolina R. Co.*, 26 So. Car. 49; *Jones v. Columbia & G. R. Co.*, 20 So. Car. 249; *Molair v. Port Royal & A. R. Co.*, 29 So. Car. 159.—**DISTINGUISHED IN** *Molair v. Port Royal & A. R. Co.*, 31 So. Car. 510, 10 S. E. Rep. 243.—*Molair v. Port Royal & A. R. Co.*, 35 Am. & Eng. R. Cas. 135, 29 So. Car. 152, 7 S. E. Rep. 60.—**QUOTING** *Simkins v. Columbia & G. R. Co.*, 20 So. Car. 258.—**APPLIED IN** *Harley v. Eutawville R. Co.*, 31 So. Car. 151.

Much less care is required of railroad companies in South Carolina since the passage of the stock law, in providing against stock on the track, than was required before its passage. *Joyner v. South Carolina R. Co.*, 29 Am. & Eng. R. Cas. 258, 26 So. Car. 49, 1 S. E. Rep. 52.—**FOLLOWING** *Jones v. Columbia & G. R. Co.*, 20 So. Car. 258; *Simkins v. Columbia & G. R. Co.*, 20 So. Car. 265.—**APPLIED IN** *Harley v. Eutawville R. Co.*, 31 So. Car. 151.

**60. Liability for gross negligence.\***

A company is not liable except for gross

\* See ante, 37, 50; post, 187, 200, 217, 218, 264.

or wilful negligence where an animal running at large, contrary to a municipal ordinance, is run into and killed. *Denver & R. G. R. Co. v. Olsen*, 4 Colo. 239.

In those jurisdictions in which the common-law rule prevails that the owner of cattle is bound to keep them in his own inclosure, it is generally held, though with some exceptions, that if he suffers them to go at large, and the cattle stray upon the railroad track, and are injured or killed, the company is not liable, unless the conduct of its agents in the management of the train was wanton or wilful. *Moses v. Southern Pac. R. Co.*, 42 Am. & Eng. R. Cas. 555, 18 Oreg. 385, 23 Pac. Rep. 498.—REVIEWING *Bowman v. Troy & B. R. Co.*, 37 Barb. (N. Y.) 519; *Maynard v. Boston & M. R. Co.*, 115 Mass. 460; *Little Rock & S. F. R. Co. v. Finley*, 37 Ark. 569; *Balcom v. Dubuque & S. C. R. Co.*, 21 Iowa 103; *Searles v. Milwaukee & St. P. R. Co.*, 35 Iowa 491; *Cincinnati & Z. R. Co. v. Smith*, 22 Ohio St. 227.

In a suit against a railway company for an injury inflicted by its engine on animals running at large, it is competent for the company to prove that, under a local law, stock were not permitted to run at large at the place where the injury was inflicted. Where such a law exists the company would only be liable when guilty of gross negligence. *International & G. N. R. Co. v. Dunham*, 31 Am. & Eng. R. Cas. 530, 68 Tex. 231, 4 S. W. Rep. 472.

#### c. Lookout; Signals; Speed; Stopping Train, Etc.

**61. Duty to comply with statutory requirements, generally.**—Under statutory provisions making a railroad company liable "for all damages to persons, stock, or other property, resulting from a failure to comply with" statutory requirements (Alabama Code, § 1144), it is not necessary that this failure shall be the sole or immediate cause of the injury, but only that it contributed, with other concurring and efficient causes (not including plaintiff's own fault) to produce the injury. *Western R. Co. v. Sistrunk*, 85 Ala. 352, 5 So. Rep. 79.

Under the Alabama Code railroad companies are liable for killing or injuring live stock, if those in charge of their trains fail to comply with certain requirements pro-

vided for in the statute; but where compliance with these requirements is impossible, the company may escape liability by showing that their trainmen used all the means in their power and known to skillful engineers to prevent the injury complained of. *Mobile & O. R. Co. v. Malone*, 46 Ala. 391.

In carrying out the provisions of Mill. & V. Tennessee Code, § 1298, railroad engineers are not required to observe the precautions mentioned in the statute to avoid injuries to persons or animals in the way in which they are named, but may do so in any manner which is best calculated under the circumstances of the particular case to prevent an injury. *Memphis & C. R. Co. v. Scott*, 87 Tenn. 494, 11 S. W. Rep. 317.

Section 1166 of the Tennessee Code means that if the company prove that when it occurred all the statutory precautions were observed, then the accident was unavoidable, and the company is not liable. But if the company fail to prove that the several statutory precautions were literally obeyed it is responsible for all damages occasioned by the accident, whether resulting from its own negligence or not. *Memphis & C. R. Co. v. Smith*, 9 Heisk. (Tenn.) 860.

To exonerate itself, the company must show not only that the precautions specified were observed, but, in addition, that "every possible means was employed to stop the train and prevent the accident." In resorting to the additional means, it was not intended that the company should use means which would probably endanger the lives and property of those on the train; but that unless each and all the statutory precautions were observed it is no excuse that an attempt to reverse the engine might have ditched the train. *Memphis & C. R. Co. v. Smith*, 9 Heisk. (Tenn.) 860, 20 Am. Ry. Rep. 861.

**62. Duty to keep a lookout.\***—(1) *Generally.*—A locomotive engineer is required to keep a lookout for stock on the track. *Gulf, C. & S. F. R. Co. v. Ellis*, 54 Fed. Rep. 481, 10 U. S. App. 640, 4 C. C. A. 454.—FOLLOWING *Gulf, C. & S. F. R. Co. v. Washington*, 49 Fed. Rep. 347; 4 U. S. App. 121, 1 C. C. A. 286, *Gulf, C. & S. F. R. Co. v. Johnson*, 54 Fed. Rep. 474.

\* Duty of company's employes to keep lookout for stock on track, see note, 11 L. R. A. 460; or on right of way, see note, 56 Am. & Eng. R. Cas. 192; or in proximity to the track, see 40 Am. & Eng. R. Cas. 176, *abstr.* See also *post*, 60, 187, 200, 218, 284.



Under the Arkansas law, as enforced in the Indian Territory, an engineer running a train is required to keep a lookout for stock on the track, and when it is discovered he is required to use reasonable care to avoid injuries thereto. *Gulf, C. & S. F. R. Co. v. Johnson*, 54 Fed. Rep. 474, 10 U. S. App. 629, 4 C. C. A. 447.—FOLLOWING *Little Rock & Ft. S. R. Co. v. Finley*, 37 Ark. 562; *Little Rock & Ft. S. R. Co. v. Holland*, 40 Ark. 336; *St. Louis, I. M. & S. R. Co. v. Monday*, 49 Ark. 257.—FOLLOWED IN *Gulf, C. & S. F. R. Co. v. Ellis*, 54 Fed. Rep. 481, 10 U. S. App. 640, 4 C. C. A. 454.

Though stock may be wrongfully upon a railroad track, yet in order to excuse the railroad company from liability for injuries thereto, it must appear that the engineer was not negligent in keeping a lookout for such stock or for danger signals, and that reasonable care was exercised to avoid the injury after the stock was discovered. *Memphis & L. R. R. Co. v. Sanders*, 19 Am. & Eng. R. Cas. 497, 43 Ark. 225.

It is the duty of an engineer in charge of a moving train of cars to maintain a lookout, as continuously as his other duties will permit, for obstructions on the track, and when, in an action against a railroad company for the killing of a mare by a moving train, the evidence is in conflict upon the question as to whether such lookout was maintained, a charge stating the duty owing by the defendant in the operation of its trains to the owners of stock is faulty in ignoring the inquiry as to the engineer's observance of the duty to maintain a proper lookout. *Mobile & B. R. Co. v. Kimbrough*, 96 Ala. 127, 11 So. Rep. 307.

It being the duty of the servants of the railroad company, so far as consistent with their other and paramount duties, to use ordinary care to avoid injuring cattle on the track, they are bound to adopt the ordinary precautions to discover danger, as well as to avoid its consequences after it becomes known. *Nuzum v. Pittsburgh, C. & St. L. R. Co.*, 30 W. Va. 228, 4 S. E. Rep. 242.—DISTINGUISHED IN *Spicer v. Chesapeake & O. R. Co.*, 34 W. Va. 514.

In case of injury to live stock, railroad companies will be held liable when their employes, by exercising the necessary vigilance, might have seen at a proper distance the animals on the track, and with due regard to the safety of passengers have stopped the train before it struck them, but

failed to do so. *Fossier v. Morgan's L. & T. R. & S. Co., McGloin (La.)* 349.

The Tennessee act of 1856, ch. 94, § 8, requires all railroad companies within the state to keep a special watchman upon the locomotive when in motion, to watch the track and give warning of any obstacle or obstruction. This is a special duty to be performed by one person as his sole occupation while the train is in motion, and if in the absence of such special watchman injury result to person or property by being overrun, the company is liable in damages as for negligence. *Memphis & C. R. Co. v. Dean*, 5 Sneed (Tenn.) 291.—FOLLOWED IN *Louisville & N. R. Co. v. Stone*, 7 Heisk. (Tenn.) 468.

It being the duty of the servants of the railroad company, so far as consistent with their other and paramount duties to their passengers, to use ordinary care to avoid injuring cattle on the track, they are bound to adopt the ordinary precautions to discover danger, as well as avoid its consequences after it becomes known. *Baylor v. Baltimore & O. R. Co.*, 9 W. Va. 270.—FOLLOWED IN *Layne v. Ohio River R. Co.*, 35 W. Va. 438, 14 S. E. Rep. 123. QUOTED IN *Coyle v. Baltimore & O. R. Co.*, 11 W. Va., 94.

The rule that in the case of an animal trespassing on the track of a company, without the fault of the company, there is no duty of watchfulness on the part of those in charge of its trains to ascertain if the animal be there, and that their duty of care with respect to it arises only upon their discovering its peril, applies as well in the case of an animal wrongfully upon a highway at a railroad crossing. *Palmer v. Northern Pac. R. Co.*, 31 Am. & Eng. R. Cas. 544, 37 Minn. 223, 33 N. W. Rep. 707, 5 Am. St. Rep. 839.—FOLLOWING *Locke v. First Div. St. Paul & P. R. Co.*, 15 Minn. 350; *Witherell v. Milwaukee & St. P. R. Co.*, 24 Minn. 410.

The extent of the duty which a railroad company owes to stock upon its track, is that the engineer in charge of the train at the time shall use ordinary or reasonable care after the stock is discovered by him to prevent injury to it, and this negatives the idea that the engineer is bound to keep a lookout for stock. *Memphis & L. R. R. Co. v. Kerr*, 52 Ark. 162, 40 Am. & Eng. R. Cas. 171, 12 S. W. Rep. 329.—QUOTED IN *Gulf, C. & S. F. R. Co. v. Washington*, 49 Fed. Rep. 347, 4 U. S. App. 121, 1 C. C. A. 286.



(2) *Degree of care.*\*—Locomotive engineers are required to use reasonable care to discover cattle on the track and to avoid injuries thereto in the Indian Territory, where there is no law requiring companies to fence their tracks, nor the owners of animals to fence. *Gulf, C. & S. F. R. Co. v. Washington*, 49 Fed. Rep. 347, 4 U. S. App. 121, 1 C. C. A. 286.—QUOTING *Memphis & L. R. R. Co. v. Kerr*, 52 Ark. 162, 12 S. W. Rep. 329; *Little Rock & Ft. S. R. Co. v. Finley*, 37 Ark. 562; *Little Rock & Ft. S. R. Co. v. Holland*, 40 Ark. 336.—FOLLOWED IN *Gulf, C. & S. F. R. Co. v. Childs*, 49 Fed. Rep. 358, 4 U. S. App. 200, 1 C. C. A. 297; *Gulf, C. & S. F. R. Co. v. Martin*, 49 Fed. Rep. 359, 4 U. S. App. 198, 1 C. C. A. 298; *Gulf, C. & S. F. R. Co. v. Ellis*, 54 Fed. Rep. 481, 10 U. S. App. 640, 4 C. C. A. 454.

Though stock be wrongfully upon a railroad track, yet it is the duty of engineers to keep a constant and careful look-out for them, and to use ordinary care and diligence to discover and to avoid injuring the same. *Little Rock & Ft. S. R. Co. v. Finley*, 11 Am. & Eng. R. Cas. 469, 37 Ark. 562.

It is the duty of trainmen to use ordinary care in keeping a lookout for cattle on the track, and it is not sufficient to use due care after they are discovered, if by the use thereof they might have been seen in time to have stopped the train and avoid an injury thereto. *Chicago & A. R. Co. v. Legg*, 32 Ill. App. 218.—QUOTING *Toledo, W. & W. R. Co. v. Barlow*, 71 Ill. 640.

In running its trains at places where its tracks are not fenced, and where animals are liable to stray upon its tracks, a railway company is under the duty of keeping a reasonable lookout for such animals. Accordingly, when stock thus straying upon its tracks is killed by one of its trains, the railway company is responsible therefor, if its employes could, by the exercise of reasonable care, have discovered the stock in time to have avoided injury thereto. *Hill v. Missouri Pac. R. Co.*, 49 Mo. App. 520.

The company owes to the owner of domestic animals the duty of reasonable outlook for such animals straying upon its track. The company is bound to adopt the ordinary precautions to discover that the

cattle are on the track, as well as to avoid injuring them after they are seen. *Gunn v. Ohio River R. Co.*, 54 Am. & Eng. R. Cas. 167, 36 W. Va. 165, 14 S. E. Rep. 465. *Layne v. Ohio River R. Co.*, 35 W. Va. 438, 14 S. E. Rep. 123.

(3) *What is performance of this duty.*—An engineer must keep a constant lookout for obstructions as well as live stock on the track, but this duty is discharged when he gives it that care and watchfulness, in connection with his other duties, which a prudent and careful person would give. *East Tenn., V. & G. R. Co. v. Bayliss*, 22 Am. & Eng. R. Cas. 596, 75 Ala. 466.—REVIEWED IN *East Tenn., V. & G. R. Co. v. Deaver*, 79 Ala. 216.

While it is the duty of those in charge of a moving train to keep a lookout for stock on the track, yet this duty must be regulated with reference to their other duties, and if it appears, on account of their other duties, that neither the engineer nor fireman, for a short time, looked ahead, the company will not be liable for an animal killed. *Howard v. Louisville, N. O. & T. R. Co.*, 67 Miss. 247, 7 So. Rep. 216.

While it is the duty of those in charge of trains to keep a lookout for stock on the track, and, if discovered, to do what they can to avoid injuries thereto, yet this duty is limited to the use of such means as are consistent with their own safety and the safety of passengers that they may be carrying. *Carlton v. Wilmington & W. R. Co.*, 40 Am. & Eng. R. Cas. 178, 104 N. Car. 365, 10 S. E. Rep. 516. *S. P. Owens v. Hannibal & St. J. R. Co.*, 58 Mo. 386.

The provision of the Tennessee Code, §§ 1166-1168, requiring engineers to keep a lookout for any person, animal, or other obstructions appearing upon the road,—held, to include not only the roadbed proper or track, but the whole of the road. *Nashville, & C. R. Co. v. Anthony*, 1 Lea (Tenn.) 516.

Section 1166 (5) of the Tennessee Code: "Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead, etc.," is not to be construed as requiring for the exoneration of the company that somebody on the locomotive must throughout the whole trip have been literally always upon the lookout. It is sufficient if the precaution was being observed when the accident happened. *Louisville & N. R. Co. v. Stone*, 7 Heisk. (Tenn.) 468,—

\* See ante, 48, 49, 58; post, 116, 141, 186.

FOLLOWING *Memphis & C. R. Co. v. Dean*, 5 Sneed (Tenn.) 291.

Those in charge of trains are not required to keep a lookout for teams near the track, and to operate the trains so as not to frighten them. A company does not owe any duty beyond keeping a lookout to avoid injuries to persons who may be found on the track, especially at public crossings. *Hargis v. St. Louis, A. & T. R. Co.*, 75 Tex. 19, 12 S. W. Rep. 953.

(4) *Obstructions to view*.—The duty of railroad companies to avoid unnecessary injury to stock upon their tracks does not require them to keep their entire right of way clear of obstructions which conceal stock from view of the engineer of the train until they rush upon the track unseen, and too late to avoid the injury. *Kansas City, S. & M. R. Co. v. Kirksey*, 48 Ark. 366, 3 S. W. Rep. 190.—QUOTED IN *St. Louis, I. M. & S. R. Co. v. Ferguson*, 57 Ark. 16.

It is negligence on the part of a railway company to permit grass or weeds to grow on its grounds so as to obstruct the view of stock by the engine-driver. *Ohio & M. R. Co. v. Clutter*, 82 Ill. 123.

It is the duty of a railroad company to remove such growth, whether of shrubs, trees, or grain, as is calculated to obstruct the view of its engineers, to the outer bank of the side ditches of its roadbed; and when, by reason of such growth, a horse is concealed from the view of the engineer, and gets upon the track in front of the moving train and is killed, the company is liable, although, after seeing the horse, the engineer did all he could to avoid the collision. *Ward v. Wilmington & W. R. Co.*, 113 N. Car. 566, 18 S. E. Rep. 211.

If by failing to keep bushes cut down on the right of way of a railroad where stock are accustomed to roam at will, the bushes afford cover and concealment for cattle, so that their dangerous proximity to the train cannot be seen in time to avoid accident by those operating a moving train, whereby injury results (from a wreck caused by stock suddenly stepping from the bushes on the track in front of the train), the company is liable in damages. *Eames v. Texas & N. O. R. Co.*, 22 Am. & Eng. R. Cas. 540, 63 Tex. 660.

(5) *Effect of non-performance of this duty*.—The failure of the engineer to keep a diligent lookout for obstructions, and his failure to ring the bell (or blow the whistle)

under the circumstances specified in the statute, are each violations of a statutory duty, and if such failure reasonably contributed to the injury, the plaintiff himself not being guilty of contributory negligence, the railroad company is liable. *Western R. Co. v. Sistrunk*, 85 Ala. 352, 5 So. Rep. 79.

If stock be run down and killed by a train where the engineer in charge saw or might have seen it in time to have stopped the train and avoided the injury, the company is liable. *Buster v. Hannibal & St. J. R. Co.*, 18 Mo. App. 578.

A railroad company cannot excuse itself from liability for killing stock on the ground that when it was first seen the train was too close to avoid a collision, if it appear that such impossibility was due to the negligence of those in charge of the train in not discovering the stock sooner. *Brooks v. Hannibal & St. J. R. Co.*, 35 Mo. App. 571.

Where trespassing animals were killed by a train, if the servants of the company having the train in charge, by the exercise of ordinary care, and with due regard to their duties for the safety of the persons and property in their charge, could have seen such animals on the track in time to have saved them, it was their duty to have done so, and for their negligence in this respect, where the owner is not guilty of contributory negligence, the company will be liable. *Cincinnati & Z. R. Co. v. Smith*, 22 Ohio St. 227.—DISTINGUISHING *Cincinnati, H. & D. R. Co. v. Waterson*, 4 Ohio St. 424.—REVIEWED IN *Moses v. Southern Pac. R. Co.*, 42 Am. & Eng. R. Cas. 555, 18 Oreg. 385.

(6) *Illustrations*.—In an action against a railroad company for killing stock the evidence showed that the killing was on a foggy morning before daylight, and that it was impossible to see the stock far enough ahead to stop the train before reaching them. *Held*, that the railroad company was not liable on the ground of negligence. *Georgia R. & B. Co. v. Wall*, 80 Ga. 202, 7 S. E. Rep. 639.—FOLLOWED IN *Georgia M. & G. R. Co. v. Harris*, 83 Ga. 393, 9 S. E. Rep. 786; *Central R. & B. Co. v. Bryant*, 89 Ga. 457.

Where it appeared that at the time the cow in question was killed the train was going down a steep grade quite rapidly, that the engineer alone was on the lookout, sitting at the right side of his engine; that, by reason of the fact that the smoke-stack obstructed his view to the left, he could not

see the cow; that the fireman, the only other person on the engine, was at the time "firing up the engine," and that nobody was looking out on the left side of the engine, on which side the cow got upon the railroad; a verdict finding against the company was not without evidence to support it. The jury may have considered that the fact that nobody was on the lookout on the left side of the engine was negligence on the part of the railroad company, and they may have concluded that if anybody had been looking out on that side the cow could have been seen in time to have stopped the train and avoided the casualty. *Northeastern R. Co. v. Martin*, 78 Ga. 603, 3 S. E. Rep. 701.

Where a colt ran on the track in front of a train, before it was struck and killed, for a distance of twenty-five or thirty rods, and the track was straight, so that the engine-driver, by the exercise of reasonable diligence, could have discovered it in time to have slackened the speed of the train, the company was held liable, notwithstanding the evidence was conflicting. *Paris & D. R. Co. v. Mullins*, 66 Ill. 526.

"If the cattle, by the use of proper vigilance, could have been discovered while the train was three hundred and fifty yards in their rear, and the train could have been stopped within three hundred yards of the place of such discovery, then the cattle could have been saved, as well as the disaster to the train, and there was certainly some evidence conducing to this conclusion." *Kentucky C. R. Co. v. Lebus*, 14 Bush (Ky.) 518.

**63. Duty to avoid injury after discovery of animal on track.\***—Whenever the danger of collision becomes apparent, whether by animals coming upon the track or otherwise, it is the duty of the engineer to use whatever appropriate means he reasonably can to prevent or avoid it. *Cleveland, C. & St. L. R. Co. v. Rice*, 48 Ill. App. 51.

A railroad company will be liable for killing stock if those in charge of the train could by proper care have avoided the killing after the stock was discovered, though the stock was unlawfully running at large, through either the voluntary act or negli-

gence of the owner. *Cleveland, C. & St. L. R. Co. v. Ahrens*, 42 Ill. App. 434.—QUOTING *Indianapolis & St. L. R. Co. v. Peyton*, 76 Ill. 340; *Peoria, P. & I. R. Co. v. Champ*, 75 Ill. 577.

The owner of cattle trespassing upon a track may recover for injuries to the stock if it appears that the engineer, after discovering the stock, might have prevented the injury. *Chicago & A. R. Co. v. Hill*, 24 Ill. App. 619.—QUOTING *Toledo, W. & W. R. Co. v. Barlow*, 71 Ill. 640.

A railroad company will be liable to the owner of live stock injured on the track if it appears that the engineer in charge did not use proper effort to avoid the injury after discovering the stock. *Young v. Hannibal & St. J. R. Co.*, 19 Am. & Eng. R. Cas. 512, 79 Mo. 336.—FOLLOWED IN *Milburn v. Hannibal & St. J. R. Co.*, 21 Mo. App. 426.

If the engineer in charge of a train, after discovering live stock on or near the track in danger, fails to use proper effort to avoid injuring them, the company will be liable for any injury done. *Welch v. Hannibal & St. J. R. Co.*, 20 Mo. App. 477.—NOT FOLLOWED IN *Hill v. Missouri Pac. R. Co.*, 49 Mo. App. 520.

If the injury was the result of the defendant's actual negligence, and if the defendant's servants discovered the danger in time to avoid the injury, and if it could have been avoided without imperiling the persons or property intrusted to the defendant for transportation, then the jury should find for the plaintiff. *White v. St. Louis & S. F. R. Co.*, 20 Mo. App. 564.

Persons in charge of a train are not justified in regarding cattle that are seen on an uninclosed track as unlawfully there, so as to relieve them from the duty of using proper precautions to prevent injuries thereto; and if the stock be injured through the negligence or mismanagement of those in charge of the train, the company is liable. *Raiford v. Mississippi C. R. Co.*, 43 Miss. 233.

Railroads must govern themselves by the actual facts, and if they observe a drove of cows upon the railroad, whether properly or improperly or negligently there, they should indulge in no presumptions that they are properly attended, and will be driven off in abundant season to escape collision with a railroad engine, but should exercise a degree of care and precaution proportioned to the impending danger and the probabilities

\* Duty of locomotive engineer after he discovers stock on or near the track, see notes, 35 AM. & ENG. R. CAS. 151, *abstr.*; 49 *Id.* 548; 20 AM. ST. REP. 161. See also *ante*, 49, 52; *post*, 115.

of a collision. *Card v. New York & H. R. Co.*, 50 Barb. (N. Y.) 39.

In an action for injury to the plaintiff's horses, if it appears that the road runs through plaintiff's land, and the horses got upon the track of the road without any negligence or default of his, and were killed by the company's engine, the company will be liable for the damage sustained by the plaintiff, if the damage was done by the failure of the engineer to take the proper care to avoid doing the injury. *Trout v. Virginia & T. R. Co.*, 23 Gratt. (Va.) 619.—QUOTING AND DISAPPROVING *New York & E. R. Co. v. Skinner*, 19 Pa. St. 298. QUOTING *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150.

An engineer has no right to presume that a cow or other animal will leave the track as the engine approaches in time to avoid injury. *Overton v. Indiana, B. & W. R. Co.*, 1 Ind. App. 436, 27 N. E. Rep. 651.—QUOTING *Dennis v. Louisville, N. A. & C. R. Co.*, 116 Ind. 42.—*Elmsley v. Georgia Pac. R. Co.*, (Miss.) 10 So. Rep. 41.

**64. Duty to avoid injury to animal discovered near the track.\***—Persons in charge of moving trains are not required to exercise the same diligence where stock is seen in dangerous proximity to the track, as if they were actually on the track. *Western R. Co. v. Lazarus*, 88 Ala. 453, 6 So. Rep. 877.

The diligence of an engineer in charge of a train to avoid injuries to stock does not necessarily commence when he perceives the stock on the track, but it may begin earlier when he sees the stock in dangerous proximity to the track. *Alabama G. S. R. Co. v. Powers*, 19 Am. & Eng. R. Cas. 502, 73 Ala. 244.—QUOTING *South & N. Ala. R. Co. v. Jones*, 56 Ala. 507.

The duty of the engineer, or other person in charge of a moving train, to take precautions against inflicting injuries upon live stock arises not only when he sees an animal on the track, or in dangerous proximity thereto, but also when, by the exercise of due diligence, he might have seen it. A failure in either of these respects is negligence for which the railroad company is liable. *Louisville & N. R. Co. v. Posey*, 96 Ala. 262, 11 So. Rep. 423.

It is not enough for the engineer and fireman in charge of a locomotive and train

\* Duty when cattle are seen near the track, see 38 AM. & ENG. R. CAS. 308, *abstr.* See also *post*, 65, 67.

to merely use diligence in driving animals away that are discovered upon the track, but they should keep a vigilant lookout, and exercise ordinary diligence to frighten away animals that may be discovered approaching, and in dangerous proximity to the track, by sounding the whistle, ringing the bell, and using the means provided for that purpose. *Missouri Pac. R. Co. v. Gedney*, 45 Am. & Eng. R. Cas. 492, 44 Kan. 329, 24 Pac. Rep. 464.

If an engineer discovers the presence of hogs in such relation to his track as to indicate to a watchful and prudent person, in his situation, that they are about to, or would, likely, enter upon the track in front of his engine, it is his duty to put forth every reasonable effort, consistent with the safety of his train and the passengers, to avoid a collision. *Ravenscraft v. Missouri Pac. R. Co.*, 27 Mo. App. 617.

It is negligence for the engineer to take no notice of a horse feeding in plain view, within three feet of the track until the horse gets on the track. *Snowden v. Norfolk Southern R. Co.*, 95 N. Car. 93.—DISTINGUISHING *Wilson v. Norfolk & S. R. Co.*, 90 N. Car. 69.

**65. Duty to give signals\*—Ring bell and blowing whistle.**†—(1) *Generally.*—The provision in the Alabama statute requiring a whistle to be blown or a bell rung when approaching depots, crossings, etc., is intended for the safety of persons at such places, and has no reference to stock which may be running at large along the track where there is no such crossing. *Nashville, C. & St. L. R. Co. v. Hembree*, 38 Am. & Eng. R. Cas. 300, 85 Ala. 481, 5 So. Rep. 173.

Under Mill & V. Tennessee Code, § 1298, sub-sec. 4, it is the duty of locomotive engineers to use every possible means to stop the train and every means to prevent an accident to persons or animals discovered on the track, by sounding the whistle and otherwise. *Memphis & C. R. Co. v. Scott*, 87 Tenn. 494, 11 S.W. Rep. 317.

The circuit judge was asked to charge, "If the animal jumped on the track so near the engine that it was impossible to check

\* Duty and liability of company as to giving signals when cattle are on track, see notes, 13 AM. & ENG. R. CAS. 502, 19 *Id.* 508.

† Negligence in failing to sound whistle, see 40 AM. & ENG. R. CAS. 213, *abstr.* See also *ante*, 35; *post*, 192, 208, 209.

it before it came in contact with the animal, and there was not sufficient time to do more than was done, then the railroad company should be excused from the consequences for not sounding the alarm-whistle." *Held*, there was no error in refusing the charge asked for. The statute is imperative in requiring two things to be done: 1st, to sound the alarm-whistle; 2d, to put down the brakes. If the precautions prescribed are not observed, the law tolerates no excuse. *Nashville & C. R. Co. v. Thomas*, 5 Heisk. (Tenn.) 262.—DISAPPROVED IN *East Tenn. V. & G. R. Co. v. Scales*, 2 Lea (Tenn.) 688. RESTRICTED IN *Holder v. Chicago, St. L. & N. O. R. Co.*, 11 Lea (Tenn.) 176.

(2) *Where to be given*.—Under the Alabama Code of 1876, § 1699, railroad engineers are under no duty to blow the whistle or ring the bell until within a quarter of a mile of a highway crossing or of a regular depot or stopping-place, and an instruction in an action for killing stock which assumes any other duty is erroneous. *Alabama G. S. R. Co. v. McAlpine*, 15 Am. & Eng. R. Cas. 544, 71 Ala. 545.

Where appellee's horses were killed while on the right of way of the railroad company at the farm crossing of appellee, and no whistle was blown or bell rung,—*held*, that at such a crossing a railroad company is not required by statute to ring a bell or blow a whistle. Such a duty is imposed only where a railroad crosses or intersects any public highways. *Wabash, St. L. & P. R. Co. v. Neikirk*, 13 Ill. App. 387. *S. P. Wabash, St. L. & P. R. Co. v. Neikirk*, 15 Ill. App. 172.

Under the Missouri statute (Wagn. St. 310, § 8), the failure by the person in charge of a railroad train to ring the engine-bell or blow the whistle at a distance of at least 80 rods before reaching the crossing of a public highway, is negligence, and if, under such circumstances, cattle are killed at such crossing, such negligence is sufficient of itself to create a liability on the part of the railroad company, unless some contributory negligence can be shown on the part of the owner of the cattle. *Owens v. Hannibal & St. J. R. Co.*, 58 Mo. 386, 9 Am. Ry. Rep. 19.—FOLLOWED IN *Holman v. Chicago, R. I. & P. R. Co.*, 62 Mo. 562. REVIEWED IN *Windsor v. Hannibal & St. J. R. Co.*, 45 Mo. App. 123.

(3) *Need not both ring bell and blow whistle*.—Under Missouri Rev. St., § 809, railroad companies are not required to both

ring a bell and sound a whistle; but one of the signals is sufficient. In an action under the statute for killing stock, the burden is on plaintiff to prove that neither signals were given. *Summerville v. Hannibal & St. J. R. Co.*, 29 Mo. App. 48.—FOLLOWED IN *McCormick v. Kansas City, Ft. S. & M. R. Co.*, 50 Mo. App. 109.—*Cathcart v. Hannibal & St. J. R. Co.*, 19 Mo. App. 113.—FOLLOWED IN *McCormick v. Kansas City, Ft. S. & M. R. Co.*, 50 Mo. App. 109.

(4) *Effect of failure to signal*.—Whether it is negligence to run trains without sounding a whistle, ringing a bell, or slackening the speed, depends on the circumstances of each case. *Searles v. Milwaukee & St. P. R. Co.*, 35 Iowa 499, 5 Am. Ry. Rep. 524.

As to trespassing cattle, the defendant is liable for actual negligence on the part of the engineer in omitting to give the proper signals or in failing to use due diligence to prevent the accident after he saw the danger. *Hooper v. Chicago, St. P., M. & O. R. Co.*, 37 Minn. 52, 33 N.W. Rep. 314.

To make a railroad company liable under Missouri Rev. St., § 806, for killing live stock at a crossing, it must appear that neither the whistle was sounded nor the bell rung. *Van Note v. Hannibal & St. J. R. Co.*, 70 Mo., 641.

In order to recover against a railroad company for stock killed by a failure to sound a whistle or ring a bell, the fact of such failure must be established, but it need not be established by direct evidence; it may be inferred where there is no apparent reason why the stock would not have escaped had the signals been given. *Alexander v. Hannibal & St. J. R. Co.*, 76 Mo. 494.—FOLLOWING *Goodwin v. Chicago, R. I. & P. R. Co.*, 75 Mo. 73. REVIEWING AND DISTINGUISHING *Holman v. Chicago, R. I. & P. R. Co.*, 62 Mo. 562; *Stoneman v. Atlantic & P. R. Co.*, 58 Mo. 503.—DISTINGUISHED IN *Harlan v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 483.

A failure on the part of trainmen to sound a whistle or ring a bell on approaching a crossing, as required by statute, is *prima facie* evidence of negligence. *Barr v. Hannibal & St. J. R. Co.*, 30 Mo. App. 248.—QUOTING *Goodwin v. Chicago, R. I. & P. R. Co.*, 75 Mo. 73; *Turner v. Kansas City, St. J. & C. B. R. Co.*, 78 Mo. 578.

It may be true that if the bell had been rung and the whistle blown that such signals would not have prevented the animal from

coming in contact with the train, but it cannot be said that a collision would not have been avoided had the signals required by statute to be given at crossings been given. *Texas & N. O. R. Co. v. Ludtke*, 3 *Tex. Civ. App.* 308, 23 *S. W. Rep.* 82.

(5) *Failure must be proximate cause.*\*—In the absence of contributory negligence on the part of the owner, a failure to ring a bell or sound a whistle, as required by statute, will render a company liable for an injury to stock, if such failure reasonably contributed to the injury. *Western R. Co. v. Sistrunk*, 85 *Ala.* 352, 5 *So. Rep.* 79.

In a suit under Missouri Rev. St. 1879, § 806, for killing cattle, there can be no recovery unless the evidence shows that the killing resulted from a failure to ring a bell or sound a whistle. Plaintiff cannot recover on proof that other acts of negligence, which combined with such failure, caused the injury. *Braxton v. Hannibal & St. J. R. Co.*, 13 *Am. & Eng. R. Cas.* 494, 77 *Mo.* 455.

The failure to sound a whistle or ring a bell on the train is not negligence *per se*, and in order to make a company liable for such failure there must be evidence to show some connection between such failure and the injury. *Wallace v. St. Louis, I. M. & S. R. Co.*, 74 *Mo.* 594.—FOLLOWED IN *Main v. Hannibal & St. J. R. Co.*, 18 *Mo. App.* 388.

(6) *Duty as to animals near the track.*†—The statutory duty imposed on a railroad engineer to blow the whistle or ring the bell on perceiving an obstruction "on the track" (Alabama Code, § 1144) does not strictly apply when an animal is perceived near, but not on it; yet the failure to do so, in order to frighten away stock in dangerous proximity to the track, may constitute such negligence as will render the railroad company liable in damages for injuries to them. *East Tenn., V. & G. R. Co. v. Watson*, 90 *Ala.* 41, 7 *So. Rep.* 813.

The duty of the engineer to frighten animals away from the track, by using the whistle or bell, is not limited to his discovery of them on the track, or approaching it, but arises whenever he sees (or ought to see) them in dangerous proximity to the track, and under circumstances indicating

danger that they may get on it. *Western R. Co. v. Sistrunk*, 85 *Ala.*, 352, 5 *So. Rep.* 79.

In respect of animals near railroad tracks at places other than the crossings of public highways, the railroad is under no obligation to give any warning signals, or to slacken the speed of its train. *Sloop v. St. Louis, I. M. & S. R. Co.*, 22 *Mo. App.* 593.

(7) *Illustrations.*—An animal was killed on appellant's track within one hundred feet of a public crossing. Appellant neglected to give either of the statutory signals of warning. The jury had a right to infer that such neglect contributed to the injury, although appellant could not have discovered the animal's danger in time to have avoided the killing. *St. Louis, I. M. & S. R. Co. v. Hendricks*, 53 *Ark.* 201, 13 *S. W. Rep.* 699.

No whistle was sounded, or other alarm given, until the train was within twenty rods of the crossing. This was negligence. *Central Branch R. Co. v. Phillips*, 20 *Kan.* 9, 19 *Am. Ry. Rep.* 99.

Where the plaintiff's horse was in the pasture, through which the defendant's road ran, and was run over in the daytime by one of the engines of defendant, it appearing on the trial that the horse, before being struck, ran some two hundred yards on the track, and that there was nothing to prevent the engineer from seeing him, and that no alarm was given by the engineer until about the time the horse was run over,—held, that there was such negligence on the part of the engineer as would make the defendant liable in damages for the injury to the horse. *Jones v. North Carolina R. Co.*, 70 *N. Car.* 626.—REVIEWED IN *Doggett v. Richmond & D. R. Co.*, 81 *N. Car.* 459.

#### 66. Duty to stop train, generally.

—(1) *When must stop.*—If a conductor of a train sees a cow on the track at such distance ahead that the train could be stopped so she could be gotten off unhurt, the company is liable if the necessary steps are not taken to avoid the injuries. *Richmond v. Sacramento Valley R. Co.*, 18 *Cal.* 351.

Where stock is killed on a railroad track, and the engineer in charge could, by the use of ordinary care and skill, without danger, have stopped the train in time to avoid the collision, although the animals were wrongfully upon the track, the company is nevertheless liable. *Toledo, P. & W. R. Co. v.*

\* See *ante*, 34-36; *post*, 136, 188, 194, 277-279.

† See *ante*, 64; *post*, 67.

*Bray*, 57 Ill. 514, 10 Am. Ry. Rep. 441.—REVIEWED IN *Chicago & N. W. R. Co. v. Taylor*, 8 Ill. App. 108.

If those in charge of a train see a frightened animal running before the train toward a trestle, it is their duty to stop the train, both to avoid a collision with the animal and to avoid running it onto the trestle, where it will injure itself. *Newman v. Vicksburg & M. R. Co.*, 61 Mo. 580, 9 So. Rep. 172.

If it appears that animals might not have been killed by the exercise of due care, the company will be liable where the engineer fails to make an effort to stop a train, and fails to make any effort to frighten them from the track after they are seen. *Master v. Montana Union R. Co.*, 49 Am. & Eng. R. Cas. 564, 12 Mont. 163.

When the employés in charge of the trains of a railway company discover animals upon the track they are bound to exercise proper care and prudence to prevent injury to them, and a mere slackening of speed will not be considered sufficient to relieve them from responsibility. *Pontiac Pac. J. R. Co. v. Brady*, 4 Montr. L. R. (Q. B.) 346.

(2) *When need not stop.*—It is not always necessary that those in charge of a railroad train should stop it or slacken its speed on discovering stock on the track. Ordinary prudence requires them to promptly endeavor to drive them off by sounding the whistle, but does not require them to stop or slacken the speed of the train, when they may reasonably believe that they will leave the track in time, and there is no cause or reason to suppose there is any risk or danger. *Little Rock & Ft. S. R. Co. v. Trotter*, 11 Am. & Eng. R. Cas. 475, 37 Ark. 593.

There was no negligence in not stopping a train before the injury happened, if it could not have been anticipated that, as a consequence of not stopping, cattle running along the track would attempt to cross the culvert into which they fell and were injured. *Hot Springs R. Co. v. Newman*, 36 Ark. 607.

Where trespassing animals are killed by a moving train the company will not be liable where the engineer otherwise acted in a proper and lawful manner, merely because he did not stop the train until the animals were entirely off the track. *Hurd v. Grand Trunk R. Co.*, 35 Am. & Eng. R. Cas. 450, 15 Ont. App. 58.—DISTINGUISHING *Campbell v. Great Western R. Co.*, 15 U. C. Q. B.

498. QUOTING *Degg v. Midland R. Co.*, 1 H. & N. 773. REVIEWING *Manchester, S. J. & A. R. Co. v. Fullarton*, 14 C. B. N. S. 54; *Rosenberger v. Grand Trunk R. Co.*, 8 Ont. App. 482; *Singleton v. Eastern Counties R. Co.*, 7 C. B. N. S. 287; *Auger v. Ontario, S. & H. R. Co.*, 9 U. C. C. P. 164; *Sharrod v. London & N. W. R. Co.*, 4 Exch. 580.

(3) *Must not put train in peril.*—Where those in charge of a train perceive cattle ahead on the track near the entrance of a bridge, it is not their duty in all cases to delay or retard the train until the cattle can be driven off, because said cattle may run upon the bridge and so be killed. It is not their duty to so delay or retard the train unless, taking all the circumstances into account, it is probable that the cattle will not leave the track and will run upon the bridge. The first duty of those in charge of a train is to look to its safety, and where cattle upon the track are run over and injured, the question is, whether those in charge of the train did what reasonable men would have done under the circumstances, having in view the safety of the train, speed, regularity, and the safety of the cattle. *Louisville & N. R. Co. v. Ganole*, (Ky.) 13 Am. & Eng. R. Cas. 519.—EXPLAINING *Louisville & N. R. Co. v. Wainscott*, 3 Bush (Ky.) 149.

(4) — *nor disregard passengers' safety.*—Where the engineer of a passenger train sees cattle upon the track in advance, he is only bound to stop the train when he can do so with due regard to the safety of his passengers. *Louisville & N. R. Co. v. Marriott*, (Ky.) 19 Am. & Eng. R. Cas. 509.

A railroad company is not negligent in failing to stop a train after live stock is discovered on the track, if such stopping would imperil property being carried, or the lives of passengers. *Wallace v. St. Louis, I. M. & S. R. Co.*, 74 Mo. 594.—DISTINGUISHING *Gorman v. Pacific R. Co.*, 26 Mo. 441.—APPROVED IN *Hill v. Missouri Pac. R. Co.*, 49 Mo. App. 520. FOLLOWED IN *Brooks v. Hannibal & St. J. R. Co.*, 27 Mo. App. 573. QUOTED IN *White v. St. Louis & S. F. R. Co.*, 20 Mo. App. 564.

(5) *Illustrations.*—Where the track of a railroad passed through a cut 80 rods long, and a horse of the owner of the land was near the track at the entrance of the cut, and the whistle of an approaching engine



was sounded, and the horse ran upon the track and into the cut, whence it could not escape up the sides, and the engine was run on and the whistle sounded, thereby continuing to frighten the horse until it jumped into a trestle work at the other end of the cut and was killed, when the engine could have been stopped after the horse was in the cut and before it jumped into the trestlework, —held, that the company was guilty of such negligence as rendered it liable at common law for the value of the horse. *Indianapolis, B. & W. R. Co. v. McBrown*, 46 Ind. 229, 6 Am. Ry. Rep. 415.

**67. Duty to stop train when animals are near track.\***—A locomotive engineer is not always required to stop his train upon seeing animals near the track. *Yazoo & M. V. R. Co. v. Brumfield*, 64 Miss. 637, 1 So. Rep. 905.

Failure to stop a train on discovering animals near the track is not ordinarily negligence; and to make it so the circumstances must be such as to suggest danger. *Yazoo & M. V. R. Co. v. Brumfield*, 64 Miss. 637, 1 So. Rep. 905.

Where an engineer sees a cow about to cross the track near to the train, he is not required to try to stop the train if it is apparent that the attempt would be useless. *Alabama G. S. R. Co. v. Chapman*, 31 Am. & Eng. R. Cas. 394, 80 Ala. 615, 2 So. Rep. 738.

The Alabama statute making it the duty of engineers to use all means to stop the train on perceiving any obstructions on the track of the road, does not apply to an animal running by the side of the track, but which suddenly turns and springs on the track too near the train to avoid an accident. *East Tenn. V. & G. R. Co. v. Bayliss*, 77 Ala. 429, 54 Am. Rep. 69.—APPROVING *Louisville & N. R. Co. v. Reidmond*, 11 Lea (Tenn.) 205.

An engineer of a train is not bound to stop it upon discovering cattle on the right of way, if it reasonably appears that sounding the alarm-whistle will drive them off and avoid danger. *Ohio & M. R. Co. v. Stribling*, 38 Ill. App. 17.

Those in charge of trains are not required to stop them or even check the speed upon seeing cattle near the track, unless it appears that it is necessary to do so to avoid injuring them. *New Orleans & N. E. R. Co. v. Bourgeois*, 66 Miss. 3, 5 So. Rep. 629.

If an engineer sees cattle quietly grazing along an unfenced track he is not bound to stop the train as a precautionary matter, and if they take fright and run toward the track, it is sufficient if he does all in his power to avoid a collision after the danger becomes apparent. *Young v. Hannibal & St. J. R. Co.*, 19 Am. & Eng. R. Cas. 512, 79 Mo. 336.

The failure to stop a train on seeing an animal by the side of the track a short distance ahead of the train is not negligence, when there is nothing in the actions of the animal to indicate that it will attempt to go upon the track, until it is too late to stop. *Savannah, F. & W. R. Co. v. Rice*, 23 Fla. 575, 3 So. Rep. 170.

Negligence cannot be predicated from the fact that the engineer saw, or might have seen, the cow near the track, as was done by the instructions in this case. It was not the duty of the engineer to stop his train or slacken its speed, or sound the alarm, merely because he saw, or might have seen, the cow grazing near the track. Otherwise, trains could not make the necessary headway and form the necessary connections. *Milburn v. Hannibal & St. J. R. Co.*, 21 Mo. App. 426.—FOLLOWING *Young v. Hannibal & St. J. R. Co.*, 79 Mo. 336.—FOLLOWED IN *Sloop v. St. Louis, I. M. & S. R. Co.*, 22 Mo. App. 593.

Where those in charge of a moving train see cattle near the track, they are not required to stop the train or attempt to avoid injuring them, unless it is reasonably apparent that the animals will go on the track before the train passes. *Grant v. Hannibal & St. J. R. Co.*, 25 Mo. App. 227.

Where cattle are seen moving on a line with the track, it is the duty of the trainmen to use proper precautions in frightening them away or stopping the train, though not on the track, and if, by failing to do so, the stock suddenly turns and is injured while attempting to cross the track so near the engine that it is impossible to stop, the company will be liable. *South & N. Ala. R. Co. v. Jones*, 56 Ala. 507.—DISTINGUISHED IN *Alabama G. S. R. Co. v. McAlpine*, 22 Am. & Eng. R. Cas. 602, 75 Ala. 113. QUOTED IN *Alabama G. S. R. Co. v. Powers*, 19 Am. & Eng. R. Cas. 502, 73 Ala. 244.

Those in charge of a train are not required to stop it upon seeing cattle some fifty feet from the track, but they are required to exercise ordinary prudence by

\* See ante, 64, 65.

watching to see if they are likely to cross the track. *Missouri Pac. R. Co. v. Reynolds*, 13 Am. & Eng. R. Cas. 510, 31 Kan. 132, 1 Pac. Rep. 150.

**68. Duty to reverse engine.**—A locomotive engineer is not required to reverse his engine to avoid injuring cattle on the track if it appears that such reversal would endanger the lives of the trainmen or of passengers, but the company is not excused on the ground that such reversal would be injurious to the machinery. *East Tenn., V. & G. R. Co. v. Selcer*, 7 Lea (Tenn.) 557.—FOLLOWING *Nashville & C. R. Co. v. Anthony*, 1 Lea (Tenn.) 516.

**69. Duty to slacken speed.\***—(1) *Generally.*—A party whose cattle, without fault on his part, escape from his inclosure and wander on to a railroad track, and are there killed by alleged carelessness in not slackening the speed of the locomotive, cannot recover for their loss from the railroad company. *Price v. New Jersey R. & T. Co.*, 31 N. J. L. 229.—FOLLOWING *Munger v. Tonawanda R. Co.*, 4 N. Y. 349.—DISTINGUISHED IN *Alabama G. S. R. Co. v. Powers*, 19 Am. & Eng. R. Cas. 502, 73 Ala. 244.

(2) *When must check speed.*—Where animals can be seen on the track by the use of ordinary care on the part of those in charge of the train, it is their duty to slacken the speed, or, if necessary to avoid injury, to stop the train. *Shuman v. Indianapolis & St. L. R. Co.*, 11 Ill. App. 472.

Where a cow is killed upon a railroad track by a passing train, if she was in plain view of the engine-driver and fireman in charge of the train, and was seen, or could have been seen by them by the use of ordinary care, in time to have slackened the speed of the train, and no efforts were made in that direction, this will be such negligence as renders the company liable. *Rockford, R. I. & St. L. R. Co. v. Rafferty*, 73 Ill. 58.

If those in charge of a train see a cow on the track two or three hundred yards ahead, the company will be liable for an injury thereto if no attempt is made to slacken the speed, even though the cow be wrongfully on the track; but where it appears that the cow was suddenly driven on the track by a dog, the company will not be liable if it appears that she was killed without fault on

\*Obligation to slacken speed, see notes, 13 AM. & ENG. R. CAS. 520; 38 *Id.* 308, *abstr.* See also *note*, 32; *post*, 198, 201, 210, 211.

the part of the engineer. *Illinois C. R. Co. v. Wren*, 43 Ill. 77.

An engineer is guilty of negligence where he discovers stock on the track and blows the alarm-whistle, but fails to check the speed of his train and runs down the stock and kills it. *Bullington v. Newport News & M. V. Co.*, 32 W. Va. 436, 9 S. E. Rep. 876.

(3) *When need not check speed.*—A railroad company cannot be held liable for negligently killing live stock on proof that the rate of speed was not slackened, nor the whistle sounded, where the circumstances of the case show that such efforts would have been unavailing. *Flattes v. Chicago, R. I. & P. R. Co.*, 35 Iowa 191, 5 Am. Ry. Rep. 518.

A railroad company will not be liable to the owner of horses killed on the track by reason of the engineer not slackening the speed of the train, unless it appears that he acted maliciously or wantonly. *Boyle v. New York, L. E. & W. R. Co.*, 39 Hun. (N. Y.) 171; *affirmed* in 115 N. Y. 636, *mem.*, 2 Silt. App. 326, 21 N. E. Rep. 724, 23 N. Y. S. R. 731.—QUOTING *Darling v. Boston & A. R. Co.*, 121 Mass. 118. REVIEWING *Maynard v. Boston & M. R. Co.*, 115 Mass. 458.

The failure to slacken the speed of a train on approaching a highway crossing is not negligence *per se*, and will not in itself entitle an owner of animals killed to recover against the company. *Zeigler v. North Eastern R. Co.*, 7 So. Car. 402.—APPLIED IN *Barber v. Richmond & D. R. Co.*, 34 So. Car. 444.

(4) *Must consult safety of passengers.\**—Railroad companies are not required to diminish the speed of passenger trains in order to avoid injuring live stock on the track, if so doing would increase the danger to the passengers. *Sandham v. Chicago, R. I. & P. R. Co.*, 38 Iowa 88.

A railroad company will not be liable for killing live stock on the track by reason of a failure to check the speed of a train, where such checking would endanger property being carried, or the lives of passengers; but it is otherwise if no such danger would result from checking the speed. *Pryor v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 215.

(5) *Illustrations.*—Under Alabama Code 1876, § 1699, railroad companies are only required to reduce the speed of their trains

\* See *ante*, 38, 60, 68.

when approaching road-crossings in "a curve or cut where the engineer cannot see at least one quarter of a mile ahead," and it is error in an action for damages for killing stock to instruct the jury that it is the duty of railroads to check the speed of their trains when approaching a public crossing, when the undisputed evidence shows that the killing took place in an open field, the ground being level, and there being neither curve nor cut in that part of the road; that the train was approaching and was within 175 or 200 yards of a flag-station; and that there was a public road-crossing ahead of the train and within 300 or 400 yards of the scene of the collision. *Nashville, C. & St. L. R. Co. v. Hembree*, 38 *Am. & Eng. R. Cas.* 300, 85 *Ala.* 481, 5 *So. Rep.* 173.

Where the evidence tends to prove that a horse ran 400 yards on the track, on a bright moonlight night, and in the full glare of the headlight, gradually increasing his speed until overtaken, and yet there was no slackening of the speed of the engine, this is suggestive of recklessness on the part of the company's agents, and the court will refuse to disturb a verdict against the road. *Macon & W. R. Co. v. Lester*, 30 *Ga.* 911.

Where a railroad company is charged with negligently killing a horse, the company cannot be said to be entirely free from negligence under proof that the engineer saw the horse running some forty yards ahead of his train, but ran on without perceptibly checking its speed, and without sounding the whistle, claiming that it would have been impossible to have prevented striking the animal. *Bedford v. Louisville, N. O. & T. R. Co.*, 65 *Miss.* 385, 4 *So. Rep.* 121.

Where it appeared that the train was running at a greater than usual speed upon a straight part of the road, in the daytime, and that one of several cattle that were feeding near, and crossing the road was killed by the locomotive,—*held*, that it was negligence that the speed was not lessened, nor the usual mode of driving off stock by the blowing of a steam-whistle resorted to. *Aycock v. Wilmington & W. R. Co.*, 6 *Jones (N. Car.)* 231.—DISTINGUISHED IN *Laws v. North Carolina R. Co.*, 7 *Jones (N. Car.)* 468. REVIEWED IN *Doggett v. Richmond & D. R. Co.*, 81 *N. Car.* 459.

The plaintiff's mule was run over and killed. On the trial, the company proved that the engineer was on the lookout ahead; that he saw the mule when it dashed into

the road; that he immediately sounded the alarm-whistle, and that one of the brakes was put down, but as to whether the other two brakes were put down no proof was made. *Held*, to exempt itself from damages under the Tennessee statute it was incumbent on the company to show that all three brakes were put down. *Memphis & C. R. Co. v. Smith*, 9 *Heisk. (Tenn.)* 860.—DISAPPROVED IN *East Tenn., V. & G. R. Co. v. Scales*, 2 *Lea (Tenn.)* 688. EXPLAINED IN *Nashville & C. R. Co. v. Anthony*, 1 *Lea (Tenn.)* 516.

In an action against a railroad company for negligently killing a mule, plaintiff's evidence showed that it was killed while standing in a space from three to seven feet wide, between the track and a bank on which was a fence; that it could have been seen 500 yards, and that the train could have been stopped in 200 yards, but the train was running 30 miles an hour and passed without signals and without checking its speed. *Held*, that it was error in the trial court to sustain a demurrer to plaintiff's evidence. *Heard v. Chesapeake & O. R. Co.*, 26 *W. Va.* 455.

**70. Right to run at reasonably high rate of speed.\***—Railroad companies are not required to regulate the manner of running their trains with reference to live stock that may stray upon the track, but have a right to run at a reasonable speed, either day or night, being controlled therein entirely by the exigencies of their business and by custom. *Raiford v. Mississippi C. R. Co.*, 43 *Miss.* 233.

A railroad company will not be adjudged negligent in killing stock on proof merely showing that the train was running faster than usual. *Plaster v. Illinois C. R. Co.*, 35 *Iowa* 449, 5 *Am. Ry. Rep.* 528.

The rate of speed to be adopted in the running of trains is to be determined from the nature of the business and the amount of carrying that the company is required to do. If the exigencies of business demand a rapid transportation, the companies will not be liable, because the danger to stock is increased by running fast trains, yet companies are not allowed to relax their efforts to protect live stock from injury.

\* Running train at a high speed not negligence *per se*, see note 38 *AM. & ENG. R. CAS.* 304, *abstr.*

Speed of train when animals are on track, see notes, 19 *AM. & ENG. R. CAS.* 496, 511.

*New Orleans, J. & G. N. R. Co. v. Field*, 46 Miss. 573, 2 Am. Ry. Rep. 439.

A railroad company is not liable for killing stock on the track where the train is not exceeding the statutory limit, and the engineer, as soon as he saw the stock, or with proper care might have seen it, did everything that he could to avoid the accident, though the train was running faster than schedule time. *Seawell v. Raleigh & A. R. Co.*, 106 N. Car. 272, 10 S. E. Rep. 1045.—FOLLOWING *Winston v. Raleigh & G. R. Co.*, 90 N. Car. 66.

Where owners of live stock permit them to run at large in the vicinity of an unclosed railroad track, the company is only required in the legitimate conduct of its business to exercise ordinary and reasonable care to avoid unnecessary injury thereto. The speed at which trains shall be run is to be determined by reference to its other business, and the company is not bound to consider the increased risk to live stock running at large, and lessen the speed of its trains on that account. *Central Ohio R. Co. v. Lawrence*, 13 Ohio St. 66.—DISTINGUISHED IN *Burlington & M. R. Co. v. Brinckman*, 11 Am. & Eng. R. Cas. 438, 14 Neb. 70. REVIEWED IN *Pittsburgh, C. & St. L. R. Co. v. McMillan*, 7 Am. & Eng. R. Cas. 588, 37 Ohio St. 554.

In consideration of the public conveyance and accommodation, railroad companies are to be considered in the exclusive possession of lands purchased for their right of way, and as possessing a license to use the greatest obtainable rate of speed, without reference to property or persons that may go upon the track. *New York & E. R. Co. v. Skinner*, 19 Pa. St. 298.

Proof that an engineer passed a station at a greater rate of speed than that prescribed by the rules of the company, and that a watchman gave an incorrect signal as to an obstruction on the track, will not make a company liable for killing animals 150 rods beyond a station, where it does not appear that the incorrect signal was the result of negligence on the part of the watchman, and the rate of speed was not an unusual one. *Stern v. Michigan C. R. Co.*, 76 Mich. 591, 43 N. W. Rep. 587.

**71. Running at unlawful rate of speed.**—If a railroad company knowingly runs its trains under such conditions as renders it impossible for those in charge of them to prevent injury to stock straying

upon the track, and such injury results, it ought to be and is held responsible for the loss; especially, when the train is run in the nighttime at such a high rate of speed that stock cannot be seen in time to prevent injury by ordinary means and appliances. *Central R. & B. Co. v. Ingram*, 98 Ala. 395.

A railroad company will be liable for negligently killing stock where the train at the time is being run, on a straight track, at night, at such a speed as cannot be stopped within the distance in which cattle may be seen on the track with the use of a headlight. *Memphis & C. R. Co. v. Lyon*, 62 Ala. 71.—FOLLOWING *Tanner v. Nashville & D. R. Co. (M. S.)*.—REVIEWED IN *East Tenn., V. & G. R. Co. v. Deaver*, 79 Ala. 216.

Proof that stock was killed by a train moving at a rate of speed prohibited by law makes the company liable. *Houston & T. C. R. Co. v. Terry*, 42 Tex. 451.

The engineer on a government railway train was guilty of negligence for which the Crown was liable under Rev. St. Canada, ch. 38, § 23, and 50-51 Vic. ch. 16, § 16 (c.), for allowing his train to run over and kill a horse, when it appeared that at the time of the accident the train was being run faster than usual to make up time, that it had passed a station without slowing up, and was approaching a crossing at full speed, the engineer admitting that he saw something on the track but paid no attention to it. *Gilchrist v. Queen*, 2 Can. Exch. 300.

**72. Effect of increasing rate of speed.**—Where it is apparent that cattle were discovered on a crossing too near the train to avoid a collision, the company will not be liable because those in charge increased the rate of speed in order to lessen the danger to the train. *Owens v. Hannibal & St. J. R. Co.*, 58 Mo. 386, 9 Am. Ry. Rep. 19.

If a locomotive is running through an incorporated city at less than six miles an hour when animals jump into a trestle and render a collision inevitable, the speed may be increased, notwithstanding Mississippi Code 1880, § 1047, in order to strike them with such momentum as to knock them off the track and avoid throwing the train from the bridge. *Chicago, St. L. & N. O. R. Co. v. Jones*, 11 Am. & Eng. R. Cas. 450, 59 Miss. 465.

Where a train which injures cattle is run without stopping, in order to escape liability the company must show that its em-

ployés were guilty of no default, and that a collision was inevitable, and that by increasing the speed of the train the danger to the train and persons thereon was diminished. *Chicago, St. L. & N. O. R. Co. v. Jones*, 11 *Am. & Eng. R. Cas.* 450, 59 *Miss.* 465.

Upon the approach of the railroad train to the horses, they ran along the side of the track a long distance, and were forced upon the track by an embankment, and were driven into a bridge, and some of them were injured by the train, its speed not having been diminished, but having been increased; and the remaining horses were injured on the bridge by another train which followed in a few minutes, the engineer of which did not discover the horses until he was near them, though the conductor jumped off the train and the fireman deserted his post, and when the signal was given there was no person to apply the brakes. *Held*, that the railroad company was guilty of negligence. *Toledo, W. & W. R. Co. v. Milligan*, 52 *Ind.* 505.

### 3. Necessity for Actually Touching Animal.\*

**73. When actual contact is necessary.**—(1) *In Indiana.*—It is well settled that under the statutes of Indiana prior to the law of 1885 there could be no liability of a railroad company for the death or injury of an animal unless the same was killed or injured by an actual touching by the engine or cars or other carriages. The act of 1885 has not changed the statutory liability, and hence, where an animal is not killed by an actual touching by the engine, the company can only be sued on its common-law liability. *Ft. Wayne, C. & L. R. Co. v. O'Keefe*, 4 *Ind. App.* 249, 30 *N. E. Rep.* 916.

Under the Indiana statute, railroad companies are not liable for injuries to live stock unless the animal is actually struck by the train. *Pittsburgh, C. & St. L. R. Co. v. Troxell*, 57 *Ind.* 246.—**DISTINGUISHED IN** *Louisville, N. A. & C. R. Co. v. Harrington*, 19 *Am. & Eng. R. Cas.* 606, 92 *Ind.* 457.—*Croy v. Louisville, N. A. & C. R. Co.*, 19 *Am. & Eng. R. Cas.* 608, 97 *Ind.* 126.

In an action under the statute, evidence

\* Injuries not resulting from contact with train, see notes, 19 *AM. & ENG. R. CAS.* 610, 15 *Id.* 526.

When injury to live stock is "done by" or "caused by" a train or engine within meaning of statutes, see note, 14 *L. R. A.* 841. See also *post*, 1355.

must be introduced from which the court or jury may find that the locomotive or cars came in actual contact with the animals killed or injured. *Louisville, E. & St. L. R. Co. v. Thomas*, 106 *Ind.* 10, 5 *N. E. Rep.* 198. *Jeffersonville, M. & I. R. Co. v. Dunlap*, 31 *Am. & Eng. R. Cas.* 512, 112 *Ind.* 93, 13 *N. E. Rep.* 403. *Louisville, N. A. & C. R. Co. v. Smith*, 58 *Ind.* 575, 19 *Am. Ry. Rep.* 18.

The cases of killing or injury to live stock, provided for under 1 *Indiana Rev. St.* 1876, p. 751, § 1, by locomotives, etc., do not include cases where animals become so frightened as to injure or kill themselves. *Baltimore, P. & C. R. Co. v. Thomas*, 60 *Ind.* 107.

It is essential to the liability of a railroad company, under the acts of 1853 and 1863, for the death or injury of an animal, that the animal should be actually touched by the engine, cars, or other carriages. *Indianapolis, B. & W. R. Co. v. McBrown*, 46 *Ind.* 229, 6 *Am. Ry. Rep.* 415.

The Indiana act of 1853, making railroad companies liable for injuries to live stock, whether negligent or not, does not include cases where animals become frightened and injure themselves, without actual collision with the train. *Peru & I. R. Co. v. Hasket*, 10 *Ind.* 409.—**DISTINGUISHED IN** *Strong v. Sacramento & P. R. Co.*, 8 *Am. & Eng. R. Cas.* 273, 61 *Cal.* 326; *Meeker v. Northern Pac. R. Co.*, 21 *Oreg.* 513. **FOLLOWED IN** *Lafferty v. Hannibal & St. J. R. Co.*, 44 *Mo.* 291. **REVIEWED IN** *Young v. St. Louis, K. C. & N. R. Co.*, 44 *Iowa* 172.

To render a railroad company liable, under the statute, for animals killed or injured by its cars, locomotives, or other carriages, there must be actual collision of the cars, locomotives, or other carriages with such animals. A company is not liable where a train caused the animal to take fright, and the injury was the result of the fright, as, e.g., where a colt frightened by a train ran from an adjoining field upon the railroad track, which was not properly fenced, and there broke its leg between the bars of a cow-pit. *Ohio & M. R. Co. v. Cole*, 41 *Ind.* 331.—**DISTINGUISHED IN** *Indianapolis, P. & C. R. Co. v. Collingwood*, 71 *Ind.* 476; *Meeker v. Northern Pac. R. Co.*, 21 *Oreg.* 513.

Judgment must be reversed in the absence of evidence showing that a horse found dead by the side of the road was struck by the locomotive. *Toledo, W. & W. R. Co. v. Stithorn*, 16 *Ind.* 225.

Two mules were tied together and turned out to graze, one of which was struck by a train and killed, and was so dragged along the track as to kill the other. *Held*, that the owner could recover only for the one struck by the train. *Jeffersonville, M. & I. R. Co. v. Downey*, 61 Ind. 287.

(2) *In Missouri*.—There is a wide difference between the case of an actual collision and one where there is none, in respect to the inquiry, whether negligence in running the railroad train at an excessive rate of speed, in violation of a municipal ordinance, was the proximate cause of the injury. *Lourey v. St. Louis & H. R. Co.*, 40 Mo. App. 554.

Under Missouri Rev. St., § 809, in order to recover for live stock killed or injured, there must be proof, either direct or circumstantial, of an actual collision between the animals and the train. *Hesse v. St. Louis, I. M. & S. R. Co.*, 36 Mo. App. 163.—*REVIEWING BLEWETT v. Wyandotte, K. C. & N. W. R. Co.*, 72 Mo. 583.

There can be no recovery for cattle alleged to have been killed by a train in the absence of any evidence to show a collision. Such evidence, however, need not be direct, but the collision may be inferred from facts and circumstances. *Halferty v. Wabash, St. L. & P. R. Co.*, 82 Mo. 90.

(3) *In Nebraska*.—The true meaning of §§ 1 and 2 of ch. 72 of the Comp. St. of Nebraska is that the injury to stock must be caused by actual collision—that is, it must be done by the agents, engines, or cars of the company, or the locomotives, engines, or trains of any other corporation permitted and running over or upon the said road, or the wilful misconduct of the trainmen in the course of their employment—to make the company liable. *Burlington & M. R. R. Co. v. Shoemaker*, 22 Am. & Eng. R. Cas. 565, 18 Neb. 369.

(4) *In Texas*.—Under Texas Rev. St., art. 4245, making railroads liable to the owner for the value of all stock killed or injured by the locomotive and cars of such railroad company in running their respective railroads, there can be no recovery unless the injury is caused by actual collision of the locomotive or cars with the stock injured. *Houston & T. C. R. Co. v. Harris*, 3 Tex. App. (Civ. Cas.) 270.

**74. Where actual contact is unnecessary.**—In an action against a railroad company for damages for the killing of a

horse by defendant's train, at a point where defendant had a right to build a fence it had failed to do so, the fact that the train did not strike the horse, and that the horse was injured by running in front of the train into a bridge, does not relieve the railroad company of liability. *Liston v. Central Iowa R. Co.*, 26 Am. & Eng. R. Cas. 593, 70 Iowa 714, 29 N.W. Rep. 445.

Where stock is injured on a railroad which is unfenced, it is a question for the jury whether or not the injury was caused by the negligence of the railroad company. It is not necessary that stock should have been struck by a train to authorize a recovery under the statute. *Kraus v. Burlington, C. R. & N. R. Co.*, 55 Iowa 338, 7 N.W. Rep. 598.—*FOLLOWING Young v. St. Louis, I. C. & N. R. Co.*, 44 Iowa 172.—*FOLLOWING International & G. N. R. Co. v. Hug* 31 Am. & Eng. R. Cas. 569, 68 Tex. 290.

In an action for injury to stock by a railroad, there may be a recovery without any actual collision, if the action be one at common law, though it is otherwise when the action is one for double damages under the statute. *Lourey v. St. Louis & H. R. Co.*, 40 Mo. App. 554.

Under § 4044, Hill's Oregon Code, a railroad company is liable for the death or injury of stock caused by a moving train upon or near its unfenced track, happening where the track is required to be fenced, whether or not the death or injury is caused by actual contact with the train. *Meeker v. Northern Pac. R. Co.*, 21 Oreg. 513, 28 Pac. Rep. 639.—*DISTINGUISHING Peru & I. R. Co. v. Hasket*, 10 Ind. 409, 71 Am. Dec. 335; *Ohio & M. R. Co. v. Cole*, 41 Ind. 331. *NOT FOLLOWING Lafferty v. Hannibal & St. J. R. Co.*, 44 Mo. 291; *Schertz v. Indianapolis, B. & W. R. Co.*, 107 Ill. 577.

**75. Injuries caused by excavations, etc., near track.**—The law does not require a railway company to keep the excavations along the sides of its track free from water and ice, and it will not be liable for stock killed in consequence of ice therein, so as to prevent escape from the track over the same. *Peoria & R. I. R. Co. v. McClenahan*, 74 Ill. 435.

A railroad company is not liable for killing a horse where it becomes frightened on the approach of a train while grazing near the track, and runs some distance along the track, but not on it, and jumps into a "barrow-pit" and is killed. *New Orleans & N.*



*E. R. Co. v. Thornton*, 65 Miss. 256, 3 So. Rep. 654.

In North Carolina, where railroad companies are not required to fence, a company will not be liable where a fence is removed in the construction of a road, and an animal pasturing upon the lands falls into an unfenced cut. *Jones v. Western N. C. R. Co.*, 95 N. Car. 328.

**70. — by wells near the track.**—

In an action against a railroad for an injury to a horse from falling into a dry well on defendant's lot partly concealed by rubbish, where the fence was down, the presumption is that the company knew of the existence of such well and is chargeable with negligence in not having it securely closed. *Nelson v. Central R. & B. Co.*, 48 Ga. 152.

No statutory liability is imposed upon railroads for damages to cattle that may fall into abandoned wells or tanks on its right of way, although occasioned by its failure to erect and maintain fences, as required by the Missouri Railroad Act, § 43. The liability of a company in such case is, therefore, such only as is imposed by the common law. *Hughes v. Hannibal & St. J. R. Co.*, 66 Mo. 325.—FOLLOWED IN *Turner v. Thomas*, 71 Mo. 596.

Where a well is dug upon the right of way of a railroad company without their knowledge and consent, and a mule falls into it and is killed, the company cannot be held liable on the ground of negligence in not covering or securing such well. The act requiring railroad companies to fence their roads is only designed to protect the travelling community from accidents occasioned by stock getting upon the road, and also to prevent damage to such stock from their liability to be run over and killed, and is not intended to extend their liability to the case named. *Illinois C. R. Co. v. Carraher*, 47 Ill. 333.—APPROVED IN *O'Conner v. Illinois C. R. Co.*, 44 La. Ann. 339.

**77. Injuries at or on bridges.**—

(1) *When company liable.*—A railroad company is liable for the death of a horse that goes upon the track where it is not fenced and runs ahead of a train until it falls into a bridge, where it was so injured as to die, it appearing that the track was on a fill from where the horse went on the track to the bridge, with but one narrow place where it could have escaped, though the train was stopped before reaching the horse. *Young v. St. Louis, K. C. & N. R. Co.*, 44 Iowa 172.

—REVIEWING *Peru & I. R. Co. v. Hasket*, 10 Ind. 409; *Lafferty v. Hannibal & St. J. R. Co.*, 44 Mo. 291.—FOLLOWED IN *Kraus v. Burlington, C. R. & N. R. Co.*, 55 Iowa 338. REVIEWED IN *International & G. N. R. Co. v. Hughes*, 31 Am. & Eng. R. Cas. 569, 68 Tex. 290.

Under the Kansas act of 1874, ch. 94, § 5, making railroad companies liable for killing stock, but providing that the act shall not apply to any company "whose road is inclosed with a good and lawful fence, to prevent such animals from being on such road," in order to make the company liable for killing stock there must not only be a lack of a fence, but also the lack of one which would have prevented the injury. In order to make the company liable, the injury must be the direct result of operating the road, but it is not necessary that there be actual collision between the engine and the animals injured where the injury was caused by falling into a tie-bridge. *Atchison, T. & S. F. R. Co. v. Jones*, 20 Kan. 527.—QUOTED IN *Missouri Pac. R. Co. v. Gill*, 49 Kan. 441; *International & G. N. R. Co. v. Hughes*, 31 Am. & Eng. R. Cas. 569, 68 Tex. 290. REVIEWED IN *Missouri Pac. R. Co. v. Eckel*, 49 Kan. 794.

The injuries resulting from the animals falling into the bridge were not within the scope of the Kansas act of 1874, ch. 94, § 5, although the company might be liable therefor on account of its negligence. *Atchison, T. & S. F. R. Co. v. Edwards*, 20 Kan. 531, 20 Am. Ry. Rep. 311.

The track of a railroad being unfenced, two mares got onto it, and, walking along, attempted to cross a bridge. The bridge being built of ties, with open spaces between, their legs slipped into these open spaces, and the animals became fastened in the bridge, receiving certain injuries therefrom. There was negligence, as the jury found, on the part of the company in the construction of the bridge causing these injuries. Afterward, a train approaching found the animals still fastened in the bridge. The trainmen proceeded to remove them therefrom, and in so doing the animals sustained still further injuries. Held, that the injuries done in removing the animals from the track were done in operating the road, within the meaning of the law of 1874 concerning injuries to stock. *Atchison, T. & S. F. R. Co. v. Edwards*, 20 Kan. 531, 20 Am. Ry. Rep. 311.

Where a horse is killed by taking fright



and breaking through a railing on the side of an approach to a bridge, which a railroad company is bound to maintain, the company is liable where it appears that the railing was insufficient, and that the accident would not have happened had it been otherwise. *Titcomb v. Fitchburg R. Co.*, 12 Allen (Mass.) 254.—QUOTED IN *Sowles v. Moore*, 65 Vt. 322.

Under the provision of the General Railroad Act (§ 44, ch. 140, New York Laws of 1850, as amended by § 8, ch. 282, Laws of 1854), requiring railroad corporations to erect and maintain fences on the sides of their roads, and making a corporation which neglects to comply with said requirement "liable for damages which shall be done by the agents or engines of any such corporation to any cattle, horses \* \* \* thereon," to create a liability there must be some action on the part of the corporation, by its mechanical or other agents, producing the injury; no liability is imposed for injuries to cattle or horses caused by themselves when straying upon a railroad bridge. *Knight v. New York, L. E. & W. R. Co.*, 23 Am. & Eng. R. Cas. 188, 99 N. Y. 25, 1 N. E. Rep. 108; reversing 30 Hun. 415.—DISTINGUISHED IN *Dolan v. Newburgh, D. & C. R. Co.*, 42 Am. & Eng. R. Cas. 611, 120 N. Y. 571, 24 N. E. Rep. 824, 31 N. Y. S. R. 852; *Graham v. Delaware & H. C. Co.*, 46 Hun (N. Y.) 386, 12 N. Y. S. R. 390. REVIEWED IN *Leggett v. Rome, W. & O. R. Co.*, 41 Hun (N. Y.) 80, 2 N. Y. S. R. 312.

(2) *When company not liable.*—In the absence of any statute requiring railroad companies to fence or secure their bridges, a company cannot be made liable on mere proof that an animal was found fastened on a bridge with its legs broken. *Denver & R. G. R. Co. v. Chandler*, 8 Colo. 371, 8 Pac. Rep. 571.

Under the Illinois statute relating to the liability of railroads for stock killed, a company is not liable where a horse becomes frightened by an approaching train and runs upon a bridge and is so injured as to die, the train not having come in contact with the animal. *Chicago & N. W. R. Co. v. Taylor*, 8 Ill. App. 108.

A railroad company is not liable for an injury to a horse that occurs in a county where the commissioners have made no order as to what stock shall run at large, where it appears that the animal strayed upon the track, and becoming frightened

by an approaching train, and despite the slackening of the speed and the sounding of a whistle, fails to leave the track, as it safely might have done, but runs ahead of the train upon a bridge and breaks its leg. *Pittsburgh, C. & St. L. R. Co. v. Stuart*, 71 Ind. 500.—QUOTING *North Pa. R. Co. v. Rehman*, 49 Pa. St. 101; *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255.—DISTINGUISHED IN *Alabama G. S. R. Co. v. Powers*, 19 Am. & Eng. R. Cas. 502, 73 Ala. 244; *Bostwick v. Minneapolis & P. R. Co.*, 2 N. Dak. 440.

Under the provisions of §§ 1 and 2 of ch. 72 of Comp. St. of Nebraska, where a party's horse gets on the railroad track for the want of a fence such as the law requires the company to erect and maintain to inclose its track, and while on or near the track is frightened by a passing train, and in its flight is injured by falling through a bridge on the line of the railroad, and no negligence or wilful misconduct is charged to the agents of the company in charge of the train at the time, and where no injury is done to the horse by any actual collision or contact with the engine or cars of the train, the railroad company will not be liable to the owner of the horse for such injury. *Burlington & M. R. R. Co. v. Shoemaker*, 22 Am. & Eng. R. Cas. 565, 18 Neb. 369.

A railroad company is not liable for killing a colt on a bridge crossing a river where it appears that the colt was pastured on lands on the opposite side of the river, but had broke away, went a half-mile to a ford and crossed the river to an open mill-yard, from which it went upon the track near the bridge. *Hyatt v. New York, L. E. & W. R. Co.*, 46 N. Y. S. R. 7, 64 Hun 542, 19 N. Y. Supp. 461.

The owner of a horse cannot recover from a railroad company for its value when killed upon a bridge, where it does not appear that it was actually struck by the train, but where the evidence tended to show that the horse ran on the bridge and fell off. *Gulf, C. & S. F. R. Co. v. Ritter*, 4 Tex. App. (Civ. Cas.) 212, 16 S. W. Rep. 909.

One who, as a mere licensee, uses for the passage of his stock an opening under a railway bridge constructed by the company for its own use and benefit, does so at his own risk, and cannot recover for the death of a horse caused by his suddenly throwing up his head and striking the end of a bolt left projecting down from a timber of the

bridge. *Truax v. Chicago, St. P., M. & O. R. Co.*, 83 Wis. 547, 53 N. W. Rep. 842.

**78. Injuries on trestles.**—(1) *When company liable.*—A company is liable for the negligence of its employes in constructing a part of its yard, designed for receiving cotton, so that a mule is injured by catching its foot between a rail and a plank, while being driven with due care. *Central R. Co. v. Gleason*, 69 Ga. 200.—**DISTINGUISHING** *Thompson v. Central R. & B. Co.*, 54 Ga. 509; *Lindsey v. Central R. & B. Co.*, 46 Ga. 447.

Where a colt was unlawfully running at large, and strayed upon a railroad track, and became frightened at an approaching train, and ran upon the track and fell upon a trestle, so that it could not get off the track, and the employes of the company, after being requested to wait till other help could be secured, as that present was insufficient to remove the colt with safety, kicked the colt and gave it a lunge, when it fell off the side of the trestle, falling about eight feet, and in a few days thereafter died from injuries thus sustained, there was evidence tending to show that the injury to the colt was willfully and negligently inflicted, and that the plaintiff was entitled to recover, notwithstanding his own negligence in permitting the colt to run at large. *Ft. Wayne, C. & L. R. Co. v. O'Keefe*, 4 Ind. App. 249, 30 N. E. Rep. 916.

A railroad company is liable for the value of a horse which is killed by taking fright from a train and running upon a trestle and jumping therefrom, if it appears that those in charge of the train could have prevented the killing by the exercise of due care. *Newman v. Vicksburg & M. R. Co.*, 64 Miss. 115, 8 So. Rep. 172.

Running a train at an unlawful speed will not make the company liable for an injury to stock that becomes frightened and runs in front of a train into a trestle, where they are injured without any collision with the train, as the unlawful speed is not the proximate cause of the injury. *Lowry v. St. Louis & H. R. Co.* 40 Mo. App. 554.

(2) *When company not liable.*—It is proper to order a nonsuit where suit is brought against a railroad company for killing a horse, and plaintiff's evidence shows that his horse went upon the track and ran upon a trestle, where he fell and was killed, without negligence on the part of the com-

pany. *East Tenn., V. & G. R. Co. v. Walters*, 77 Ga. 69.

A railroad company is not liable for double damages under the Missouri statute, where the animal was killed by the company's employes in trying to extricate it from a trestle into which it had fallen. *Seibert v. Missouri, K. & T. R. Co.*, 72 Mo. 565.

A plaintiff is not entitled to recover for injuries to an animal which ran from fright into a trestle or bridge and was injured without being struck by the train. *Foster v. St. Louis, I. M. & S. R. Co.*, 90 Mo. 116, 2 S. W. Rep. 138.

Live stock killed or injured by running upon and falling from a trestle in consequence of fright caused by a moving train are not "killed or crippled by any train of cars or locomotive" within the meaning of the Tennessee acts 1891, ch. 101, making unfenced railroads absolutely liable for live stock killed or injured upon or near their tracks by actual collision with their moving trains. Only cases of killing or injury of live stock by actual collision with moving trains, etc., are within said act. *Nashville, C. & St. L. R. Co. v. Sadler*, 91 Tenn. 508, 19 S. W. Rep. 618.

A failure to sound a whistle as required by statute, when stock is seen on the track, will not necessarily make the company liable where the animal becomes frightened and runs on the track to a trestle, from which it jumps and is killed. *Holder v. Chicago, St. L. & N. O. R. Co.*, 13 Am. & Eng. R. Cas. 567, 11 Lea (Tenn.) 176.—**APPLYING** *East Tenn., V. & G. R. Co. v. Scales*, 2 Lea (Tenn.) 688. **RESTRICTING** *Nashville & C. R. Co. v. Thomas*, 5 Heisk. (Tenn.) 262.

Under a statute (Texas Rev. St. art. 4245) providing that every railroad company shall be liable to the owner for any stock killed or injured by the locomotives and cars of the company in running over their respective railways, unless the track is fenced, a railroad company is not liable for an injury to an animal running on the track through fright at the train, and being injured on a trestle, and not by contact with the locomotive or cars. *International & G. N. R. Co. v. Hughes*, 31 Am. & Eng. R. Cas. 569; 68 Tex. 290, 4 S. W. Rep. 492.—**FOLLOWING** *Kraus v. Burlington, C. R. & N. R. Co.*, 55 Iowa 338. **QUOTING** *Atchison, T. & S. F. R. Co. v. Jones*, 20 Kan. 527. **REVIEWING**

Young v. St. Louis, K. C. & N. R. Co., 44 Iowa 172.

**79. Injuries at cattle-guards; \* culverts.**—Plaintiff's horse was injured by falling through a cattle-guard. The injury was alleged to have been caused by failure of defendant to fence its track. It was not claimed that the horse was struck by the engine. The evidence tended to prove that the tracks of three horses, one of which was the horse injured, showed that they were going fast, on the right of way before the cattle-guard was reached, and that, during the night in which the accident occurred, a train passed over the road. The jury were instructed that in order to entitle the plaintiff to recover, he must establish, by a preponderance of evidence, that the horse was injured by being driven by one of defendant's trains into the cattle-guard. *Held*, that the presumption that the horses were frightened by a train is a mere surmise, and a verdict for the plaintiff cannot be sustained. *Moore v. Burlington & W. R. Co.*, 31 Am. & Eng. R. Cas. 572, 72 Iowa 75, 33 N. W. Rep. 371.—DISTINGUISHING *Chicago & N. W. R. Co. v. Dement*, 44 Ill. 74. FOLLOWING *Meade v. Kansas City, St. J. & C. B. R. Co.*, 45 Iowa 699.—REVIEWED IN *Brockert v. Central Iowa R. Co.*, 82 Iowa 369.

A railroad company is not bound to plank or cover culverts or drains necessary in the construction of its road, so as to prevent cattle from getting fast therein; and it is not liable for killing the same if there is no negligence in the management of the train. *Memphis & C. R. Co. v. Lyon*, 62 Ala. 71.—MODIFIED IN *Alabama G. S. R. Co. v. McAlpine*, 22 Am. & Eng. R. Cas. 602, 75 Ala. 113.

A railroad company is liable for injuries to a cow which escapes from adjoining lands to the track through an open culvert, though it appeared that the culvert was sufficient to turn stock at the ordinary height of water. *Keliker v. Connecticut River R. Co.*, 107 Mass. 411.—DISTINGUISHING *Eames v. Salem & L. R. Co.*, 98 Mass. 560. FOLLOWING *Eames v. Boston & W. R. Co.*, 14 Allen (Mass.) 151.—DISTINGUISHED IN *McDonnell v. Pittsfield & N. A. R. Co.*, 115 Mass. 564.

**80. Injuries caused by barbed wire fences.**—(1) *Generally.*—Where a company

incloses its track with a barbed wire fence it must use diligence corresponding to the increased danger of injuring stock thereon. *Atlanta & W. P. R. Co. v. Hudson*, 62 Ga. 679.—REVIEWED IN *Hillyard v. Grand Trunk R. Co.*, 23 Am. & Eng. R. Cas. 154, 8 Ont. 583.

Where a colt runs against a barbed wire fence maintained by a railroad company, and the issue is made, in an action against the company, as to whether such fence is dangerous and a nuisance, the railroad company should be permitted to prove that other municipalities had held out inducements to the company to erect them, the evidence tending to show that they were not considered dangerous or a nuisance. *Hillyard v. Grand Trunk R. Co.*, 23 Am. & Eng. R. Cas. 154, 8 Ont. 583.

(2) *When company liable.*—The right to make the usual noises incident to the operation of a railroad, including the right to give the usual danger signals, is included in the right to operate a railroad; but these rights may be exercised in such a negligent manner as to make a company liable for frightening a horse so as to make him injure himself by running into a wire fence. *Louisville & N. R. Co. v. Upton*, 18 Ill. App. 605.

A mare went upon the right of way of the railway company, where it ought to have been, but was not, fenced, and was frightened by a passing train, and was either thrown or ran off the railroad track into a wire fence located near but not on the line of the right of way, and sustained such injuries that she died. *Held*, that the railroad company was liable, under par. 1252 of the general statutes of 1889. *Missouri Pac. R. Co. v. Eckel*, 56 Am. & Eng. R. Cas. 174, 49 Kan. 794, 31 Pac. Rep. 693.—REVIEWING *Atchison, T. & S. F. R. Co. v. Jones*, 20 Kan. 527.

Plaintiff's mare was pastured on the defendant's right of way, at a place where it ought to have been, but was not, inclosed. She was frightened by the sounding of a whistle upon an engine drawing a train of cars, and ran along by the side of the track on the right of way into a barbed wire fence running at right angles with the railroad, and was injured. *Held*, that the defendant was liable under the statute. *Missouri Pac. R. Co. v. Gill*, 49 Kan. 441, 30 Pac. Rep. 414.—QUOTING *Atchison, T. & S. F. R. Co. v. Jones*, 20 Kan. 527.

\* See post, 160-169.

When an animal gets on the track at a point where the company was bound to fence, and being frightened by the approach of a train, is injured by attempting to jump a barbed wire fence, an action is maintainable, although not under the statute. *Boggs v. Missouri Pac. R. Co.*, 18 Mo. App. 274.

Prior to the New York act of 1891, ch. 367, it could not be said as a matter of law that it was negligence for a railroad company to erect and maintain a barbed wire fence, whereby a horse was injured, in the absence of anything to show the nature of the land fenced. *Guilfoos v. New York C. & H. R. R. Co.*, 23 N. Y. Supp. 925.

(3) *When company not liable.*—A railway company which inclosed part of its track with a barbed wire fence and permitted it to fall into disrepair is not liable for injury to a colt which, uninvited, strayed upon the track through a gap in the fence, became frightened by a train whistle and ran into the fence, and was thereby wounded and killed, there being no duty upon the part of the railway to build the fence or to keep it in a state of repair. *St. Louis, I. M. & S. R. Co. v. Ferguson*, 57 Ark. 16, 20 S. W. Rep. 545.—QUOTING *St. Louis, I. M. & S. R. Co. v. Fairbairn*, 48 Ark. 491; *Kansas City, S. & M. R. Co. v. Kirksey*, 38 Ark. 366; *Knight v. Abert*, 6 Pa. St. 472.

A railroad track was inclosed by a wire fence, but at the ends of the fence it did not connect with the track, so as to prevent stock from passing to the inclosed portion. A colt strayed upon the inclosed right of way, and becoming frightened at a train, ran against the wires and was killed. *Held*, that the company was not liable. The colt was trespassing, and the company was under no obligation to construct its fence of material such as would make it harmless. *St. Louis, I. M. & S. R. Co. v. Ferguson*, 57 Ark. 16, 20 S. W. Rep. 545.—APPROVING *Hughes v. Hannibal & St. J. R. Co.*, 66 Mo. 325; *Leseman v. South Carolina R. Co.*, 4 Rich. (So. Car.) 413; *Gilman v. Sioux City & P. R. Co.*, 62 Iowa 299, 17 N. W. Rep. 520. DISTINGUISHING *Clary v. Burlington & M. R. R. Co.*, 14 Neb. 232, 15 N. W. Rep. 220. QUOTING *St. Louis, I. M. & S. R. Co. v. Fairbairn*, 48 Ark. 491, 4 S. W. Rep. 50; *Kansas City, S. & M. R. Co. v. Kirksey*, 48 Ark. 366, 3 S. W. Rep. 190.

Although the evidence shows that an animal was found dead near an opening in the fence, with her foot entangled in the top

wire of the fence, and that tracks were found on the right of way inside of the fence, still a recovery cannot be had, unless it be further shown that she was frightened by the cars and for that reason ran against or attempted to jump over the fence and was thereby killed. *Perkins v. St. Louis, I. M. & S. R. Co.*, 103 Mo. 52, 15 S. W. Rep. 320.

Under Texas Rev. St. art. 4245, making railroads liable for the value of stock killed or injured by locomotives and cars running over their tracks, there can be no recovery for the death of a horse that becomes frightened and is killed by running into a fence. The statute only applies to damages caused by actual collision of the locomotives or cars with the stock injured or killed, as the case may be. *Texas & P. R. Co. v. Mitchell*, 4 Tex. App. (Civ. Cas.) 454, 17 S. W. Rep. 1079.

A barbed wire fence used by a railroad, where it is required to fence, and constructed upon an ordinary country road, cannot be treated as a nuisance in the absence of any by-law of the locality respecting fences of this kind, and therefore a railroad company will not be liable for loss of a colt, while following its dam, which runs against such fence and is injured, since 46 Vic. ch. 18, § 490, sub-section 16 (O), seems to sanction such fences. *Hillyard v. Grand Trunk R. Co.*, 23 Am. & Eng. R. Cas. 154, 8 Ont. 583.—REVIEWING *Atlanta & W. P. R. Co. v. Hudson*, 62 Ga. 679.

### 81. Injuries outside right of way.—

Although a railroad company is not ordinarily liable for injury resulting from fright occasioned by the running of its trains, when its servants are informed of the dangerous situation of an animal they must act with reference to its known habits in avoiding injury. *Newman v. Vicksburg & M. R. Co.*, 64 Miss. 115, 8 So. Rep. 172.

A railroad company is not liable for the value of a horse that takes fright, while on the highway, at a passing train and in his fright ruptures a blood-vessel, which causes his death, in the absence of anything to show that the injury resulted from some wrongful act of the company. *Moshier v. Utica & S. R. Co.*, 8 Barb. (N. Y.) 427.—DISAPPROVED IN *Coy v. Utica & S. R. Co.*, 23 Barb. (N. Y.) 643. NOT FOLLOWED IN *Lafferty v. Hannibal & St. J. R. Co.*, 44 Mo. 291. REVIEWED IN *Rood v. New York & E. R. Co.*, 18 Barb. (N. Y.) 80.

4. *Injuring or Killing Dogs.\**

**82. Company when liable.**—A railroad company is liable for killing a dog where it appears that the same could have been seen by those in charge of the train and the killing avoided, though the owner at the time is a trespasser on the track with his dog, which becomes frightened and runs on the track before the train. *St. Louis, A. & T. R. Co. v. Hauks*, 45 Am. & Eng. R. Cas. 521, 78 Tex. 300, 14 S. W. Rep. 691.

**83. — and when not liable.**—In an action for killing a dog, the evidence showed that there was a curve in the railroad at or close to the place where it was killed; that the railroad at that point was in a deep cut so that the engineer could not see it at any great distance; and that it was on a down grade. The testimony of the engineer was that as soon as he saw the dog, he reversed the engine, sounded the alarm-whistle and did all he could to avert the accident, and that the animal attempted to cross the track, when he was run over and killed. The fireman testified that he was otherwise engaged, and did not see the accident, but did hear the alarm-whistle and knew that the engine was reversed. Plaintiff's witnesses testified that they heard the whistle, but thought it was the whistle giving notice of the approach of the train to a town. *Held*, that the evidence was not sufficient to justify a judgment for the plaintiff. *Jones v. Bond*, 40 Am. & Eng. R. Cas. 191, 40 Fed. Rep. 281.

A dog is not "stock," within the meaning of Tex. Rev. St. art. 4245, hence railroads are not required to fence against that character of animals. The company will not be held liable for killing a dog, though the conductor knows that it is on the track. *Texas & P. R. Co. v. Scott*, 4 Tex. App. (Civ. Cas.) 476, 17 S. W. Rep. 1116.

**84. Presumption of negligence.†**—A dog is not property, except in a qualified sense, either at common law or under the statutes of Georgia. The owner may maintain an action of trespass *vi et armis* for the wanton and malicious killing of his dog, but he cannot maintain case for its unintentional, though negligent, destruction; and where a dog was killed by a railroad train, a presumption did not arise against the company, as in cases of injury to persons or prop-

erty. *Jemison v. Southwestern R. Co.*, 75 Ga. 444, 58 Am. Rep. 476.—APPROVING *Wilson v. Wilmington & M. R. Co.*, 10 Rich. (So. Car.) 52.

Where a dog is killed on the track, the rule as applied to cattle, that proof of the killing is *prima facie* proof of negligence, does not apply. *Wilson v. Wilmington & M. R. Co.*, 10 Rich. (So. Car.) 52.—DISTINGUISHING *Danner v. South Carolina R. Co.*, 4 Rich. (So. Car.) 329.—APPLIED IN *Roof v. Charlotte, C. & A. R. Co.*, 4 So. Car. 61. APPROVED IN *Jemison v. Southwestern R. Co.*, 75 Ga. 444, 58 Am. Rep. 476.

## III. LIABILITY AS DEPENDENT UPON COMPANY'S DUTY TO FENCE.\*

1 *Duty to Fence Track.†*

## a. In General.

**85. At common law.**—At common law railroad companies are not required to fence, and in the absence of a statute requiring them to fence, they are only, as a rule, liable for injuries to cattle which result from wilful negligence or misconduct. *Vandegrift v. Delaware R. Co.*, 2 Houst. (Del.) 287.

In the absence of special legislation on the subject requiring a railroad to fence its track, there is no general law which requires them to do so, neither is there any general law against the owners of stock allowing animals to run at large or to depasture public roads; consequently the bare fact that a railway is uninclosed, or unprotected by cattle-stops, where it crosses a public road, does not in general render the railroad company liable to pay for such stock straying upon the track and killed by a train; nor, upon the other hand, can contributory negligence be attributed to the plaintiff for allowing his stock to run at large. *Layne v. Ohio River R. Co.*, 35 W. Va. 438, 14 S. E. Rep. 123.

The rights, duties, and obligations of the New Orleans, O. & G. W. R. Co. are created by express law, and until the legislature re-

\* See also FENCES.

† Duty of companies to fence track generally, see note, 35 AM. & ENG. R. CAS. 132; and liability for stock that goes upon track where it might have been fenced, see 35 AM. & ENG. R. CAS. 165, *abstr.*; 56 *Id.* 166, *abstr.*; 42 *Id.* 578, *abstr.*; 7 *Id.* 577.

Duty of company to fence where it is legal to permit cattle to roam, see note, 22 AM. & ENG. R. CAS. 616.

\* See *post*, 202.

† See *post*, 128, 193, 207.

quires them to inclose their road, or delegates the power to the parochial authorities, and the latter exercise the same, the company will be under no obligation to inclose their road, or any part thereof, with fences or barriers. And if cattle stray upon the track and are killed or maimed by accident, it will be *damnum absque injuria*, and the owner will have the loss to bear. *Knight v. New Orleans, O. & G. W. R. Co.*, 15 *La. Ann.* 105.

**86. Rule where statute does not impose a positive duty to fence.\*—**

Under the system in Alabama all uninclosed lands are common pasture. The owners of stock have the right to allow them to go at large upon the commons. It is the duty of the railroad, if necessary to secure it in the safe operation of its road, and not of the owners of stock, to fence against the incursion of stock upon the railroad track. *Central R. & B. Co. v. Ingram*, 98 *Ala.* 395.

Under Wagn. Missouri St. 520, § 5, railway companies are not required to fence anywhere, the section simply dispensing with proof of negligence, where animals are killed, and the track is not fenced, but might have been. *Edwards v. Hannibal & St. J. R. Co.*, 66 *Mo.* 567.—QUOTING *Tiarks v. St. Louis & I. M. R. Co.*, 58 *Mo.* 45.—FOLLOWED IN *Wymore v. Hannibal & St. J. R. Co.*, 79 *Mo.* 247.

In Oregon the duty to fence is not imposed upon railroad companies as a duty, yet proof that the track is unfenced where stock is killed is conclusive of negligence, and the only defence that the company can make is that the owner contributed to the injury, or that he has wilfully procured the killing. *Hindman v. Oregon R. & N. Co.*, 38 *Am. & Eng. R. Cas.* 310, 17 *Oreg.* 614, 22 *Pac. Rep.* 116.

**87. Statutes requiring fences.†—** A statute which prescribes, as a precautionary measure, what shall be deemed a sufficient fence to protect a railroad track from the entrance of live stock, and declares an absolute liability for the killing of stock for the failure to fence, or for killing stock on an unfenced track, except for contributory negligence or misconduct, imposes by im-

plication the duty to fence as much as if such duty was expressly declared. *Sullivan v. Oregon R. & N. Co.*, 42 *Am. & Eng. R. Cas.* 625, 19 *Oreg.* 319, 24 *Pac. Rep.* 408.

Section 4044 of the Oregon statute makes a railroad company liable for the value of stock killed upon or near any unfenced track by a moving train, and § 4045 prescribes what shall be deemed a sufficient fence to guard the railway track from the entrance thereon of live stock, and § 4048 provides that in every action for the value of any stock mentioned in § 4044, so killed, that proof of such killing shall be deemed and held conclusive evidence of negligence, except where the owner is guilty of negligence or misconduct. *Held*, that the statute, in prescribing the fence, and declaring that stock killed "on or near any unfenced track" shall be conclusive evidence of negligence, by implication, makes it the duty of a railway to fence its track. A statute oftens speaks as plainly by inference and by means of the purpose which underlies the enactment as in any other manner. *Sullivan v. Oregon R. & N. Co.*, 42 *Am. & Eng. R. Cas.* 625, 19 *Oreg.* 319, 24 *Pac. Rep.* 408.—DISTINGUISHING *Bielenberg v. Montana Union R. Co.*, 8 *Mont.* 276; *Ohio & M. R. Co. v. Lackey*, 78 *Ill.* 55; *Zeigler v. South & N. Ala. Co.*, 58 *Ala.* 594; *Jensen v. Union Pac. R. Co.*, 6 *Utah* 253; *Hindman v. Oregon R. & N. Co.*, 17 *Oreg.* 614. QUOTING *Bennett v. Wabash, St. L. & P. R. Co.*, 61 *Iowa* 355; *Welsh v. Chicago, B. & Q. R. Co.*, 53 *Iowa* 632.

Such a statute is intended as a precautionary measure to protect the track from stock where allowed to roam at large, so as to insure safety in the running of the trains, as well as to prevent the destruction of live stock, and is a police regulation which finds its authority in the same power as regulates the storage of gunpowder or other dangerous instrumentalities, and is not obnoxious to the constitutional objection of depriving the company of its property without due process of law, or of denying it the equal protection of the laws. *Sullivan v. Oregon R. & N. Co.*, 42 *Am. & Eng. R. Cas.* 625, 19 *Oreg.* 319, 24 *Pac. Rep.* 408.

Under the statute, in view of the construction given in *Hindman v. Railroad Co.*, 17 *Oreg.* 619, when it is alleged and proven that stock is killed or injured at a place where the company has failed to fence,

\* See *post*, 130, 212.

† See *ante*, 1-28.

Various state statutes with their construction regarding liability of railroads for injuring or killing live stock by failure to fence, see note, 8 *L. R. A.* 135.



but the duty existed,—an unfenced track,—a case of negligence is made out unless the defendant can show contributory negligence or misconduct. *Sullivan v. Oregon R. & N. Co.*, 42 Am. & Eng. R. Cas. 625, 19 Oreg. 319, 24 Pac. Rep. 408.

Generally a railroad company, under the stock law of Kansas, 1874, in order to be absolved from liability for stock killed by it in the operation of its railroad must have its railroad "inclosed with a good and lawful fence, to prevent such animals from being on such road." *Atchison, T. & S. F. R. Co. v. Shaft*, 19 Am. & Eng. R. Cas. 529, 33 Kan. 521, 6 Pac. Rep. 908.

**88. Contract between company and landowner.\***—Where a railroad company has entered into a contract with an adjoining owner that the company will fence its right of way, and has failed, and is sued for stock killed on the track and for injuries by cattle trespassing upon fields, it cannot set up the defence, or escape liability, on the ground that the landowner might have fenced after the company failed to do so. *Louisville, N. A. & C. R. Co. v. Sumner*, 24 Am. & Eng. R. Cas. 641, 106 Ind. 55, 5 N. E. Rep. 404.

If proper fences are built and maintained, it will make no difference, in an action by an adjoining landowner for stock killed, whether such fences are built and maintained by the railroad company or such adjoining landowner, or whether they are upon the right of way or upon the lands of such owner, with his consent. *Bond v. Evansville & T. H. R. Co.*, 23 Am. & Eng. R. Cas. 200, 100 Ind. 301.

Where the law imposes upon railroads the duty of fencing, and a company is sued for killing live stock, it cannot exempt itself from liability by showing an agreement with the owner whereby the company agreed to put in certain cattle-guards as its only obligation in regard to fencing. *Cincinnati, H. & I. R. Co. v. Hildreth*, 77 Ind. 504.

Railroads in Indiana are required to fence, but it is immaterial whether the company or an adjoining landowner fences. If a fence is built and kept in repair, the roads will be held liable only for common-law negligence. *New Albany & S. R. Co. v. Pace*, 13 Ind. 411.

In an action against a railroad company by the owner of stock killed by a train used

by it in the construction of its road, at a point on the plaintiff's land where the road was not fenced, the defendant offered in evidence, in connection with proof of the date of the completion of the road, a deed containing several covenants of warranty, conveying to the defendant its roadbed across such land, executed by the plaintiff to the defendant prior to the alleged injury, and providing that the defendant should "make a good fence along" its "roadway, on said premises, within a reasonable time after the completion of" said railroad. *Held*, that the "completion" meant by the terms of such deed was the completion, not of the whole line of road, but simply of the same across plaintiff's land. *Held*, also, that such fence should have been built within a reasonable time after the completion of "said railroad. *Held*, also, that the evidence was proper. *Baltimore, P. & C. R. Co. v. McClellan*, 59 Ind. 440.

A railroad company which has entered into a contract, agreeing to fence its track where it passes through certain lands, is under the same liability as to loss or injuries to live stock as if a statute required it to fence. *Gulf, C. & S. F. R. Co. v. Washington*, 49 Fed. Rep. 347, 4 U. S. App. 121, 1 C. C. A. 286.

**89. — or company and a third person.\***—Where a railroad company has killed stock at a point where it was its duty to fence, it cannot excuse itself on the ground that the owner had not requested it to fence, or that a third party had waived the requirements of a fence. *Parks v. Hannibal & St. J. R. Co.*, 20 Mo. App. 440.—DISTINGUISHING *Harrington v. Chicago, R. I. & P. R. Co.*, 71 Mo. 384.

The adjacent landowners, in such a case, are not the agents for each other for the purpose of waiver of liability, and no one of them could waive the right of the other to hold the railroad company to its statutory obligation, but only for himself. *Parks v. Hannibal & St. J. R. Co.*, 20 Mo. App. 440.

**90. Against what animals must fence.†**—(1) *Generally.*—In Indiana the

\* See post, 94, 139, 150, 154, 166, 173, 181, 237.

† See post, 109-113.

A team hitched up but wandering about is not "running at large" within the meaning of Iowa Code requiring companies to fence, see 35 AM. & ENG. R. CAS. 133, *abstr.*

\* See post, 138, 139, 149, 156, 175.



company must fence against animals on a highway as well against those in fields and woods adjoining the track. *Evansville & C. R. Co. v. Barbee*, 74 Ind. 169.

Railroads are not obliged to maintain either fences or cattle-guards against cattle wrongfully upon the public highways, and are not responsible for injuries to cattle wrongfully on the highway, and from thence escaping upon their tracks. *Chapin v. Sullivan R. Co.* 39 N. H. 564.

(2) "Crazy" horse.—Owing to the neglect of a railroad company to fence a part of its track, a horse of the plaintiff strayed upon the track and was injured. The horse was what is called a "crazy" horse, i.e., did not possess sufficient natural intelligence to preserve itself from injury. Held, that this fact had nothing to do with determining the liability of the company; that it is required to fence its track for the protection of "crazy" horses as well as for the protection of animals possessing good "horse sense." *Liston v. Central Iowa R. Co.*, 26 Am. & Eng. R. Cas. 593, 70 Iowa 714, 29 N. W. Rep. 445.—FOLLOWED IN *Van Slyke v. Chicago, St. P. & K. C. R. Co.*, 80 Iowa 620.

(3) Hogs.\*—If a railroad company desires to exonerate itself from liability for injury to stock, under § 1289 of the Iowa Code, it must fence its track against "live stock" running at large, which includes swine. Section 1507 of the Code, prescribing what is a lawful fence, does not determine the character of fence which a railway company is required to build in such cases. *Lee v. Minneapolis & St. L. R. Co.*, 20 Am. & Eng. R. Cas. 476, 66 Iowa 131, 23 N. W. Rep. 299.

A company need not fence against hogs in a township where by law hogs cannot run at large, and it will not be liable for their death, notwithstanding the fact that they came upon the track from the adjoining premises of their owner through a defective gate. *Leebrick v. Republican V. & S. W. R. Co.*, 41 Kan. 756, 21 Pac. Rep. 796.—QUOTING *Atchison T. & S. F. R. Co. v. Yates*, 21 Kan. 613. RECONCILING *Missouri Pac. R. Co. v. Bradshaw*, 33 Kan. 533.

Whenever the building of a fence would have prevented an accident to domestic animals there, the negligence of the railroad

company in not fencing its road is the cause of the injury, and the company would be liable, regardless of the species of the animals. In the case of sheep or swine this would be a question of fact depending on the size of the animals. *Halverson v. Minneapolis & St. L. R. Co.*, 19 Am. & Eng. R. Cas. 526, 32 Minn. 88, 19 N. W. Rep. 392.

In a county where the law restraining swine from running at large is in force, a railroad company is relieved from the duty of fencing against them merely to prevent their getting upon its track; but where its road passes through, along, or adjoining inclosed or cultivated fields it is under legal obligation to erect and maintain lawful fences on the sides of its roads, and is liable in double damages for injury to swine by its engines and cars where they entered upon its track from such fields, because of its failure to erect and maintain lawful fences along the sides of its road. *Stanley v. Missouri Pac. R. Co.*, 29 Am. & Eng. R. Cas. 250, 84 Mo. 625.—QUOTING *Gorman v. Pacific R. Co.*, 26 Mo. 441. REVIEWING *Clark v. Hannibal & St. J. R. Co.*, 36 Mo. 202; *Silver v. Kansas City, St. L. & C. R. Co.*, 78 Mo. 528.—FOLLOWED IN *Morrow v. Missouri Pac. R. Co.*, 17 Mo. App. 103.

(4) Sheep.—Under § 68 of the Railways Clauses Act, 1845, a railway company is bound to keep its fences sufficiently strong to prevent sheep and cattle from straying out of the adjoining lands. If the company uses a hedge fence and the sheep escapes through a hole and is killed while upon the track, the company is liable. *Bessant v. Great Western R. Co.*, 8 C. B. N. S. 368.—SEE *Halverson v. Minneapolis & St. L. R. Co.*, 19 Am. & Eng. R. Cas. 526, 32 Minn. 88, 19 N. W. Rep. 392.

**91. Time within which fences must be built.\***—Where cattle are killed by reason of the failure of a railroad company to erect fences along its tracks, the company will be liable for double damages under the statute (Iowa Code, § 1289), although the road has not been completed and opened to traffic, and the injury complained of is caused by a construction train carrying materials to be used in the construction of the road at a point beyond where the accident occurred. *Glandon v. Chicago, M. & St. P.*

\* See post, 110.

\* See ante, 88; post, 123-125.

*R. Co.*, 24 *Am. & Eng. R. Cas.* 366, 68 *Iowa* 457, 27 *N. W. Rep.* 457.

It is no defence to an action against a railway company for the killing of stock owing to the failure of the company to fence its road, that, at the time of the injury complained of, the road had not been in operation for three months; the statutory obligation of the company to fence begins at least as soon as cars are run over the road. *Cobb v. Kansas City, Ft. S. & M. R. Co.*, 43 *Mo. App.* 313.

#### b. Against Whom Must Fence.

**92. Generally.**—Cattle which escape from one having charge of them on a highway, and go upon an adjoining lot without the knowledge or consent of the owner, are unlawfully on the lot, and a railroad company owes the party no duty to fence, such as would make it liable to the owner of the stock when injured by going from the lot to the railroad track, unless the injury was wanton or malicious. *McDonnell v. Pittsfield & N. A. R. Co.*, 115 *Mass.* 564, 7 *Am. Ky. Rep.* 465.—**DISTINGUISHING** *Lord v. Wormwood*, 29 *Me.* 282; *Keliher v. Connecticut River R. Co.*, 107 *Mass.* 411. **FOLLOWING** *Eames v. Salem & L. R. Co.*, 98 *Mass.* 560.

A railroad company owes no duty to fence towards subcontractors engaged in the construction of its road, and is therefore not liable for a horse of such subcontractor killed by getting on the track, through the act of the contractor in leaving a fence down. *Clark v. Chicago & W. M. R. Co.*, 62 *Mich.* 358, 28 *N. W. Rep.* 914.

**93. Adjoining landowners.\***—Statutes requiring railroads to maintain fences on the sides of its track are designed for the protection of adjoining owners, and their requirements may be waived by such owners, so as to exonerate the company from injuries to cattle happening by reason of a fence not being constructed according to such requirements. *Enright v. San Francisco & S. J. R. Co.*, 33 *Cal.* 230.

Under Missouri statute requiring railroads to fence, only adjoining owners or persons holding under such adjoining owners can recover for injuries to cattle which go upon the track by reason of a failure to fence. *Summers v. Hannibal & St. J. R. Co.*, 29 *Mo. App.* 41.

A railway company is not bound to maintain and keep up fences along their track, except as between them and the owners of the adjoining property, and when cattle were allowed to pasture upon a neighbor's land, and from thence strayed on the railway track, and were killed, the company was not responsible. *McLennan v. Grand Trunk R. Co.*, 8 *U. C. C. P.* 411.

It appeared that the plaintiff owned land on either side of the defendants' railway, but the Toronto, G. & B. R. Co., which lay to the north of defendants' railway, and had also been taken from his farm, ran between his land and defendants' railway. *Held*, upon the facts stated below, that there was no evidence that the cattle had reached the railway from the south side, and the fact that the Toronto, G. & B. R. Co. had neglected to fence, did not give the plaintiff, in respect of the occupation of their land by his cattle, the status of that company for the time, as adjoining proprietors, against whom only the defendants were bound to fence, so as to make the defendants liable. *Douglass v. Grand Trunk R. Co.*, 5 *Ont. App.* 585.—**APPLYING** *McAlpine v. Grand Trunk R. Co.*, 38 *U. C. Q. B.* 446.

#### **94. Persons using, though not owning, adjoining lands.**—(1) *Generally.*—

Railroad companies are liable for killing the stock of occupants of adjoining lands by reason of a failure to fence, the same as of owners of such lands. *Veerhusen v. Chicago & N. W. R. Co.*, 53 *Wis.* 689, 11 *N. W. Rep.* 433.

Where there is a statute requiring railroad companies to fence, one who has a right to pasture his sheep on the land of another can recover for sheep killed by reason of the failure of a company to fence. *McCoy v. Southern Pac. R. Co.*, (Cal.) 26 *Pac. Rep.* 629.

The Canada Company owned land in the town of Goderich, through which defendants' railway ran, and on which, being an open common, the cattle of persons living in the town had for thirty or forty years been accustomed to pasture, though without any express permission. The plaintiff's cow, having escaped from this land on to the railway, owing to the want of fences, and been killed by a train,—*held*, that he could not recover, for as against him the defendants were not bound to fence. *McIntosh v. Grand Trunk R. Co.*, 30 *U. C. Q. B.* 601.—**FOLLOWING** *McLennan v. Grand*

\* See post, 139, 149, 306.

Trunk R. Co., 8 U. C. C. P. 411. QUOTING *Auger v. Ontario, S. & H. R. Co.*, 16 U. C. Q. B. 92.

(2) *Lessees*.—The owner of land adjoining a railroad, under an agreement with the company, erected a fence along the line between his land and the right of way, and took upon himself to maintain it. A tenant of such owner, while in the occupancy of the premises, and with full knowledge of the undertaking of his landlord, and with knowledge of the condition of the fence, placed his live stock in the inclosure which was separated from the right of way by this fence. The stock got upon the track through the fence and were killed. In an action by the tenant to recover for the stock killed,—*held*, that he could not allege any want of sufficiency in the fence as a ground of recovery. *St. Louis, V. & T. H. R. Co. v. Washburn*, 97 Ill. 253.

A tenant, in the absence of notice, will not be bound by an agreement of his landlord exempting a railroad from liability for failing to fence its track passing through his field, and although he may have unwittingly accepted the benefit of the consideration, he may recover double damages for stock injured through the failure to fence. *Thomas v. Hannibal & St. J. R. Co.*, 23 Am. & Eng. R. Cas. 183, 82 Mo. 538.

The statutory duty of a company to fence does not extend to fencing between the track and a strip of land that it may own, and a tenant occupying such strip cannot recover for stock killed by reason of the company's failure to fence. *Potter v. New York C. & H. R. R. Co.*, 38 N. Y. S. R. 798, 60 Hun 313, 15 N. Y. Supp. 12.

(3) *Licenses*.—Where the lessees of land along a railroad track have made an opening in the railroad fence, which has been constructed by the railroad company as required by the statute, one who has a license to pasture sheep upon such land cannot recover the value of the sheep from the company on whose track they have been killed after passing through the opening. *McCoy v. Southern Pac. R. Co.*, 56 Am. & Eng. R. Cas. 132, 94 Cal. 568; 29 Pac. Rep. 1110.

If the opening in the said fence was made with the consent of the company, under an understanding that the said company would substitute a gate for the panel

removed, it would be the duty of the company to put up the gate within a reasonable time, and failure to do so would make it liable for the loss of the stock; but where such agreement was made with an agent of the company, it was the duty of the plaintiff to show that the person assuming the act for the company had authority to do so. *McCoy v. Southern Pac. R. Co.*, 56 Am. & Eng. R. Cas. 132, 94 Cal. 568; 29 Pac. Rep. 1110.

One having a license to graze his cattle upon land adjoining a railway track may maintain an action for injury to his cattle, owing to the neglect of the company to construct the fence required by statute. *Dawson v. Midland R. Co.*, 42 L. J. Exch. 49, L. R. 8 Exch. 8, 21 W. R. 56.

#### c. Where Fences Must be Built.\*

**95. Generally.**—At such places as it is practicable to do so a railroad company must fence its track to avoid injury to live stock. *Louisville, N. A. & C. R. Co. v. Zink*, 85 Ind. 219.

The burden of proof is upon a railroad company to show that a space along its track left unfenced, which was not within the station grounds, but sometimes used by passengers in going between the station and a hotel nearby, was left open and unfenced for the convenience of the public, and that, therefore, their statutory duty to fence was complied with. *Dixon v. New York C. & H. R. R. Co.*, 51 Hun 644, 4 N. Y. Supp. 296, 22 N. Y. S. R. 61. *Cox v. Minneapolis, S. St. M. & A. R. Co.*, 38 Am. & Eng. R. Cas. 287, 41 Minn. 101, 42 N. W. Rep. 924.

Where it appears that the fencing of a railroad track would not obstruct any street or public highway, a company cannot avoid liability for live stock killed by showing that a fence at the point would cause much inconvenience to the company's servants in loading and unloading cars, and in the operation of trains. Inconvenience to a railroad company is not a sufficient excuse for failing to fence. *Houston & T. C. R. Co. v. Simpson*, 2 Tex. App. (Civ. Cas.) 591.

Where a cow got upon a railroad track and was killed by a passing locomotive, at a

\* Where railroad company is obliged to fence, see notes, 11 AM. & ENG. R. CAS. 496, 19 Id. 649.

Points where companies are not bound to fence, see note, 19 AM. & ENG. R. CAS. 539.

\* See post, 139, 310.

point on said railroad where there was a saw-mill located and in operation 50 feet from said track, the intervening ground between said track and said mill being used by the owners of the mill for piling their lumber, and for loading lumber upon the cars of the railroad company for transportation, and by the public for passing to and from said mill with logs and lumber, and for piling wood to be sold to the railroad company,—held, that the railroad company was not bound to fence in the track at such point, and, in the absence of negligence, was not liable for the killing of the cow. *Pittsburgh, C. & St. L. R. Co. v. Bowyer*, 45 Ind. 496.

**96. When fence would interfere with transaction of company's business.**—A railroad company is not required by the statute to fence its track at places where fences would interfere with its own rights in operating its road or transacting its business, nor where the rights of the public in travelling or doing business with the company are interfered with, nor where such fencing would imperil the lives of its employés. No recovery can be had under the statute for stock killed by its locomotives or cars where such places on the line of its road are left unfenced. *Evansville & T. H. R. Co. v. Willis*, 19 Am. & Eng. R. Cas. 565, 93 Ind. 507.—FOLLOWED *Jeffersonville, M. & I. R. Co. v. Beatty*, 36 Ind. 15.—FOLLOWED IN *Lake Erie & W. R. Co. v. Kneadle*, 94 Ind. 454; *Pearson v. Chicago, B. & K. C. R. Co.*, 33 Mo. App. 543. QUOTED IN *Banister v. Pennsylvania Co.*, 98 Ind. 220; *Indianapolis, D. & W. R. Co. v. Clay*, 4 Ind. App. 282.

**97. — or the use of its own property.**—A railroad company is not required by the statute to fence its road, where such fencing would result in cutting itself from the use of its own land, or leased property, or buildings, or woodsheds, although the buildings or sheds may not be in present use; and if cattle are killed at such a point by the cars of the company, it is not liable unless there is proof of negligence or want of care or skill on the part of the persons operating the train. *Jeffersonville, M. & I. R. Co. v. Beatty*, 36 Ind. 15.—FOLLOWED IN *Evansville & T. H. R. Co. v. Willis*, 19 Am. & Eng. R. Cas. 565, 93 Ind. 507.

**98. Lands used for public purposes.\***—The implied exemption that

places necessary for use for public purposes need not be fenced is not to be extended to cases where the reason for it is wanting; and where the particular land in controversy is not actually used for such public purposes, it is not enough that the plans of the company contemplate such use at some indefinite time in the future. *Cox v. Minneapolis, S. St. M. & A. R. Co.*, 38 Am. & Eng. R. Cas. 287, 41 Minn. 101, 42 N. W. Rep. 924.

**99. In cities, towns, and villages.\***

—(1) *When must fence.*—Railroads are not required by statute to fence their roads within the corporate limits of a town, and in actions against them to recover for injuries to stock, occurring within such limits, it is error to refuse so to instruct the jury. *Chicago & A. R. Co. v. Engle* 58 Ill. 381.

The Iowa act of 1862, ch. 169, § 6, relating to the duty of railroads to fence, does not apply to depot grounds, and especially to cities and towns where tracks are often laid along streets. *Davis v. Burlington & M. R. R. Co.*, 26 Iowa 549.

Where, within the limits of a town or city, lands dedicated to public use, and crossing or abutting upon the right of way of a railroad company, are occupied and used for farming purposes, such occupancy does not make it lawful for the railroad company to fence across them, and its failure to do so will not subject it to liability under § 5 of the Missouri damage act. *Elliot v. Hannibal & St. J. R. Co.*, 66 Mo. 683.—FOLLOWED IN *Vanderwerker v. Missouri Pac. R. Co.*, 48 Mo. App. 654.

A railroad company is not required, within the limits of a city, to place guards around a cut, away from a public thoroughfare, to prevent animals grazing there in violation of law from falling down the bank. *Clary v. Burlington & M. R. R. Co.*, 11 Am. & Eng. R. Cas. 493, 14 Neb. 232.—DISTINGUISHED IN *Rathburn v. Burlington & M. R. R. Co.*, 19 Am. & Eng. R. Cas. 137, 16 Neb. 441.

While the New York act of 1850, ch. 140, § 44, making it the duty of railroad companies to fence, does not apply to cities and villages, yet it does apply to outskirts of a city or village where the land is not built upon. *Brady v. Rensselaer & S. R. Co.*, 1 Hun (N. Y.) 378, 3 T. & C. 537.

a public user, see note, 13 AM. & ENG. R. CAS. 533.

\* See post, 117, 203-212.

\* Company not bound to fence where there is

(2) *When not required to fence.*—Where the nearest objects to the place where a horse went upon the main track of a road within the city limits and was injured were a building one hundred and seventy-five feet north, a crossing one hundred and seventy-five feet south, and a yard track sixty feet east, the ground adjoining the main track being unoccupied, the situations and surroundings are not shown to be such that a fence could not be maintained without interfering with the company's business, or with the proper discharge of its duty to the public, or without endangering the safety of the company's employes, and the company was bound to maintain a fence. *Jeffersonville, M. & I. R. Co. v. Peters*, 1 Ind. App. 69, 27 N. E. Rep. 299.

There are no exceptions under the Indiana act as to the liability of a railroad company for injury to animals coming upon the track through defect of fences, founded on the idea that at certain places a company is not bound to fence their track. But the supreme court has interpolated some necessary exceptions, such as the crossings of highways, streets, and alleys, in towns and cities, and at mills, where the public have a right and a necessity to go undisturbed; but the court has not made, and ought not to make, under the statute, an exception of large blocks of ground merely because they are situated within the limits of a city. There is no reason why such lands not in a city must be fenced, that does not apply with equal, if not greater, force when they are within the limits of a city. *Toledo, W. & W. R. Co. v. Howell*, 38 Ind. 447, 10 Am. Ry. Rep. 272.—DISTINGUISHED IN *Louisville, N. A. & C. R. Co. v. Porter*, 20 Am. & Eng. R. Cas. 446, 97 Ind. 267.

It is necessary for railroad companies, for the purpose of avoiding the statutory liability for killing stock on the line of road within the limits of corporate towns, and outside of the first street or alley of said town, to fence the same against stock running at large. Such portion of the corporate territory through which a railway runs, which lies outside of or beyond streets or other public highways, may be fenced by the railway company along its right of way to the same extent and in the same manner as if the municipal corporation did not exist, unless possibly there is an ordinance of the town which would control such right. *Coyle v. Chicago, M. & St. P. R. Co.*, 13 Am. &

1 D. R. D.—10.

*Eng. R. Cas.* 526, 62 Iowa 518, 17 N. W. Rep. 771.

In an action to recover the value of a cow killed by a railroad train in a small hamlet, it will not be presumed, in the absence of evidence, that any reason of public or private convenience prevented the application of the general statute (Sess. Laws 1872, 72), requiring every railroad company to fence their track and put cattle-guards at highway crossings, and in default thereof making them liable for all damage done to cattle, etc., thereon; any exceptional case must be proved by the party claiming a benefit therefrom. In an action under this statute, negligence of the plaintiff in care of his property, contributing to the injury, constitutes no defence. *Flint & P. M. R. Co. v. Lull*, 28 Mich. 510, 12 Am. Ry. Rep. 296.—FOLLOWED IN *Grand Rapids & I. R. Co. v. Cameron*, 45 Mich. 451. QUOTED IN *Cressey v. Northern R. Co.*, 15 Am. & Eng. R. Cas. 540, 59 N. H. 564, 47 Am. Rep. 227.

The duty imposed upon railroad companies to fence their roads to prevent injury to live stock, by the Ohio act of March 25, 1859 (S. & C. 331), and the amendments thereto, requires the construction and maintenance of such fences within the limits of cities and villages where they do not obstruct streets, highways, or other public grounds. *Cleveland & P. R. Co. v. McConnell*, 26 Ohio St. 57, 11 Am. Ry. Rep. 266.

**100. Inclosed or cultivated fields.**—Wagn. Missouri St. 310, 311, which require railroads to erect and maintain fences on the sides of the road where the same pass through, along, or adjoining inclosed or cultivated fields or uninclosed prairie-lands, does not include lands from which timber has been cut, but which is not cultivated; and where stock is killed at such places the owner is not entitled to recover double damages under the statute. *Tiarks v. St. Louis & I. M. R. Co.*, 58 Mo. 45.—REVIEWING *Walther v. Pacific R. Co.*, 55 Mo. 271; *Slattery v. St. Louis, K. C. & N. R. Co.*, 55 Mo. 362.—DISTINGUISHED IN *Swearingen v. Missouri, K. & T. R. Co.*, 64 Mo. 73. FOLLOWED IN *Mason v. St. Louis & I. M. R. Co.*, 58 Mo. 51; *Shrum v. St. Louis & I. M. R. Co.*, 58 Mo. 51; *Dee v. St. Louis & I. M. R. Co.*, 58 Mo. 52; *Switzer v. St. Louis & I. M. R. Co.*, 58 Mo. 52; *Riffey v. St. Louis & I. M. R. Co.*, 58 Mo. 53; *Grounds v. St. Louis & I. M. R. Co.*, 58 Mo. 53; *Buxton v. St. Louis & I. M. R. Co.*, 58

Mo. 55; *Stephens v. St. Louis & I. M. R. Co.*, 58 Mo. 54; *Wymore v. Hannibal & St. J. R. Co.*, 79 Mo. 247. QUOTED IN *Edwards v. Hannibal & St. J. R. Co.*, 66 Mo. 567; *Russell v. Hannibal & St. J. R. Co.*, 83 Mo. 507; *Clarkson v. Wabash, St. L. & P. R. Co.*, 84 Mo. 583.

*Wagn. Mo. St. p. 310, § 43*, providing for the recovery of double damages for stock killed by reason of a railroad company failing to fence "where the road passes through, along or adjoining enclosed or cultivated fields, or unenclosed prairie lands," requires a fence on both sides of the track where it runs between timbered lands on one side and cultivated lands on the other. *Walther v. Pacific R. Co.*, 55 Mo. 271. — DISTINGUISHED IN *Robertson v. Atlantic & P. R. Co.*, 64 Mo. 412. REVIEWED IN *Tiarks v. St. Louis & I. M. R. Co.*, 58 Mo. 45.

Railroad companies that were in existence on Feb. 24, 1853, are subject to the provisions of the Missouri act of that date, § 51 (Rev. Code, 1855, § 52), relating to injuries to live stock where railroads pass through inclosed lands, and resulting from a failure of the companies to fence. *Trice v. Hannibal & St. J. R. Co.*, 35 Mo. 188. — FOLLOWING *Gorman v. Pacific R. Co.*, 26 Mo. 441.

**101. Uninclosed prairie-lands.\***—Under the Missouri St. 310, § 43, a company will not be liable for killing stock where its track passes through uninclosed lands, unless the lands are prairie. *Cary v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 209. — FOLLOWED IN *Shelton v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 412; *Rhea v. St. Louis & S. F. R. Co.*, 84 Mo. 345. REVIEWED IN *Crutchfield v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 255.

**102. Lands owned and occupied by private persons.**—*Nevada St. 1864, 427, § 30*, making railroad companies liable for the killing of domestic animals "when they stray upon their line of road where it passes through or alongside of the property of the owners thereof," does not require them to fence where the road runs through public land, but only where it runs through or alongside of the land of private individuals, and even then the fencing is only for the protection of adjoining owners, and no other person can complain of the want of it. *Walsh v. Virginia & T. R. Co.*, 8 Nev. 110.

Under the statute requiring railroad tracks to be fenced where they run through lands "owned or settled and occupied by private owners," a fence is required to be built along the entire track that runs through land that is so settled or occupied, though but part of the track be under actual cultivation. *Stimpson v. Union Pac. R. Co.*, 9 Utah 123, 33 Pac. Rep. 369.

Plaintiff in an action against a railroad company for killing a horse which went upon its track where it was unfenced, must show that the land was owned by a private person and was in the possession or occupation of such a person, to recover under the Utah statute requiring railroad companies to maintain fences where their roads pass through lands owned and settled or occupied by private owners. *Stimpson v. Union Pac. R. Co.*, 8 Utah 349, 31 Pac. Rep. 449.

Under the Railway Act, 46 Vict. ch. 24 (D.) "occupied lands" are such as adjoin a railway and are either actively or constructively occupied up to the track by actual occupation of some portion of the land, either as owner or as occupier; and the act includes one who has gone on Crown lands and who is still occupying them, but who has failed to fulfil the conditions of his location, the Crown having taken no steps to cancel the location, and such person may require the railroad company to fence. *Davis v. Canadian Pac. R. Co.*, 12 Ont. App. 724. — REVIEWING *Conway v. Canadian Pac. R. Co.*, 12 Ont. App. 708. QUOTING *Brown v. Grand Trunk R. Co.*, 24 U.C.R. 330.

**103. Where railroad is parallel with highway.**—A railroad company is not required to fence where its track intersects and runs near to and parallel with a highway, and, as a consequence, will not be liable for killing live stock at such places. *Indianapolis, P. & C. R. Co. v. Crandall*, 58 Ind. 365.

Where, with the permission of the proper board of county commissioners, a railroad is located upon part of a public highway, the remainder of which is still used by the public as a highway, the company is not bound to fence its right of way, and is not liable under the statute for stock killed thereon. *Louisville, N. A. & C. R. Co. v. Francis*, 58 Ind. 389. DISTINGUISHED IN *Louisville, N. A. & W. R. Co. v. White*, 94 Ind. 257; *Louisville, N. A. & C. R. Co. v. Shanklin*, 98 Ind. 573. FOLLOWED IN

\* See post, 117, 159.



Louisville, N. A. & C. R. Co. v. Wysong, 58 Ind. 597.

Where there is a travelled road running parallel with the line of a railway, but a sufficient distance from the railway track to permit the construction of a fence, such railway company is not, by reason of the existence of such travelled road, excused from inclosing its road with a good and lawful fence, to prevent animals from being on its track. *Missouri Pac. R. Co. v. Eckel*, 56 Am. & Eng. R. Cas. 174, 49 Kan. 794, 31 Pac. Rep. 693.

Where defendant's railroad runs parallel with the public road, from which the evidence tends to show the plaintiff's animals strayed upon its railroad track, it is not excused from fencing the same, even though its said right of way occupied part of the public road. It is not the right of way which the law requires to be fenced, but the "road." *Emmerson v. St. Louis & H. R. Co.*, 35 Mo. App. 621.

**104. Where private way crosses track.\***—It is the duty of railroad companies to fence their tracks where private ways cross them, and in an action for killing stock at such place it is not necessary that it be shown by direct evidence that the stock was killed by the company's cars, but it may be inferred from circumstances. *Indianapolis, P. & C. R. Co. v. Thomas*, 11 Am. & Eng. R. Cas. 491, 84 Ind. 194.—APPROVED IN *Pittsburgh & L. E. R. Co. v. Cunningham*, 13 Am. & Eng. R. Cas. 529, 39 Ohio St. 327. DISTINGUISHED IN *Pennsylvania Co. v. Spaulding*, 35 Am. & Eng. R. Cas. 184, 112 Ind. 47.

**105. Where no necessity for fence exists.**—Under Wisconsin Rev. St. § 810, providing that fences shall not be required where the proximity of ponds, hills, embankments, or other sufficient protection renders a fence unnecessary to protect cattle from straying upon the track, proof that cattle went upon the track over an embankment is conclusive that such embankment was not sufficient protection under the statute. *Veerhusen v. Chicago & N. W. R. Co.*, 53 Wis. 689, 11 N. W. Rep. 433.

**106. Where two railroads run parallel.**—The provisions of §§ 3505, 3507, Connecticut Gen. St., that railroad companies shall fence their tracks except at such points as the railroad commissioners shall

adjudge unnecessary, and that in the event of a failure to do so, any person suffering damage by reason thereof shall have a cause of action, do not require a railroad company to fence its track at a place where it is located 50 feet distant from and parallel to another railroad track upon the side next to the latter track, although the commissioners had never adjudged that the fencing of that part was unnecessary; and the company is not liable in damages for injuries to a horse which came upon the track at that point. *Gallagher v. New York & N. E. R. Co.*, 40 Am. & Eng. R. Cas. 197, 57 Conn. 442, 18 Atl. Rep. 786, 5 L. R. A. 737.

In an action to recover damages for the killing of plaintiff's cattle, it appeared that defendant is one of five railroad companies whose tracks run parallel for some distance, being separated only enough to permit the passage of trains, defendant's tracks being the central ones. No fence had been built along the exterior of the outer track, and there was no natural or artificial barrier. Plaintiff's cattle strayed from a farm adjoining across the intervening tracks belonging to other companies on to defendant's track, where they were killed by an engine running thereon. *Held*, that plaintiff was entitled to recover; that the land from which the cattle strayed was adjoining defendant's track within the meaning of the statute, and that defendant was not excused by the fact that the company owning the track, nearest to plaintiff's land had failed to perform its duty. *Kelver v. New York, C. & St. L. R. Co.*, 49 Am. & Eng. R. Cas. 551, 126 N. Y. 365, 27 N. E. Rep. 553, 37 N. Y. S. R. 485; *affirming* 35 N. Y. S. R. 673, 12 N. Y. Supp. 723.—FOLLOWING *Shepard v. Buffalo, N. Y. & E. R. Co.*, 35 N. Y. 641.

Upon the trial evidence offered by the defendant that fences on the sides of defendant's road would, by reason of the narrow space between its tracks and those of the adjacent roads, constitute a dangerous obstruction and imperil the lives of passengers and operatives employed about the cars and upon the tracks was excluded. *Held*, no error; that defendant could not set up a situation it had wrongfully created as an excuse for disregarding its duty. *Kelver v. New York, C. & St. L. R. Co.*, 49 Am. & Eng. R. Cas. 551, 126 N. Y. 365, 27 N. E. Rep. 553, 37 N. Y. S. R. 485; *affirming* 35 N. Y. S. R. 673, 12 N. Y. Supp. 723.—

\*See post, 170-184.



DISTINGUISHING *Dolan v. Newburgh, D. & C. R. Co.*, 120 N. Y. 571.

**107. At stations, depots or sidings.\***—(1) *Generally*.—Fencing against animals is not required at stations and sidings where freight or passengers are received or discharged. *Indiana, B. & W. R. Co. v. Quick*, 109 Ind. 295, 9 N. E. Rep. 788, 925.—FOLLOWED IN *Indiana, B. & W. R. Co. v. Sawyer*, 109 Ind. 342, 10 N. E. Rep. 105.

And a railroad company is not liable for killing animals which enter upon its track at such places, and it is error to refuse to so instruct the jury where there is evidence to which such an instruction is applicable. *Indiana, B. & W. R. Co. v. Sawyer*, 109 Ind. 342, 10 N. E. Rep. 105.—FOLLOWING *Indiana, B. & W. R. Co. v. Quick*, 109 Ind. 295.—*Indianapolis & St. L. R. Co. v. Christy*, 43 Ind. 143.—QUOTING *Indianapolis & C. R. Co. v. Parker*, 29 Ind. 471.

The company need not fence their road where the engine-house, machine-shop, car-house, and wood-house are located, and are not responsible for killing or injuring live stock at such places by reason of a want of fencing. *Indianapolis & C. R. Co. v. Oestel*, 20 Ind. 231.—REVIEWED IN *Davis v. Burlington & M. R. R. Co.*, 26 Iowa 549.

In an action for stock killed near the depot in an unincorporated village,—*held*, that the railroad company is not bound to fence the grounds about a station. Chapter 114, § 48, of the Illinois Rev. St. is not to be construed to embrace depots and stations. *Terre Haute & I. R. Co. v. Bowles*, 16 Ill. App. 261.—REVIEWING *Chicago, B. & Q. R. Co. v. Hans*, 111 Ill. 114.

The fact that the place where the cow entered and was killed was used for storing wood and grain brought for shipment, shows that public necessity required that it should remain unfenced as part of the company's depot grounds. *Hooper v. Chicago, St. P., M. & O. R. Co.*, 37 Minn. 52, 33 N. W. Rep. 314.—FOLLOWING *Greeley v. St. Paul, M. & M. R. Co.*, 33 Minn. 136, 22 N. W. Rep. 179.

\* See post, 199-202.

Obligation of company to fence depot grounds, see 42 AM. & ENG. R. CAS. 578, *abstr.* Company not liable for failure to fence depot grounds, but extent of grounds is for the jury, see 38 AM. & ENG. R. CAS. 290, *abstr.*; 35 Id. 132. What are depot grounds where fences are not required, see 49 AM. & ENG. R. CAS. 554, *abstr.*

A railway company is not liable either at common law or under § 68 of the Railway Clauses Act, 1845, to fence from its track a yard adjoining the station into and through which cattle brought by the company to the station were accustomed and were obliged to pass in going to the highway. *Roberts v. Great Western R. Co.*, 4 C. B. N. S. 506, 4 Jur. N. S. 1240, 27 L. J. C. P. 266.

(2) *Lands not necessary for station grounds*.—Action for the value of horses killed on defendant's main track outside but near the entrance of the side-tracks at a station, and at a place where the town plat was bounded by the right of way. The company claimed that it had not the right to fence at that point because (1) it was a part of the depot grounds, it being necessary for the trainmen to use the track at that point for entering the side tracks, and (2) because the streets and alleys of the town extended to the right of way. *Held*, that this position could not be sustained, because the absence of a fence at that point was not necessary for the convenience of the public in transacting business with the company at the station, and the streets and alleys did not cross the right of way. *Peyton v. Chicago, R. I. & P. R. Co.*, 70 Iowa 522, 30 N. W. Rep. 877.—DISTINGUISHING *Cole v. Chicago & N. W. R. Co.*, 38 Iowa 311.

The railroad company owned a strip of land 250 feet wide by 2400 feet long, which it used for station grounds. The plaintiff owned a steer, which he permitted to run at large near the station grounds. This animal passed along the highway and on to the station grounds, and wandered along the same until it passed upon the company's right of way and upon the railroad track, where it was killed. Neither the railroad track, nor the right of way, nor the station grounds was inclosed with a fence. A fence, however, extended along one end and a part of the two sides of the station grounds. The place where the animal was killed, though used as a part of the defendant's station grounds, was not necessary for such use. *Held*, that, assuming that land necessarily used for station grounds need not be fenced, still, as the place where the animal was killed was not necessary in the present case for the use of the railroad company as a part of its station grounds, the same should have been fenced. *Atchison, T. & S. F. R. Co. v. Shaft*, 19 Am. & Eng. R. Cas. 529, 33 Kan. 521, 6 Pac. Rep. 908.

**108. At crossings of streets and highways.\***—A railroad company is not required to fence its road where it would obstruct a public highway, and the want of fencing at such place does not make it liable for stock killed or injured. *Louisville, N. A. & C. R. Co. v. Hurst*, 98 Ind. 330.

There is no liability for killing of animals for want of a suitable fence at a place where a platted street in an incorporated town crosses a railway track, even though such street was only used by persons on foot. *Ohio, I. & W. R. Co. v. Heady* (Ind. App.), 28 N. E. Rep. 212.

The statute does not apply to injuries done at points where it would be illegal or improper for the railroad company to maintain fences, such as road and street crossings, etc. It is not every place, however, within the corporate limits of a town or city that is within the exception, but only such as would be improper to fence. *Indianapolis & C. R. Co. v. Parker*, 29 Ind. 471.—QUOTED IN *Indianapolis & St. L. R. Co. v. Christy*, 43 Ind. 143.

A railroad company has no right to fence its tracks where they cross a public street in a city or town, and the owner of an animal killed at such point cannot recover therefor on the ground of the failure of the company to fence. *Long v. Central Iowa R. Co.*, 19 Am. & Eng. R. Cas. 541, 64 Iowa 657, 21 N. W. Rep. 122.

And the Iowa statute, 1862, ch. 169, requiring railroads to fence their track to prevent injuring live stock, does not include crossings of streets and highways. *Soward v. Chicago & N. W. R. Co.*, 30 Iowa 551.

The statutory obligation of a railroad to fence the road does not extend to crossings of highways, whether *de jure* or *de facto*. *Held*, accordingly, in an action for the killing of stock, predicated on the failure of the railroad company to fence where its road crossed a highway, that it was immaterial whether the highway was maintained by work under a road overseer or not. *Roberts v. Quincy, O. & K. C. R. Co.*, 43 Mo. App. 287.—FOLLOWING *Luckie v. Chicago & A. R. Co.*, 76 Mo. 639; *Brown v. Kansas City, St. J. & C. B. R. Co.*, 20 Mo. App. 427. REVIEWING *Walton v. St. Louis, I. M. & S. R. Co.*, 67 Mo. 56.

Under Missouri Rev. St. 1855, 649, § 5, a railroad company is not required to fence

its track where it crosses a public highway, and in the absence of negligence is not liable for animals killed at such crossing. *Meyer v. North Mo. R. Co.*, 35 Mo. 352.—APPLIED IN *Miller v. Wabash R. Co.*, 47 Mo. App. 630. EXPLAINED IN *Ells v. Pacific R. Co.*, 48 Mo. 231. REVIEWED IN *Wier v. St. Louis & I. M. R. Co.*, 48 Mo. 558.

The law requiring companies to fence their tracks does not apply to streets; and where stock is killed at a street crossing, in order to recover, plaintiff must prove negligence in the management of the train. *International & G. N. R. Co. v. Leuders*, 1 Tex. App. (Civ. Cas.) 133.

#### d. Sufficiency of Fences.\*

**109. Generally.**—In order that a railway company may escape liability for double damages for injury to stock under the statute, it is not enough that it once fence its track it must maintain a sufficient fence. *Bennett v. Wabash, St. L. & P. R. Co.*, 61 Iowa 355, 16 N. W. Rep. 210.—QUOTED IN *Sullivan v. Oregon R. & N. Co.*, 19 Oreg. 319.

If a railroad company allow an opening to be made in the fence inclosing its road, and left insecure, it cannot be said that the road is securely fenced, and if animals pass through the same and upon the railroad, and are killed, the company is liable without proof of negligence on the part of the company. *Cleveland, C. & I. R. Co. v. Swift*, 42 Ind. 119.

The main object of the law requiring railroads to fence their road is the protection of the public, and where a railroad adjoins a public road on one side and inclosed fields on the other, and stock come upon the track from the roadside and are injured, the company is liable under § 43, Missouri Railroad Act. In such a case the company is bound to fence the road on both sides, and the fact that the stock injured went upon the track from land of another is immaterial. *Humes v. Missouri Pac. R. Co.*, 9 Mo. App. 588.

Under the New York Railroad Act of 1852, as amended in 1854, railroad companies are required to erect and maintain a fence on both sides of their track, and are liable for injuries to stock so long as this is not done. *Shepard v. Buffalo, N. Y. & E. R. Co.*, 35

\* See ante, 100.

What is a sufficient fence, see 42 AM. & ENG. R. CAS. 579, *abstr.*

\* See post, 117, 185-198.

*N. Y.* 641.—APPROVED IN *Cleveland, C., C. & I. R. Co. v. Scudder*, 13 *Am. & Eng. R. Cas.* 561, 40 *Ohio St.* 173. FOLLOWED IN *Spence v. Chicago & N. W. R. Co.*, 25 *Iowa* 139; *Kelver v. New York, C. & St. L. R. Co.*, 126 *N. Y.* 365. QUOTED IN *Klock v. New York C. & H. R. R. Co.*, 42 *N. Y. S. R.* 200. —*Tredway v. Sioux City & St. P. R. Co.*, 43 *Iowa*, 527, 8 *Am. Ry. Rep.* 415, 14 *Id.* 465.\*

A railroad company is liable for a failure to fence as required by the statute, unless it be inclosed on both sides of the track, and when sued for killing live stock it is no defence that the track was fenced on one side. Cattle were killed by going upon the track over a fence that was so broken down as to be but a little more than half as high as when it was originally erected by the company. *Held*, that the company was liable. *Leyden v. New York C. & H. R. R. Co.*, 55 *Hun (N. Y.)* 114, 28 *N. Y. S. R.* 72, 8 *N. Y. Supp.* 187.—DISTINGUISHING *Morrison v. New York & N. H. R. Co.*, 32 *Barb. (N. Y.)* 568.

A railroad company is not bound to provide places for stock to leave its track. *Gilman v. Sioux City & P. R. Co.*, 13 *Am. & Eng. R. Cas.* 538, 62 *Iowa* 299, 17 *N. W. Rep.* 520.

**110. Hog-tight fences.**†—In the absence of want of due care on the part of those running a train, a railroad company is not liable for killing hogs that go upon the track through a fence that the company has erected, which is a lawful fence as to other stock, but which will not turn hogs, the fence being in a district where hogs are prohibited from running at large. *Atchison, T. & S. F. R. Co. v. Yates*, 21 *Kan.* 613.—FOLLOWED IN *Henning v. Wilkinson*, 21 *Kan.* 747. QUOTED IN *Leebrick v. Republican V. & S. W. R. Co.*, 41 *Kan.* 756, 21 *Pac. Rep.* 796.

If a railroad company allow an opening to be made in the fence inclosing its road and left insecure, it cannot be said that the road is securely fenced, and if hogs pass through the same and upon the railroad and are killed, the company is liable without proof of negligence on the part of the company. *Cleveland, C., C. & I. R. Co. v. Swift*, 42 *Ind.* 119.

#### 111. With respect to unruly

\* See *post*, 132.

† See *ante*, 90.

Duty to maintain hog-tight fences, see note, 33 *AM. & ENG. R. CAS.* 168.

beasts.\*—A railway company is only required to maintain fences and cattle-guards sufficient to restrain ordinary domestic animals, and is not compelled to guard against the foraging propensities of exceptionally unruly beasts. *Wabash R. Co. v. Ferris*, 6 *Ind. App.* 30, 32 *N. E. Rep.* 112.

**112. Joining with fences already built.**—Under § 2 of the act of 1859 (56 *Ohio L.* 62), where the owner of lands adjacent to a railroad constructs and maintains a good and sufficient fence inclosing his own lands, in such manner that it may be made to answer the purpose of inclosing the railroad also, the fact that compensation was not paid for the right of way through such lands will not prevent the company from joining its fences to the fence constructed by such landowner so as to inclose its road; and where the railroad is rightly inclosed by such joining of fences, no additional fence need be constructed between the railroad and such inclosed lands. *Haxton v. Pittsburgh, C. & St. L. R. Co.*, 26 *Ohio St.* 214, 11 *Am. Ry. Rep.* 257.

**113. Waiver of statutory requirements as to sufficiency.**†—Where bars in the fence of a railroad alongside of its track did not conform to statutory requirements, but were so made for the convenience and at the request of the former owner, who conveyed to the plaintiff, and plaintiff had used them and made no complaint to defendant of their unsuitability, these facts will amount to a waiver on his part of the requirement of the statute, in an action to recover for horses killed. *Enright v. San Francisco & S. J. R. Co.*, 33 *Cal.* 230.

The owner of land, by persistently keeping open a gate through which his stock escaped upon a railroad track, may release the company from liability for a failure to build and maintain a fence as required by statute; and a tenant with knowledge of such release has no greater right than the landlord. *Manwell v. Burlington, C. R. & N. R. Co.*, 45 *Am. & Eng. R. Cas.* 501, 80 *Iowa* 662, 45 *N. W. Rep.* 568.

In an action against a railroad for killing stock on the track by reason of a failure to maintain proper fences, the company set up the defence that it had erected a suitable fence with gates therein, which it was the

\* See *ante*, 90.

† See *ante*, 88, 89; *post*, 138, 139, 140, 156, 157.

duty of the plaintiff to keep closed, but which he allowed to get out of repair and open, whereby the stock got on the track. *Held*, that the acceptance of the fence with the gates was a waiver of a further duty imposed on the company, and it was not bound to use extraordinary means to prevent accidents. *Great Western R. Co. v. Vilaire*, 11 U. C. C. P. 509.

2. *Effect of Performance of this Duty.*

**114. Generally.**—Where a train is running on a well-fenced track, the company is not necessarily guilty of negligence in injuring stock trespassing on the track because the engineer does not act upon the gestures made by persons standing near the track, unless they are such as to be a full and fair warning that stock will be injured if the train is not stopped. *Dennis v. Louisville, N. A. & C. R. Co.*, 35 Am. & Eng. R. Cas. 141, 116 Ind. 42, 15 West Rep. 547, 18 N. E. Rep. 179, 1 L. R. A. 448.—QUOTED IN *Overton v. Indiana, B. & W. R. Co.*, 1 Ind. App. 436.

**115. Duty to use care arises only after discovery of animal.**—Where animals trespass upon the track of a railway company which is properly inclosed, and the animals exposed to injury, the duty of the company to exercise care as to them arises only after discovery of their presence on the track. If, after discovering animals upon the track the servants of the company might, by the exercise of proper care and prudence prevent an injury, and fail to do so, the company may be liable. *Illinois C. R. Co. v. Noble*, 56 Am. & Eng. R. Cas. 186, 142 Ill. 578, 32 N. E. Rep. 684; reversing 42 Ill. App. 509.—DISAPPROVING *Illinois C. R. Co. v. Middlesworth*, 46 Ill. 494. QUOTING *Toledo, W. & W. R. Co. v. Barlow*, 71 Ill. 640.

**116. Degree of care.**†—Railroad companies may be free from any negligence with reference to fencing and yet be liable for killing stock. In all cases railroad companies are required to use ordinary care and diligence to avoid injuring stock on the track. *Illinois C. R. Co. v. Baker*, 47 Ill. 295.—FOLLOWED IN *Rockford, R. I. & St. L. R. Co. v. Irish*, 72 Ill. 404.

So where stock are upon the track and a

train is approaching, though down a slight grade, and the engine-driver, instead of stopping his train to drive off the stock, pursues them to a point where, by reason of ditches filled with water, on each side of a high embankment, there is little probability the animals will leave the track, and they are overtaken and killed, the company are guilty of gross negligence, and they will be liable, notwithstanding it may appear the animals got on the track within the limits of a town. *Illinois C. R. Co. v. Baker*, 47 Ill. 295.

A company is not held to any greater degree of care to avoid injuring stock by reason of a break in a fence.—*Illinois C. R. Co. v. Walker*, 63 Miss. 13.—EXPLAINING *Tyler v. Illinois C. R. Co.*, 61 Miss. 445.

If a road is properly fenced, as required by the Ohio act of 1859, the company is held to the exercise of ordinary care only in the running of trains, to prevent the killing of animals. Where the road is not properly fenced a higher degree of care is required. *Gill v. Atlantic & G. W. R. Co.*, 27 Ohio St. 240.

**117. Animals coming on track where company not bound to fence.**

—(1) *Generally.*—Railroad companies are not liable for killing stock that goes upon the track at points where it is not required to fence under the statute. *Indianapolis, P. & C. R. Co. v. Caudle*, 60 Ind. 112. *Indianapolis & C. R. Co. v. Kinney*, 8 Ind. 402.—QUOTED IN *Indianapolis & C. R. Co. v. Kercheval*, 16 Ind. 84. REVIEWED IN *Davis v. Burlington & M. R. Co.*, 26 Iowa, 549.—*Bechdolt v. Grand Rapids & I. R. Co.*, 35 Am. & Eng. R. Cas. 168, 113 Ind. 343, 13 W. Rep. 53, 15 N. E. Rep. 686. *Henderson v. St. Louis & H. R. Co.*, 36 Mo. App. 109.

And in such cases common-law principles must determine the rights and liabilities of the parties. *Indianapolis & C. R. Co. v. Caldwell*, 9 Ind. 397.

Where the attorneys for the plaintiff and defendant agree in writing that certain stock killed by the engines of a railway company escaped without the fault of the owner, and were killed at a place where the court finds the company was not required to fence its track, and without the negligence of the railway company, there can be no recovery

\* See ante, 49, 51, 52, 63, 64-72.

† See ante, 48, 49, 58, 62; post, 141, 186.

\* See, generally, ante, 29-84.

Cattle coming on track at point where company is not bound to fence, see note, 19 AM. & ENG. R. CAS. 580.

for such stock. *Chicago, B. & Q. R. Co. v. Hogan*, 27 Neb. 801.

The Indiana statute, requiring railroad companies to fence, and making them liable for stock killed by reason of a failure to fence, only applies to the portion of the road where the company ought to maintain a fence; and if animals be killed at other points on the road where the company is not required to fence, then their liability remains as at common law, and depends upon whether there was negligence or wilful killing. *Jeffersonville, M. & I. R. Co. v. Brevoort*, 30 Ind. 324.—FOLLOWED IN *Louisville, N. A. & C. R. Co. v. Quade*, 101 Ind. 364.

In the absence of proof of negligence a railroad company is not liable for killing stock that goes upon the track where a fence or cattle-guards cannot safely be maintained. *Pearson v. Chicago, B. & K. C. R. Co.*, 33 Mo. App. 543.—FOLLOWING *Ehret v. Kansas City, St. J. & C. B. R. Co.*, 20 Mo. App. 251; *Nance v. St. Louis, I. M. & S. R. Co.*, 79 Mo. 196.

A company is not liable for killing stock at a point where it is not bound to fence, in the absence of such negligence as would make it liable at common law. *Cleveland, C., C. & St. L. R. Co. v. Myers*, 43 Ill. App. 251. *Peoria, D. & E. R. Co. v. Dugan*, 10 Ill. App. 233. *Long v. St. Louis, K. & N. W. R. Co.*, 23 Mo. App. 178.

A railroad company is not liable for injuries to animals that enter upon its track at places where to maintain fences would interfere with the discharge of its duty to the public, or with the rights of the public in the use of the highway, or in doing business with the company, nor at any place where fences and connecting cattle-guards would make the running and handling of trains or the necessary or proper switching of cars more hazardous to its employes. Where animals enter upon railroad grounds at such places, and are killed within limits that cannot be and are not required to be fenced, the company is not liable. *Pennsylvania Co. v. Mitchell*, 124 Ind. 473, 24 N. E. Rep. 1065.

A company is not liable for killing stock that go upon the track where it is not bound to fence, though it pass along the track and is killed at a point where the company is bound to fence. *St. Louis, A. & T. H. R. Co. v. Linder*, 39 Ill. 433.—DISTINGUISHED IN *Toledo, P. & W. R. Co. v. Darst*, 51 Ill. 365.

(2) *When it is not practicable to fence.\**—Where an animal is killed by cars, having entered upon the railroad at a place not fenced on either side, but where it is practicable to fence only on one side, the railroad company is not liable under the statute. *Indiana, B. & W. R. Co. v. Leak*, 13 Am. & Eng. R. Cas. 521, 89 Ind. 596.

(3) *Uninclosed lands.†*—Under *Wagn. St. of Missouri*, § 43, p. 310, a railroad company is not responsible for stock killed by the cars, etc., when such killing takes place at a point on their road where it is not fenced, and when it does not pass through or along inclosed or cultivated fields, or uninclosed prairie lands, unless actual negligence be proven. *Musick v. Atlantic & P. R. Co.*, 57 Mo. 134.

Under *Maine St. 1842*, if an injury to one's cattle happen through want of fences upon common and uninclosed land, it is not legally imputable to the negligence of the company. *Perkins v. Eastern R. Co.*, 29 Me. 307.

(4) *Public crossings.‡*—Railway companies cannot be made liable for injuries to animals entering upon their tracks at places where the maintaining fence would interfere with the proper discharge of their duties to the public or with the rights of the public in the use of highways and streets, or in doing business with the company, nor at any place where fences connecting cattle-guards and wing fences would make the running and holding of trains, or the necessary and proper switching of cars more hazardous to their employes. *Ohio, I. & W. R. Co. v. Heady (Ind. App.)*, 28 N. E. Rep. 212.

(5) *In towns.§*—Although a cattle-guard is placed 28 feet outside the limits of a town and 140 feet from the head of a switch, and the railroad is not fenced between that point and the town limits, the company is not liable, under *Missouri Rev. St. 1879*, § 809, for an animal killed at such unfenced point, if such part of the track could not be fenced without endangering the lives of employes in switching trains. *Jennings v. St. Joseph & St. L. R. Co.*, 37 Mo. App. 651.—FOLLOWING *Pearson v. Chicago, B. & K. C. R. Co.*, 33 Mo. App. 543.—APPLIED IN *Straub v. Eddy*, 47 Mo. App. 189.

(6) *Where others besides company must*

\* See ante, 105, 109; post, 132.

† See ante, 100; post, 159.

‡ See ante, 108; post, 185-198.

§ See ante, 99; post, 203-212.

*fence.\**—If stock go upon a track at a point where others besides the company are required to fence, in the absence of gross negligence the company is not liable for killing them, whether it be at the point of entry or at another place. *St. Louis, A. & T. H. R. Co. v. Linder*, 39 Ill. 433.

**118. Where animal jumps or breaks through lawful fence.**—Where animals go upon a railroad track which is fenced, the right of recovery from the company for killing the same will depend upon the condition of the fence at the place where they went on the track, and if the fence at such point is in good condition, there can be no recovery. *Peoria, D. & E. R. Co. v. Aten*, 43 Ill. App. 68.

A railroad company is not liable for killing a mule that jumps a fence and goes on the track only 50 yards ahead of the engine, in the absence of anything to show defect of machinery, negligence, mismanagement or recklessness of those in charge of the train. *Louisville & N. R. Co. v. Wainscott*, 3 Bush (Ky.) 149.—APPROVED IN *Volkman v. Chicago, St. P., M. & O. R. Co.*, 35 Am. & Eng. R. Cas. 204, 5 Dak. 69, 37 N. W. Rep. 731. QUOTED IN *Washington v. Baltimore & O. R. Co.*, 17 W. Va. 190. REVIEWED IN *Louisville & N. R. Co. v. Ganote*, 13 Am. & Eng. R. Cas. 519.

Where a fence at the point at which an animal broke through the same and got upon the track, was such as the law required to be erected, the finding must be for the defendant. *Coryell v. Hannibal & St. J. R. Co.*, 82 Mo. 441.

**119. Liability for actual negligence.**†—Though a railroad company may have properly fenced its track, still it will be liable for wilfully killing live stock thereon. *New Albany & S. R. Co. v. McNamara*, 11 Ind. 543.

If it appear that a railroad company has erected and maintained a fence, such as good husbandmen generally keep, it will not be liable for killing stock, except upon proof of negligence, and perhaps not always then. *Toledo & W. R. Co. v. Thomas*, 18 Ind. 215.

Even where a railroad is within a lawful inclosure, the company must answer in damages for injury to stock straying on the

track, if shown to have been caused by its negligence. *Louisville & N. R. Co. v. Simmons*, 85 Ky. 151, 3 S. W. Rep. 10.

**120. Duty to keep lookout.**—A railroad company has a right to an unobstructed use of its track, and where its fences are in proper condition its employes are not bound to anticipate the presence of cattle trespassing upon its tracks, nor maintain an especial vigilance in looking for them, until in some way notified that they are in fact, or are likely to be, on the track. *Illinois C. R. Co. v. Noble*, 56 Am. & Eng. R. Cas. 186, 142 Ill. 578, 32 N. E. Rep. 684; reversing 42 Ill. App. 509.

Where a railway company has properly fenced its track, and done all that the law has required of it, it will not be liable for injury to stock wrongfully on the track, merely for the want of care and caution to discern such animals. A railway company owes no duty to the owner of trespassing animals to keep a lookout for them up on its tracks to discover their presence there. *Illinois C. R. Co. v. Noble*, 56 Am. & Eng. R. Cas. 186, 142 Ill. 578, 32 N. E. Rep. 684; reversing 42 Ill. App. 509.—QUOTING *Illinois C. R. Co. v. Godfrey*, 71 Ill. 500.

While railway companies are not bound to be on the lookout for animals trespassing on their tracks at places where it is securely fenced, they are liable for animals killed, where the engineer in charge of the train could, by the exercise of reasonable diligence, have seen the animal and stopped the train in time to avert the accident. *Chicago, St. L. & P. R. Co. v. Nash (Ind.)*, 24 N. E. Rep. 884.

**121. Effect of snow-drifts against fences.**†—It is not negligence for railway companies to allow snow-drifts to remain over their fences, so that they do not serve the purpose of restraining stock from crossing over them into their right of way. *Patton v. Chicago, M. & St. P. R. Co.*, 75 Iowa 459, 39 N. W. Rep. 708.—RECONCILED IN *Grahlman v. Chicago, St. P. & K. C. Co.*, 42 Am. & Eng. R. Cas. 588, 78 Iowa 564, 5 L. R. A. 813, 43 N. W. Rep. 529.

\* See *ante*, 62-64, 115; *post*, 164, 195.

† See *post*, 169.

Company not liable where stock goes over a sufficient fence by reason of drifted snow, see 35 AM. & ENG. R. CAS. 118, *abstr.*

\* See *ante*, 88, 89; *post*, 138, 139, 149, 156.

† See *ante*, 29-32, 47, 57; *post*, 187, 200, 204.



### 3. Injuries Caused by Breach of this Duty.

#### a. Where Duty is Imposed by Statute.\*

**122. Generally.**—(1) *Statement of the rule.*—Since the passage of the Illinois act of 1855, requiring railway companies to fence their roads, such companies are liable for injuries to stock that stray upon their track through the want of the required fences and cattle-guards. *Galena & C. U. R. Co. v. Crawford*, 25 Ill. 435.

If animals enter upon a roadway at a place where it is the duty of the railroad company to fence, and are killed or injured, the company is liable if there was no secure fence at that place. *Ft. Wayne, C. & L. R. Co. v. Herbold*, 23 Am. & Eng. R. Cas. 221, 99 Ind. 91.

In an action to recover the value of a horse killed by the cars of a railroad company, the court instructed the jury that the company would be liable if the horse was killed at a point on the road not securely fenced, and where it could have been fenced without interfering with the rights of the public. *Held*, that the instruction was not erroneous. *Cleveland, C. & I. R. Co. v. Crossley*, 36 Ind. 370, 5 Am. Ry. Rep. 552.

Under the Iowa statute railroad companies are liable for killing stock that escape from adjoining lands and go upon the track where it is not fenced. *Swift v. North Mo. R. Co.*, 29 Iowa 243.—FOLLOWING *Hinman v. Chicago, R. I. & P. R. Co.*, 28 Iowa 491.

The owner of stock which wanders upon the track of a railroad company without the owner's fault, and is injured by the negligent running of a train, may recover where the company, though required by law to fence, has failed to do so. *Scott v. Chicago, M. & St. P. R. Co.*, 68 Iowa 360, 24 N. W. Rep. 584.

A railroad company is liable in damages for killing a horse that goes upon the track while attached to a sleigh at a point where the track is not fenced, and which is not used for depot purposes. *Dixon v. New York C. & H. R. R. Co.*, 22 N. Y. S. R. 61, 51 Hun 644, 4 N. Y. Supp. 296.

\* Liability of railroad companies for injury to animals on track where company is bound to fence and fails to do so, see notes, 96 Am. Dec. 681; 1 L. R. A. 449.

Company not liable for injuries to stock by reason of failure to fence where such would have been unavailing, see note, 21 L. R. A. 723.

Liability of company for stock killed or injured under Missouri fence laws, see note, 11 L. R. A. 426.

(2) *Its scope and extent.*—Where the law makes it the duty of a railroad company to fence its track it will not be excused from liability for killing stock, by showing that the road has been in operation for a number of years without being fenced. *Toledo, P. & W. R. Co. v. Wickery*, 44 Ill. 76.

Under the Indiana statute a railroad company is liable for cattle killed where it has not discharged its duty of fencing, whether the county commissioners have made any order as to the running at large of cattle or not. *Jeffersonville, M. & I. R. Co. v. O'Connor*, 37 Ind. 95.

A railroad company which has failed to fence its road, as required by statute, must run its trains upon the basis that cattle rightfully upon adjoining lands may stray upon the track on account of the absence of a fence. The adjoining landowner is not to be deprived of the use of his land by the failure of the company to fence, and in using the same he has a right to expect this course of conduct on the part of the company. *Schubert v. Minneapolis & St. L. R. Co.*, 27 Minn. 360, 7 N. W. Rep. 366.

At places where the law requires railroads to maintain fences they are liable for injury to stock because of failure to fence, under Missouri Rev. St., § 809. At places where they are not required, but where they may fence and do not, they are liable, under § 2124. *Rhea v. St. Louis & S. F. R. Co.*, 84 Mo. 345.—QUOTING *Wymore v. Hannibal & St. J. R. Co.*, 79 Mo. 247.

Under the New York act of 1850, 233, § 44, railroad companies are exempt from liability for injuries to animals only when they erect and maintain lawful fences, or where injury is not the result of wilfulness or negligence. *McDowell v. New York C. R. Co.*, 37 Barb. (N. Y.) 195.—APPROVED IN *Spinner v. New York C. & H. R. R. Co.*, 67 N. Y. 153; affirming 6 Hun 600.

Under Tennessee acts of 1891, ch. 101, railroads are liable for injury to live stock by their moving trains unless their track is inclosed by a lawful fence. The observance of statutory precautions does not protect company under the statute if track is unfenced. Railroads are protected from liability, under this act, if their tracks are inclosed by a lawful fence. *Cincinnati, N. O. & T. P. R. Co. v. Russell*, 92 Tenn. 108, 20 S. W. Rep. 784.

(3) *Reason of the rule.*—The owner of stock killed upon a railroad is permitted to



recover from the railroad company, because the recovery will tend to secure the discharge of a public duty, imposed by law, to fence its road. *Cincinnati, H. & I. R. Co. v. Hildreth*, 77 Ind. 504.

(4) *Illustrations*.—The charter of the Rutland & Burlington Railroad Company, § 14, requires the company to build and maintain a sufficient fence on each side of their road through the whole length thereof. *Held*, that the company takes the risk of cattle going upon the track through a failure on its part to erect and maintain fences as required, and are liable for damages to such stock. *Hurd v. Rutland & B. R. Co.*, 25 Vt. 116.—QUOTING *Sharrod v. North Western R. Co.*, 4 Wels. Hurlst. & Gord. 584.

Where a turnpike is legally but 66 feet wide, a railroad company is liable for killing a cow 43 feet from the centre of the turnpike, it appearing that she was in an open space between a cattle-guard and the crossing of the railroad and turnpike. *Indianapolis, C. & L. R. Co. v. Bonnell*, 42 Ind. 539.

**123. When liability begins to attach.**—Where a railroad company owns and operates a railroad, the construction of which is not entirely finished, and while so operating the road permits the contractor who constructed the road to run his construction train over the road so owned and operated by the company, and which at the time is unfenced, and a cow is killed by the construction train in consequence of the omission to inclose the road with a fence where it could have been fenced, an action may be maintained against the company to enforce the statutory liability for the loss of the cow. *Wichita & C. R. Co. v. Gibbs*, 47 Kan. 274, 27 Pac. Rep. 991.

Under the Michigan general railroad act the liability of corporations organized under it for a failure to fence the right of way, attaches as soon as it is in possession for the purpose of constructing the road, and this liability extends to agents or contractors in possession. *Gardner v. Smith*, 7 Mich. 410.—FOLLOWED IN *Continental Imp. Co. v. Ives*, 30 Mich. 448.

Under the Michigan railway act, making it the duty of railway companies to fence their tracks, and providing that until such fence shall be made "the corporation and their agents shall be liable for all damages which shall be done by their agents or en-

gines" to live stock, the word "agents"—*held*, to include "contractors" in possession for the purpose of constructing the road. *Gardner v. Smith*, 7 Mich. 410.

Liability for killing sheep while a railroad is in process of construction is not affected by the fact that the owner turned them into a field through which the track ran, where the contractor was constantly throwing down the fence in the prosecution of his work. *Gardner v. Smith*, 7 Mich. 410.—REVIEWED IN *Wilder v. Maine C. R. Co.*, 65 Me. 332.

**124. Failure to fence by time provided by law.**—Where a railroad has been operating trains for more than six months, and has failed to fence its track, and kills stock upon the track, the company will be liable for the value of such stock. *Toledo, P. & W. R. Co. v. Crane*, 68 Ill. 355.

A railroad ran through a common field of several square miles, owned by different parties, some of whom resided therein, which was fenced only on the outside. The railroad had been open for use more than six months, and the company had neglected to fence its track entirely through the inclosure. *Held*, that the company was liable for stock killed by its trains inside of the inclosure. *Peoria, P. & J. R. Co. v. Barton*, 80 Ill. 72.

A party who sues a railroad, under the statute, for injuries to cattle resulting from omission to fence a road, should show that the road had been opened more than six months prior to the injury. *Ohio & M. R. Co. v. Meisenheimer*, 27 Ill. 30.

Under the Missouri Gen. St. ch. 63, § 43, providing, among other things, that if a railroad company fails for three months after the completion of its road to fence its track, the adjoining landowner may do so, it is not necessary to show that the railroad had been completed for three months at the point where stock is killed. *Blewett v. Wyandotte, K. C. & N. R. Co.*, 72 Mo. 583.

**125. Injuries prior to time fixed by law for the building of fences.**—Under the Ohio act of April 18, 1874, requiring railroad companies to fence, a company is not liable for injuring trespassing animals on the track until six months after the date of the act. *Baltimore & O. R. Co. v. McElroy*, 35 Ohio St. 147.

\* See ante, 91; post, 125.

\* See ante, 91.

In an action against a railroad to recover for killing stock, where plaintiff declares upon the statutory liability, growing out of a neglect to fence the road within six months after the same is opened, no recovery can be had unless the company was bound to fence its road. *Rockford, R. I. & St. L. R. Co. v. Lynch*, 67 Ill. 149.

Before the time has elapsed in which a railway company is required to fence its road, it will be liable only for injuries to stock resulting from its failure to properly construct its road, or to manage and operate its locomotives and cars in a reasonable and prudent manner. *Centralia & C. R. Co. v. Brake*, 125 Ill. 393, 15 West Rep. 149, 17 N. E. Rep. 820.

Where a company is under no statutory liability for injury to stock by its trains by reason of its road not having been fenced, as, when the road has not been open for use six months, the only ground of liability will be that the injury might have been avoided by the exercise of ordinary care and prudence, and its servants in charge failed to exercise such care and prudence. *Gilman, C. & S. R. Co. v. Spencer*, 76 Ill. 192.

**126. Absolute liability without proof of negligence.\***—(1) *Generally*.—Railroad companies being required to fence their tracks are held liable for all injuries to live stock by reason of a failure to fence. *Louisville, N. A. & C. R. Co. v. Zink*, 85 Ind. 219.

Proof that stock were killed by a train in a field where an unfenced road passes through it, makes a *prima facie* case of negligence against the company. A company which runs its trains upon an unfenced track does so at its peril, and is liable for any stock killed which may come upon the track through lack of a fence. *McCoy v. California Pac. R. Co.*, 40 Cal. 532.—FOLLOWED IN *Johnson v. Baltimore & O. R. Co.*, 25 Va. 570.

(2) *In Colorado*.—Under the Colorado statute, railroad companies are liable for killing stock without reference to the question of negligence. *Atchison, T. & S. F. R. Co. v. Betts*, 31 Am. & Eng. R. Cas. 563, 10 Colo. 431, 15 Pac. Rep. 821.

(3) *In Illinois*.—Where a railway kills stock not at a crossing or other place where it is required to fence its track, and has been in

operation for more than six months, and has not fenced its track at the place where the killing took place, and the owner of the land has not agreed to fence the road, the company will be liable, under the Illinois act of 1855, without proof of any actual negligence, even though the owner may not prove the stock got upon the track at the point not fenced. *Toledo, P. & W. R. Co. v. Pence*, 68 Ill. 524.—FOLLOWED IN *Toledo, P. & W. R. Co. v. Logan*, 71 Ill. 191.

Where it is the duty of a railroad to securely fence its track, it will be liable for the killing of a horse that takes fright and goes upon the track through a defect in the fence at a particular place where the horse crosses it, without proof of carelessness or wilful injury. *Chicago & A. R. Co. v. Utley*, 38 Ill. 410.—QUOTED AND FOLLOWED IN *Chicago, B. & Q. R. Co. v. Bryant*, 29 Ill. App. 17.

Where a company fails to fence its track, as required by the Illinois statute, it must see that its servants so conduct its trains that injury shall not result to stock that may get upon its track, if it can be avoided by care and caution. In failing to fence it takes the hazard, and when injury results therefrom it must be required to respond in damages. *Toledo, P. & W. R. Co. v. Lavery*, 71 Ill. 522.

The Illinois statute makes it the duty of railroad companies "to erect and maintain fences suitable and sufficient to prevent cattle, horses, sheep, and hogs from getting upon their road." Where the proof shows that the fence of the company, at the place where a horse got upon its track and was killed, was not of that description, the company is liable to the owner. *Chicago & A. R. Co. v. Umphenour*, 69 Ill. 198.

(4) *In Indiana*.—Where it appears that stock go upon a track by reason of an insufficient fence and are killed, the question of negligence on the part of the company, and a defence based upon reasons why a sufficient fence was not maintained, are immaterial. *Grand Rapids & I. R. Co. v. Jones*, 81 Ind. 523.

Under the Indiana statute railroad companies are liable for stock killed or injured on the track by reason of a failure to fence at points where it is required to do so, without proof of negligence on the part of the company, and without reference to the fault of the owner. *Jeffersonville, M. & I. R. Co. v. Ross*, 37 Ind. 545. *Thayer v. St. Louis, A.*

\* See ante 6, 29-33; post, 204, 238, 239, 281.

& *T. H. R. Co.*, 22 *Ind.* 26. *McKinney v. Ohio & M. R. Co.*, 22 *Ind.* 99.

The Indiana statute upon the subject of the liability of railroads for stock killed, where the road is not fenced, gives to the want of a proper fence the same effect that negligence in the management of the train would otherwise involve. *Jeffersonville, M. & I. R. Co. v. Dunlap*, 29 *Ind.* 426.—DISTINGUISHED IN *Heller v. Abbot*, 79 *Wis.* 409.

A party cannot have the benefit of the Indiana statute of 1853, making companies liable for animals killed without negligence, unless he prove that the track was not fenced as prescribed by the statute. *Indianapolis & C. R. Co. v. Means*, 14 *Ind.* 30.

Under the Indiana act requiring railroad companies to fence, a failure to fence will make a company liable without reference to the negligence of the owner, or whether he was a proprietor of adjoining lands or not. *Indianapolis & C. R. Co. v. Townsend*, 10 *Ind.* 38.

The Indiana acts of May 11, 1852, and March 1, 1853, change the common-law rule that each landowner is entitled to the exclusive use of his own lands, and is not bound to fence against stock of adjoining owners, so far as relates to railroads; and under the statutes it is the duty of such corporations to fence their tracks, and failing to do so, they are liable for all stock killed or injured thereby, regardless of the question of negligence, misconduct, or inevitable accident. *Williams v. New Albany & S. R. Co.*, 5 *Ind.* 111.—FOLLOWED IN *Smith v. Terre Haute & R. R. Co.*, 7 *Ind.* 553; *Terre Haute & R. R. Co. v. Jones*, 8 *Ind.* 183.

(5) *In Kansas—Michigan*.—Where an animal, after entering upon the track at a place where it could not legally be fenced, passed off the railroad's premises, and, re-entering upon the track at a point where the company was bound by law to fence, was then killed—*held*, that the company was liable. *Atchison & N. R. Co. v. Cash*, 27 *Kan.* 587.—DISTINGUISHING *Missouri Pac. R. Co. v. Leggett*, 27 *Kan.* 323.

When stock gets upon a railroad right of way by reason of the neglect of the company to properly fence its track, and is killed by a passing train, no other negligence need be proved. *Talbot v. Minneapolis, St. P. & S. St. M. R. Co.*, 82 *Mich.* 66, 45 *N. W. Rep.* 1113.

(6) *In Missouri*.—Under the Missouri stat-

ute (Revision 1879, § 806), it is made the duty of a railroad company to fence its road, and it is made liable to the owner of cattle for double the amount of all damages done to them, occasioned by reason of its failure to fence the road. The neglect to fence its road, according to this act, is of itself negligence, and the corporation is liable in double damages. *Donovan v. Hannibal & St. J. R. Co.*, 26 *Am. & Eng. R. Cas.* 588, 89 *Mo.* 147, 1 *S. W. Rep.* 232.

Proof that stock was injured at a point where the land was unfenced and prairie-lands, and that the track was not fenced, will make the company liable without proof of negligence. *Shelton v. St. Louis, K. C. & N. R. Co.*, 60 *Mo.* 412.—FOLLOWING *Cary v. St. Louis, K. C. & N. R. Co.*, 60 *Mo.* 209.

Under the Missouri act of Dec. 12, 1855, § 5, railroads are liable for stock killed without regard to the question of negligence, unless it be when they are killed at crossings or within inclosed fields; and the same liability attaches to companies subject to the general railroad act, § 52. *Burton v. North Mo. R. Co.*, 30 *Mo.* 372. *Morris v. St. Louis, K. C. & N. R. Co.*, 58 *Mo.* 78.—REVIEWING *Lloyd v. Pacific R. Co.*, 49 *Mo.* 199.—DISTINGUISHED IN *Pearson v. Chicago, B. & K. C. R. Co.*, 33 *Mo.* App. 543. FOLLOWED IN *Swearingen v. Missouri, K. & T. R. Co.*, 64 *Mo.* 73. REVIEWED IN *Bean v. St. Louis, I. M. & S. R. Co.*, 20 *Mo.* App. 641.

If an animal comes upon the track of a railroad and is killed, where such track might be fenced lawfully, the railway company is liable, regardless of the question of negligence; and the mere fact that the track is in a town-plat does not make it unlawful to fence it, where the laid-out streets do not cross the track. *Vanderwerker v. Missouri Pac. R. Co.*, 51 *Mo.* App. 166.

The object of the Missouri statute requiring railroads to be fenced is the protection of the road, and of property and passengers being carried, and the prevention of injuries to live stock on the track; and if a company fails to fence as required by the statute, or to put up cattle-guards, it will be liable for stock killed on the track without proof of negligence. But a company is not required to fence its track so as to prevent stock from straying upon adjoining fields. *Clark v. Hannibal & St. J. R. Co.*, 36 *Mo.* 202.—QUOTED IN *Cannon v. Louisville, E. & St. L. C. R. Co.*, 34 *Ill.* App. 640. REFERRED TO IN *Hannibal & St. J. R. Co. v. Kenney*, 41 *Mo.*

271. REVIEWED IN *Stanley v. Missouri Pac. R. Co.*, 84 Mo. 625.

A railroad company is liable for stock killed on the track upon proof showing that the killing occurred where the track was not lawfully fenced, and not at a highway crossing, without actual proof of negligence. *Powell v. Hannibal & St. J. R. Co.*, 35 Mo. 457.

Under Missouri Rev. St. § 2124, providing that the owner of stock killed or injured on a railroad other than at crossings and where the track is fenced, may recover, "without proof of negligence, unskillfulness, or misconduct," an action cannot be defeated by showing that the train doing the injury was being run in a careful, prudent manner, and that there was no want of care or skill. *Cougill v. Hannibal & St. J. R. Co.*, 33 Mo. App. 677.

A railroad company will be liable where stock is killed on an unfenced switch which is laid at a point where it is not necessary to keep it open for the transaction of business, and to make the company liable it is not necessary to prove negligence. *Russell v. Hannibal & St. J. R. Co.*, 26 Mo. App. 368.

A railroad company is liable, without proof of negligence, for the killing of animals at a point on its road not in a town or at a public crossing, where it is not necessary to keep the space open for the transaction of its business, if the road is not lawfully fenced. *Robinson v. St. Louis, I. M. & S. R. Co.*, 21 Mo. App. 141.

(7) *In Nebraska—New Hampshire.*—Under the Nebraska statute requiring railroad companies to fence their tracks, a company is liable for stock killed upon proof showing that the killing was done where the track was unfenced, without any allegation or other proof of negligence. *Union Pac. R. Co. v. High*, 14 Neb. 14.

If an animal come upon the track of a railroad through the neglect of the corporation in not maintaining a suitable fence against the lands of its owner, and, in consequence, be there killed by their train, the corporation is liable for the damage, although there be no negligence in the management of the train by which it is killed. *Smith v. Eastern R. Co.*, 35 N. H. 356.—DISTINGUISHED IN *Laird v. Connecticut & P. R. R. Co.*, 43 Am. & Eng. R. Cas. 63, 62 N. H. 254.

(8) *In New York—Oregon.*—Under the New York act of March 27, 1848, making it

the duty of railroad companies to fence their track and to place cattle-guards at road-crossings, a company is liable for stock killed on the track, without proof of negligence. *Snydam v. Moore*, 8 Barb. (N. Y.) 358.—DISTINGUISHED IN *Talmadge v. Rensselaer & S. R. Co.*, 13 Barb. (N. Y.) 493; *Marsh v. New York & E. R. Co.*, 14 Barb. (N. Y.) 364. FOLLOWED IN *Corwin v. New York & E. R. Co.*, 13 N. Y. 42.

Under the Oregon act of 1887, defining the duty of companies to fence and the liability for stock killed by reason of a failure to fence, allegations and proof that the company owned and operated a railroad, that stock were killed on or near the track by a moving train where the company had not fenced, fixes liability, and it is not necessary to allege or prove negligence. *Hindman v. Oregon R. & N. Co.*, 38 Am. & Eng. R. Cas. 310, 17 Oreg. 614, 22 Pac. Rep. 116.—DISTINGUISHED IN *Sullivan v. Oregon R. & N. Co.*, 19 Oreg. 319. FOLLOWED IN *Eaton v. Oregon R. & N. Co.*, 19 Oreg. 371, 391.

(9) *In Texas—Vermont.*—A railroad company is liable for damages to a team of horses which runs away and enters the track at a point other than a crossing, where it is not fenced, under the Texas statute making railroad companies liable for stock injured or killed where the track is unfenced, without regard to negligence. *Gulf, C. & S. F. R. Co. v. Keith*, 74 Tex. 287, 11 S. W. Rep. 1117.

Where cattle are killed at a point where it is lawful for them to be, and where the track might have been fenced but is not, the railroad company cannot avoid liability by attempting to show ordinary care on its part, as a failure to fence is a want of ordinary care. *Gulf, C. & S. F. R. Co. v. Hudson*, 77 Tex. 494, 14 S. W. Rep. 158.

The plaintiff's horse escaped from his adjoining meadow directly on to the track, and was there killed by a passing train. The defendant had neglected to maintain a lawful fence. *Held*, that the company was liable, although the owner knew of the defect in the fence, that his horse was breachy, and although there was no neglect in running the train. *Congdon v. Central Vt. R. Co.*, 20 Am. & Eng. R. Cas. 460, 56 Vt. 390, 48 Am. Rep. 793.

(10) *Limits and exceptions to the rule.*—Under the Iowa statute railroads are absolutely liable for killing stock by reason of a failure to fence at any point on the road,

except at station grounds and at crossings of streets and highways. *Clary v. Iowa Midland R. Co.*, 37 *Iowa* 344.

But where a proper fence is maintained, and in places where it is not required to be, they are not liable for animals injured, except as at common law, where there is negligence on their part, and the negligence of the owner of the stock does not contribute to its immediate injury. *Thayer v. St. Louis, A. & T. H. R. Co.*, 22 *Ind.* 26.

If cattle stray upon a railroad directly from the land of their owner, by reason of the failure on the part of the company to fence their roads at that point, and are killed, the company would be held liable under the railroad act (St. Nevada, 1864-65, 427, § 40) on a simple showing of the facts of such killing and neglect to fence, without any further showing of negligence; but it is otherwise if they stray upon public land or from land not belonging to their owner. *Walsh v. Virginia & T. R. Co.*, 8 *Nev.* 110.

Under the Wisconsin statute the liability of railroad companies is absolute for all stock killed or injured by reason of their failure to both erect and maintain proper fences; except perhaps the liability would not be absolute where a fence became suddenly broken down, if immediate steps were taken to repair it. *Brown v. Milwaukee & P. du C. R. Co.*, 21 *Wis.* 39.—DISTINGUISHING *Hance v. Cayuga & S. R. Co.*, 26 *N. Y.* 428.—DISTINGUISHED IN *Fisher v. Farmers' L. & T. Co.*, 21 *Wis.* 73.

(11) *Effect of contributory negligence.\**—Where a company fails to fence its track, as required by law, it is sufficient, to fix its liability, if plaintiff's stock, in consequence thereof, and without any contributory negligence on his part, goes upon the track and is there killed or injured. *Ewing v. Chicago & A. R. Co.*, 72 *Ill.* 25.

A railroad company which fails to fence its track at a place where by statute it is required to fence, is liable for stock killed or injured on its track by its engine or cars, and the mere negligence of the owner of the stock is no defence. *Burlington & M. R. Co. v. Franzen*, 15 *Am. & Eng. R. Cas.* 530, 15 *Neb.* 365.—FOLLOWING *Burlington & M. R. Co. v. Brinkman*, 11 *Am. & Eng. R. Cas.* 438, 14 *Neb.* 70.

Where a company is bound to maintain

fences and cattle-guards, it is liable for all stock killed by reason of a failure to do so, except in cases where the plaintiff drives his stock onto the track and leaves them there, or voluntarily permits them to go onto the track, or by some positive act increases the danger. *Brady v. Kesselsauer & S. R. Co.*, 1 *Hun (N. Y.)* 378, 3 *T. & C.* 537.—QUOTING *Bradley v. Buffalo, N. Y. & E. R. Co.*, 34 *N. Y.* 427. REVIEWING *Corwin v. New York & E. R. Co.*, 13 *N. Y.* 42.

In case for the killing of cows by a train on defendant's railroad, it appeared that the cows when killed were lying on the track in plaintiff's meadow through which the road ran, and into which plaintiff had turned the cows to graze; and that the road, although it had then been in partial operation about a month, was there still unfenced. *Held*, that under § 47, ch. 28, Gen. St. of Vermont, the duty of defendant was absolute to erect and maintain fences along its road; and that therefore question as to contributory negligence on the part of plaintiff in turning his cows into the meadow did not arise. *Mead v. Burlington & L. R. Co.*, 7 *Am. & Eng. R. Cas.* 550, 52 *Vt.* 278.

A railroad company which has failed to erect fences and cattle-guards, as required by law, is liable, under § 1810, Rev. St. of Wisconsin, as amended by ch. 193, Laws of 1881, for the killing of horses when on its unfenced track, in the absence of evidence that the owner drove them upon the right of way, or abandoned them in a place where it was certain that they would go upon the track. *Heller v. Abbot*, 79 *Wis.* 409, 48 *N. W. Rep.* 598.—DISTINGUISHING *Corwin v. New York & E. R. Co.*, 13 *N. Y.* 42; *Missouri Pac. R. Co. v. Roads*, 23 *Am. & Eng. R. Cas.* 165, 33 *Kan.* 640; *Welty v. Indianapolis & V. R. Co.*, 105 *Ind.* 55; *Ft. Worth, C. & L. R. Co. v. Woodward*, 112 *Ind.* 118; *Jeffersonville, M. & I. R. Co. v. Dunlap*, 29 *Ind.* 426; *Curry v. Chicago & N. W. R. Co.*, 43 *Wis.* 665; *Chicago & N. W. R. Co. v. Goss*, 17 *Wis.* 441; *McCandless v. Chicago & N. W. R. Co.*, 45 *Wis.* 365.

**127. Place of entry, not place of death, fixes liability.**—(1) *Illinois.*—It matters not whether a track is sufficiently fenced or not at the point where stock is killed. The liability of the company depends on the sufficiency of the fence at the point where the stock went on the track. *Duggan v. Peoria, D. & E. R. Co.*, 42 *Ill. App.* 536.

\* See post, 148, 213-288.

Merely showing that a track was not fenced at a point where a fence was necessary will not make a company liable for stock killed; it must appear that the stock entered the track at a point where the law makes it the duty of the company to fence, and that the loss occurred by reason of a failure to fence. *Illinois C. R. Co. v. Finney*, 42 Ill. App. 390; *Great Western R. Co. v. Morthland*, 30 Ill. 451.—APPLIED IN *Louisville & N. R. Co. v. Shelton*, 43 Ill. App. 220. APPROVED IN *Cecil v. Pacific R. Co.*, 47 Mo. 246; *Atchison, T. & S. F. R. Co. v. Walton*, 3 N. Mex. 319. FOLLOWED IN *Parker v. Lake Shore & M. S. R. Co.*, 93 Mich. 607.

If stock go upon the track at a point where the company is required to fence, and then pass along the track and are killed at a point where the company is not required to fence, the company is liable without proof of negligence in the management of the train. *Alsop v. Ohio & M. R. Co.*, 19 Ill. App. 292.—QUOTING *Great Western R. Co. v. Hanks*, 36 Ill. 281.

The bad condition of appellant's fences at other places than that where the stock got upon the track could not be shown. The want of a sufficient fence at the place where the animal got upon the track is the precise thing to be considered, and if no fault existed there, no liability attaches. *Chicago, B. & Q. R. Co. v. Farrelly*, 3 Ill. App. 60.

Where suit is brought against a company to recover for injuries to cattle, through the alleged negligence of the company to maintain a proper fence, it is necessary to show that they went on the track at a point where the fence was defective and insufficient, and it is not enough to show that the fence on both sides of the track was generally poor and defective. *Wabash R. Co. v. Brown*, 2 Ill. App. 516.

(2) *Indiana*.—The material question is the condition of the road at the place where the animals enter upon the track, and not at the place where they are killed. *Indiana, B. & W. R. Co. v. Quick*, 109 Ind. 295. *Jeffersonville, M. & I. R. Co. v. Lyon*, 72 Ind. 107. *Wabash St. L. & P. R. Co. v. Tretts*, 19 Am. & Eng. R. Cas. 601, 96 Ind. 450.

A company is liable for killing stock that enter the track at a place where it might have been fenced, without a charge of negligence. *Jeffersonville, M. & I. R. Co. v. Dun-*

*lap*, 31 Am. & Eng. R. Cas. 512, 112 Ind. 93, 13 N. E. Rep. 403.

If stock come upon a railroad track where it is unfenced, and where it is the duty of the company to fence, and wander to and are killed at a place where the company is not bound to fence, the company is liable. *Wabash R. Co. v. Forshee*, 77 Ind. 158.—DISTINGUISHED IN *Louisville, N. A. & C. R. Co. v. Porter*, 20 Am. & Eng. R. Cas. 446, 97 Ind. 267.

The burden is on the plaintiff in all cases of this character to prove that the animals entered at a point where the railroad company was bound to fence, and that at that point there was no fence. It is the place of entry that controls. *Louisville, N. A. & C. R. Co. v. Goodbar*, 102 Ind. 596, 2 N. E. Rep. 337, 3 N. E. Rep. 162.

Where it appears that live stock went upon a track over a fence that was generally insecure and not such as good farmers usually keep, it is not necessary to show that the fence was insecure at the particular place where the stock went over. *Louisville, N. A. & C. R. Co. v. Spain*, 61 Ind. 460.

Where an animal is killed by cars of the company at a point where the road is insecurely fenced to within 10 feet on one side of the track, and within 20 steps on the other at a public crossing, but where the fence does not extend to the cattle-guard at the public crossing, the company cannot escape liability by showing that the track was securely fenced where the stock was killed, where it appears that it was left open to permit the cattle to enter, but so closed that they could not escape when on the track upon the approach of a train. *Jeffersonville, M. & I. R. Co. v. Avery*, 31 Ind. 277.

If animals have entered at a place where the railroad company, being bound to fence, has not done so, and they wander or are driven by the engine along the track to another place thereon and are there struck and injured by the engine, the company is liable whether or not the place at which the injury is done be one at which the company is bound to fence, and whether or not that place be, in fact, fenced, and though in passing to that place from the place of entry the animals may have passed over the place at which the company was not bound to fence, as a public highway. *Louisville, N. A. & C. R. Co. v. Etaler*, 3 Ind. App. 562, 30 N. E. Rep. 32.

In an action under the Indiana statute



against a railroad company to recover damages for the killing or injuring of animals, it is well established that the defendant's liability depends upon the question whether the railroad was securely fenced in at the place where the animals killed or injured by the passing train entered upon the railroad. The question concerning a sufficient fence always relates to the place of entry, not to the place of the killing or injuring, if it be other than the place of entry. *Louisville, N. A. & C. R. Co. v. Etzler*, 3 *Ind. App.* 562, 30 *N. E. Rep.* 32.

If an animal is killed or injured by a railroad train, the animal having entered upon the track at a point where the company was not bound to maintain a fence, such company is not liable for the damage thereby occasioned unless the killing was wilful. *Pennsylvania R. Co. v. Lindley*, 2 *Ind. App.* 111, 28 *N. E. Rep.* 106.

(3) *Kansas—Minnesota*.—Under Kansas Laws 1874, providing for a recovery for death of or injuries to cattle by railway companies, the place of entry and not the place of injury fixes the company's liability. *Missouri Pac. R. Co. v. Leggett*, 27 *Kan.* 323.—DISTINGUISHED IN *Atchison & N. R. Co. v. Cash*, 27 *Kan.* 587.

In an action against a railroad company to recover the value of a colt, it appeared that the fence along the track was defective, and that the defect was known to the company. The animal was in the pasture adjoining the track in the evening, and about 9 o'clock at night was struck by the engine and killed. Witnesses testified that the hair of the colt was found on the posts at a narrow gap in the fence through which the colt crowded, and that its tracks could be seen leading to the railway and down the track to a crossing where it was killed. Plaintiff sought to recover on the ground that the colt ran ahead of the engine into a cattle-guard, and was there struck and thrown out on the highway, where it was found. The engineer and fireman testified that it was standing on the crossing of the highway headed in the same direction that the train was going when it was killed, and the jury found that it was struck on the crossing. *Held*, that the fact that it was struck and killed on the crossing would not defeat recovery if it escaped from the pasture through the gap, and that the evidence was sufficient to sustain a verdict for the plaintiff. *Kansas City, Ft. S. & G. R. Co. v. Burge*, 40

1 D. R. D.—11.

*Am. & Eng. R. Cas.* 181, 40 *Kan.* 736, 21 *Pac. Rep.* 589.

In case of accident resulting from the presence of animals on a railroad track, caused by want of a proper fence, it is the condition of the road where they enter upon it, and not where they are killed, that governs. *Cox v. Minneapolis, S. St. M. & A. R. Co.*, 38 *Am. & Eng. R. Cas.* 287, 41 *Minn.* 101, 42 *N. W. Rep.* 924.

(4) *Missouri*.—It is the place where the animal got on the track, and not where it was killed, that fixes the railroad company's liability. *Miller v. Wabash R. Co.*, 47 *Mo. App.* 630.—APPLYING *Ehret v. Kansas City, St. J. & C. B. R. Co.*, 20 *Mo. App.* 251; *Moore v. Wabash, St. L. & P. R. Co.*, 81 *Mo.* 499; *Nance v. St. Louis, I. M. & S. R. Co.*, 79 *Mo.* 196; *Cecil v. Pacific R. Co.*, 47 *Mo.* 246.—*Ehret v. Kansas City, St. J. & C. B. R. Co.*, 20 *Mo. App.* 251.

Under the Missouri statute requiring railroad companies to fence their tracks, a company is liable only for injuries to stock that go upon the track where the company is required to fence, and a complaint under the statute is not good which does not contain an averment, expressed or implied, to that effect. *Nance v. St. Louis, I. M. & S. R. Co.*, 19 *Am. & Eng. R. Cas.* 594, 79 *Mo.* 196.—FOLLOWING *Cecil v. Pacific R. Co.*, 47 *Mo.* 246.—APPLIED IN *Miller v. Wabash R. Co.*, 47 *Mo. App.* 630. DISTINGUISHED IN *Morrow v. Missouri Pac. R. Co.*, 82 *Mo.* 169. FOLLOWED IN *Busby v. St. Louis, K. C. & N. R. Co.*, 81 *Mo.* 43; *Wilson v. Wabash, St. L. & P. R. Co.*, 18 *Mo. App.* 258; *Pearson v. Chicago, B. & K. C. R. Co.*, 33 *Mo. App.* 543. QUOTED IN *Moore v. Wabash, St. L. & P. R. Co.*, 81 *Mo.* 499; *Brassfield v. Patton*, 32 *Mo. App.* 572.

A railroad company is liable for stock killed that enter the track where it is required to fence, though the stock were killed at a point where it is not required to fence, where the killing is due to a failure on the part of the company to fence at the point where the cattle entered. *Snider v. St. Louis, I. M. & S. R. Co.*, 7 *Am. & Eng. R. Cas.* 558, 73 *Mo.* 465.

In order to recover against a railroad for killing hogs, under the Missouri railroad act, § 43, proof that the fence is defective on both sides where the hogs were killed was not sufficient, unless it appear that the hogs got on the track by reason of the company's failing to fence where by law it is re-



quired to do, so or that the company was required to fence at the place where the hogs were killed. *Clardy v. St. Louis, I. M. & S. R. Co.*, 7 Am. & Eng. R. Cas. 555, 73 Mo. 576.

On a retrial the evidence should be presented with greater care, so as to show whether the animal entered the track from the public road or not, as in the one case the defendant would be liable, in the other not. *Adams v. Quincy, O. & K. C. R. Co.*, 52 Mo. App. 590.

Railroad companies, under § 809, Rev. St., are not liable to the owner of stock killed or injured, unless it got upon the track at a place where they are by law required to fence, no matter at what place it may be killed or injured. *Brassfield v. Patton*, 32 Mo. App. 572.—QUOTING *Nance v. St. Louis, I. M. & S. R. Co.*, 79 Mo. 196.

In actions under this section (Rev. St. § 809) the fact should appear by direct averment or necessary implication that the animal got upon the defendant's railroad track at a point where by the law the defendant was required to erect and maintain fences. *Brassfield v. Patton*, 32 Mo. App. 572.

A railroad company is not liable under the Missouri double damage act, unless the stock injured or killed went upon the track at a point where the company is required to fence, regardless of where it may have been injured. *Moore v. Wabash, St. L. & P. R. Co.*, 81 Mo. 499.—QUOTING *Nance v. St. Louis, I. M. & S. R. Co.*, 79 Mo. 196.—APPLIED IN *Miller v. Wabash R. Co.*, 47 Mo. App. 630.

In order to recover double damages from a railroad company for injuries to stock under the Missouri act, it is not necessary to prove by direct evidence that the stock passed through the fence at a defective place, where it appears that the cattle went upon the track at a point where there was not a lawful fence. *Gee v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 283.—APPLIED IN *Harned v. Missouri Pac. R. Co.*, 51 Mo. App. 482. DISTINGUISHED IN *Walton v. Wabash W. R. Co.*, 32 Mo. App. 634. FOLLOWED IN *McBride v. Kansas City, St. J. & C. B. R. Co.*, 20 Mo. App. 216; *Johnson v. Chicago, B. & K. C. R. Co.*, 27 Mo. App. 379.

(5) *Oregon — Wisconsin*.—Proof of the place of entry of the stock only becomes material and devolves on the plaintiff when

stock are killed or injured at a place where the railroad company is not bound to fence, as a public highway, which have entered where its track was unfenced and the duty to fence existed, and such killing or injury is the direct consequence of omission to fence. *Sullivan v. Oregon R. & N. Co.*, 42 Am. & Eng. R. Cas. 625, 19 Oreg. 319, 24 Pac. Rep. 408.

Under the Wisconsin act of 1860, ch. 268, in order to recover from a company for stock killed on the track the owner must show that the stock got on the track at a point where the company was bound to fence, but neglected to do so, and he cannot recover by merely showing that near the place where the injury happened, and near the company's depot, certain lands of the company were not fenced. *Bennett v. Chicago & N. W. R. Co.*, 19 Wis. 145.

Plaintiff's cow strayed upon the defendant company's track and was killed by a passing train. She might have strayed on the track either at the company's station grounds, where they were not bound to erect a fence, or at other points where a fence should have been constructed, though the company had failed to do so. In an action to recover for the loss of the cow—*held*, that the plaintiff's case was fatally defective in that it failed to show that the cow had strayed on the track at a point where the company was bound by statute to construct a fence. *Bremmer v. Green Bay, S. P. & N. R. Co.*, 19 Am. & Eng. R. Cas. 575, 61 Wis. 114, 20 N. W. Rep. 687.

**128. Presumption as to place of entry.\***—Where a track is unfenced at the point where an animal is injured it will be presumed that the animal entered on the right of way thereat. *Johnson v. Chicago, B. & K. C. R. Co.*, 27 Mo. App. 379.—FOLLOWING *Gee v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 283; *Lepp v. St. Louis, I. M. & S. R. Co.*, 29 Am. & Eng. R. Cas. 242, 87 Mo. 139.

Where it is shown that a fence at a point where stock were killed was not a lawful fence, in the absence of proof to the contrary, it will be presumed that the stock entered at that point. *McGuire v. Missouri Pac. R. Co.*, 23 Mo. App. 325.—QUOTING *Jantzen v. Wabash, St. L. & P. R. Co.*, 83 Mo. 171.—FOLLOWED IN *Pearson v. Chicago, B. & K. C. R. Co.*, 33 Mo. App. 543;

\* See post, 207.

*Duke v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 105.

It need not be shown by direct evidence where the animal strayed upon the railroad track. Proof that it was killed at a point where there was no fence, but where the company was in duty bound to fence, is sufficient to take the case to the jury. *Lepp v. St. Louis, I. M. & S. R. Co.*, 29 Am. & Eng. R. Cas. 242, 87 Mo. 139.

**120. Proof of death at place required to be fenced, when sufficient.**

—A railroad company is liable for the killing of stock at a point where it was required by law to fence, though there be no evidence where the animal came upon the track, nor that the plaintiff was an adjoining or next-adjointing landowner. *Kinion v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 574. —DISTINGUISHING *Ferris v. St. Louis & H. R. Co.*, 30 Mo. App. 122.

Under § 2124, Rev. St. Missouri, relating to damages for killing stock by railroads, in order to constitute a cause of action, the injury must appear to have occurred at a place where there was no lawful fence, and where such fence could have been erected by the company had it so desired, and that it occurred at a place other than the crossing of a public highway, and not within the limits of any incorporated town or city. *Vail v. Kansas City, C. & S. R. Co.*, 28 Mo. App. 372.

**130. Rule where company has the right to but does not fence.\***—(1) *In Iowa*.—While the statute, § 1269, Code Iowa, does not impose an abstract duty or obligation upon railway companies to fence their roads, yet, as to live stock running at large, a failure to fence fixes an absolute liability for injuries occurring in the operation of the road by reason of the want of such fence. *Welsh v. Chicago, B. & Q. R. Co.*, 53 Iowa 632, 6 N. W. Rep. 13, 21 Am. Ry. Rep. 181.—QUOTED IN *Sullivan v. Oregon R. & N. Co.*, 19 Oreg. 319.

Under the Iowa act of 1862, ch. 169, § 6, the liability of railroads for stock killed or injured is not absolute, but often depends on the question of negligence, as the statute only relates to places "where they have a right to fence." *Davis v. Burlington & M. R. R. Co.*, 26 Iowa 549.—REVIEWING *Indianapolis & C. R. Co. v. Kinney*, 8 Ind. 402; *Whitbeck v. Dubuque & P. R. Co.*, 21 Iowa

103; *Lafayette & I. R. Co. v. Shriner*, 6 Ind. 141; *Indianapolis & C. R. Co. v. Oestel*, 20 Ind. 231; *Galena & C. U. R. Co. v. Griffin*, 31 Ill. 303; *Indianapolis & C. R. Co. v. Guard*, 24 Ind. 222.—DISTINGUISHED IN *Mundhenk v. Central Iowa R. Co.*, 11 Am. & Eng. R. Cas. 463, 57 Iowa 718; *Andre v. Northwestern R. Co.*, 30 Iowa 107. FOLLOWED IN *Rogers v. Chicago & N. W. R. Co.*, 26 Iowa 558; *Durand v. Chicago & N. W. R. Co.*, 26 Iowa 559; *Packard v. Illinois C. R. Co.*, 30 Iowa 474. QUOTED IN *Blanford v. Minneapolis & St. L. R. Co.*, 29 Am. & Eng. R. Cas. 289, 71 Iowa 310, 32 N. W. Rep. 357; *Moses v. Southern Pac. R. Co.*, 42 Am. & Eng. R. Cas. 555, 18 Oreg. 385. REVIEWED IN *Greeley v. St. Paul, M. & M. R. Co.*, 19 Am. & Eng. R. Cas. 559, 33 Minn. 136, 53 Am. Rep. 16.

Where an occupant of land traversed by a railway allows his swine to run at large on the land, and they go upon the track at a point where the company has the right to fence but does not, and are killed by a passing train, he may recover of the company, under § 1289 of the Iowa Code, without proving that they were killed through the negligence of the company's servants. *Lee v. Minneapolis & St. L. R. Co.*, 20 Am. & Eng. R. Cas. 476, 66 Iowa 131, 23 N. W. Rep. 299.—FOLLOWING *Krebs v. Minneapolis & St. L. R. Co.*, 64 Iowa 670. REVIEWING *Fernow v. Dubuque & S. W. R. Co.*, 22 Iowa 528; *Spence v. Chicago & N. W. R. Co.*, 25 Iowa 139; *Stewart v. Chicago & N. W. R. Co.*, 27 Iowa 282.

(2) *In Texas*.—Where a company might fence its track but fails to do so, it is liable under the statute for stock killed. A failure to fence renders the company liable where fencing is practicable, but if not, then it is only liable for negligently killing stock. *International & G. N. R. Co. v. Leuders*, 1 Tex. App. (Civ. Cas.) 133.

Where an animal is killed by a locomotive or cars, the owner is entitled to recover from the company its value without proving negligence on the part of the company or its servants, unless the company has its road fenced, if it be not unlawful to fence it at that point. A failure to fence where it is not unlawful to do so is in itself negligence. *Texas & P. R. Co. v. Mitchell*, 2 Tex. App. (Civ. Cas.) 324.

**131. Rule where owner has right to but does not fence.**—The Illinois act of 1869, giving the landowner

\* See post, § 112.

the right to build a fence along the railroad track over his premises, and hold the company liable therefor, upon its failure to fence on notice, does not release railroad companies from their liability, under the act of 1855, for stock killed. The later act creates no duty upon the landowner to fence, but merely gives him the privilege to do so, and the fence, when so built by the owner of the land, will be the property of the company. *Toledo, P. & W. R. Co. v. Pence*, 68 Ill. 524.

The adjoining owner has a right to fence under the statute after the lapse of three months, if the railroad fails to do so; but such right is cumulative, and does not deprive him of his right of action under other provisions of § 2611 of the Missouri Code. *Cobb v. Kansas City, Ft. S. & M. R. Co.*, 43 Mo. App. 313.—FOLLOWING *Carpenter v. St. Louis, I. M. & S. R. Co.*, 20 Mo. App. 644.

**132. Failure to fence on both sides of track.**—Under the New York act of 1854, ch. 282, § 8, it is the duty of railroad companies to maintain fences on each side of their roads, and the company will be liable to the owner of a horse that goes from an adjoining lot and is killed by falling into a cut at the side of the track which is not fenced. *Graham v. Delaware & H. C. Co.*, 46 Hun (N. Y.) 386, 12 N. Y. S. R. 390.

**133. Leaving opening between company's fence and the highway.**† —Where a company through mistake fails to properly fence its track at a highway crossing, leaving unfenced a space, on plaintiff's lands, between the railroad fence and the highway fence, which space was defectively fenced by plaintiff, the company is liable for the death or injury of animals getting upon its track by reason of its failure to maintain proper fences. *Coleman v. Flint & P. M. R. Co.*, 29 Am. & Eng. R. Cas. 247, 64 Mich. 160, 31 N. W. Rep. 47.

**134. Rule where animal is trespassing upon right of way.**†—On the ground of public policy, railroad companies are liable for killing trespassing stock at points where the track is not fenced. *New Albany & S. R. Co. v. Fix*, 12 Ind. 485.—

FOLLOWED IN *New Albany & S. R. Co. v. Collins*, 12 Ind. 526.

**135. Necessity for actually striking animal.**\*—The true meaning of § 1 of the Illinois act "in relation to fencing and operating railroads," as amended in 1879, is that the injury to stock must be caused by actual collision—that is, it must be done by the "agents, engines, or cars" of the company, or the wilful misconduct of the trainmen, to make the company liable. *Schertz v. Indianapolis, B. & W. R. Co.*, 15 Am. & Eng. R. Cas. 523, 107 Ill. 577; affirming 12 Ill. App. 304.

Under the Illinois act in relation to fencing and operating railroads, in force July 1, 1874, as amended by the act of 1879, where a party's horse gets on the railroad track for want of such a fence as the law requires the company to erect and maintain, to inclose its track and right of way, and while on the track is frightened either by the approaching train or the sound of the bell or whistle, or all of them combined, and in its flight is injured, either by jumping a cattle-guard or by coming in contact with a wire fence, or both, and no negligence or wilful misconduct is chargeable to the agents of the company in charge of the train at the time, and where no injury is done to the horse by any actual collision or contact with the engine or cars of the train, the railroad company will not be liable to the owner of the horse for such injury. *Schertz v. Indianapolis, B. & W. R. Co.*, 15 Am. & Eng. R. Cas. 523, 107 Ill. 577; affirming 12 Ill. App. 304.—NOT FOLLOWED IN *Meeker v. Northern Pac. R. Co.*, 21 Oreg. 513.

If the death of the mare resulted from the want of a fence, defendant was liable, even though she was not actually struck by defendant's train. *Van Slyke v. Chicago, St. P. & K. C. R. Co.*, 80 Iowa 620, 45 N. W. Rep. 396.—FOLLOWING *Liston v. Central Iowa R. Co.*, 70 Iowa 714.

A colt belonging to plaintiff ran from the highway upon lands adjoining defendant's road, which did not belong to the plaintiff, and from thence through a gap where a length in the fence on the side of the road was down, onto the track, and upon a bridge designed for the passage of railroad trains only, with the spaces between the ties open. The colt's legs were caught in these open spaces and broken. In an action

\* See ante, 105, 109.

† See post, 190.

‡ See ante, 43-60; post, 152-159.

Trespassing animals injured owing to failure to fence—liability of company, see note, 22 AM. & ENG. R. CAS. 614.

\* See ante, 73-81.

to recover damages—*held*, that defendant was not liable. *Knight v. New York, L. E. & W. R. Co.*, 23 *Am. & Eng. R. Cas.* 188, 99 *N. Y.* 25, 1 *N. E. Rep.* 108; *reversing* 30 *Hun* 415.

**136. Failure to fence must be the proximate cause.**—Under the Illinois statute, railroad companies are liable only for such injuries to live stock as are occasioned directly or indirectly by a failure to erect and maintain proper fences, and are limited to such damages as are done by the agents or trains of the company. *Indiana, B. & W. R. Co. v. Schertz*, 12 *Ill. App.* 304.

Where stock are killed at a place which is not a public crossing but a mere travelled way, the company is liable if the loss occurred by reason of a failure to fence. *Terre Haute & I. R. Co. v. Elam*, 20 *Ill. App.* 603.

Under the Iowa Code a railroad company is liable for injury to stock upon its right of way, when the want of a fence, in connection with some other act of the company, is the proximate cause of the injury. *Asbach v. Chicago, B. & Q. R. Co.*, 74 *Iowa* 248, 37 *N. W. Rep.* 182. — **DISTINGUISHED IN** *Van Slyke v. Chicago, St. P. & K. C. R. Co.*, 80 *Iowa* 620.

Where a statute makes it the duty of railroads to fence, a company is liable for stock killed if the failure to fence and the running of the train were the proximate cause of the killing. So where a horse came onto an unfenced track, and, taking fright at an approaching train, ran ahead of it and was killed by jumping from a culvert, the company was held liable. *Young v. St. Louis, K. C. & N. R. Co.*, 44 *Iowa* 172.

Under the Missouri statute a railroad company is liable for killing live stock on the track only where it appears that the injury is due to a failure to fence or erect cattle-guards on that portion of the road which the company is bound to secure by a fence or cattle-guards. *Cecil v. Pacific R. Co.*, 47 *Mo.* 246. — **APPROVING** *Morrison v. New York & N. H. R. Co.*, 32 *Barb.* (N. Y.) 568; *Great Western R. Co. v. Hanks*, 36 *Ill.* 281; *Great Western R. Co. v. Morthland*, 30 *Ill.* 451; *Brooks v. New York & E. R. Co.*, 13 *Barb.* (N. Y.) 594; *Bennett v. Chicago & N. W. R. Co.*, 19 *Wis.* 145. — **APPLIED IN** *Miller v. Wabash R. Co.*, 47 *Mo. App.*

630. **FOLLOWED IN** *Nance v. St. Louis, I. M. & S. R. Co.*, 19 *Am. & Eng. R. Cas.* 594, 79 *Mo.* 196; *Cunningham v. Hannibal & St. J. R. Co.*, 70 *Mo.* 202. **NOT FOLLOWED IN** *Fickle v. St. Louis, K. C. & N. R. Co.*, 54 *Mo.* 219; *Walther v. Pacific R. Co.*, 55 *Mo.* 271.

Under the Wisconsin act of 1860, ch. 268, § 1, and the act of 1872, ch. 119, § 30, railroad companies are liable for damages to live stock by a failure to fence as required; and in suing for injuries to live stock, under the statutes, it must affirmatively appear that the injury was due to the lack of a proper fence, and the evidence must connect the injury with the lack of the fence at some point on the road, either near to or distant from the plaintiff's premises. *Lawrence v. Milwaukee, L. S. & W. R. Co.*, 42 *Wis.* 322, 15 *Am. Ry. Rep.* 366. — **QUOTED IN** *Murphy v. Chicago & N. W. R. Co.*, 45 *Wis.* 222.

Where a railroad company built a barbed-wire fence one quarter of a mile in length along its track, but failed to construct proper cattle-guards or fences at the ends thereof, through which openings plaintiff's horses entered the right of way and were frightened by the blowing of the whistle, and jumped upon the fence and were injured—*held*, that plaintiff could recover, upon the theory that the company's failure to properly fence was a proximate cause of the injury. *Louisville & N. R. Co. v. Upton*, 18 *Ill. App.* 605.

**137. Failure to fence as the remote cause.**—Where by reason of the failure of a company to properly fence, an animal got upon the track and put its foot into a small hole between two ties and broke its leg, the failure to fence was not the proximate cause of the accident, and the company is not responsible. *Nelson v. Chicago, M. & St. P. R. Co.*, 30 *Minn.* 74, 14 *N. W. Rep.* 360. — **DISTINGUISHING** *Salisbury v. Herchenroder*, 106 *Mass.* 458; *Siemers v. Eisen*, 54 *Cal.* 418; *Powell v. Salisbury*, 2 *Y. & J.* 391. — **FOLLOWED IN** *Maher v. Winona & St. P. R. Co.*, 13 *Am. & Eng. R. Cas.* 572, 31 *Minn.* 401.

To make out a case against a railroad company for injury to stock, under Missouri Rev. St., 1889, § 2612, it must be proved that the stock got upon the railroad track at a place not inclosed by a lawful fence, and that it was frightened by a locomotive or train of cars, and was in consequence injured by running against a fence or into a culvert

\* See *ante*, 34-36; *post*, 188.

or other object along the line of the road, *Perkins v. St. Louis, I. M. & S. R. Co.*, 103 Mo. 52, 15 S. W. Rep. 320.

Assuming that a railway company which fails to fence its road, pursuant to the requirement of the statute (Rev. St. Missouri, 1889, § 2611), is liable for the escape of stock resulting from its default, even when such stock are not killed or injured on its right of way, still its liability must be restricted to losses which, under general principles of the law, are the proximate consequences of its default. And—*held*, that the railway company was not responsible for the loss of stock which had thus escaped from adjoining unfenced lands and then been killed by employes of a contractor engaged in the construction of its road. *Gordon v. Chicago, S. F. & C. R. Co.*, 44 Mo. App. 201.

A railway company is not, by reason of its failure to fence its road, liable for the loss of flesh of cattle, caused by their fright at passing trains while they are on the company's land. *Dooley v. Missouri Pac. R. Co.*, 36 Mo. App. 381.

#### b. Where Duty is Imposed by Contract.\*

**138. Where by contract company must fence.**—Where a company, in part consideration for a deed conveying a right of way, agrees to build and maintain a good and sufficient fence upon both sides of the right of way, and farm crossings with cattle-guards, a failure to construct cattle-guards at a farm crossing, and to make the fastenings of the gates secure for a continuous period of about two months, constitutes breach of the contract, and the owner of the lands may maintain an action against the company for damages for stock escaping and killed upon defendant's track in consequence of the breach. In such action, the value of the cattle, and not the cost of erecting and maintaining a secure and sufficient fence, is the measure of damages. *Chicago & A. R. Co. v. Barnes*, 38 Am. & Eng. R. Cas. 297, 116 Ind. 126, 18 N. E. Rep. 459.

Where a right of way is granted to a company, with the provision that it shall maintain a fence on each side of the track, a failure to do so will make the company liable for hogs that escape from the adjoining

lands, without negligence on the part of the owner, and are killed on the track. *Fernow v. Dubuque & S. W. R. Co.*, 22 Iowa 528.

—FOLLOWED IN *Stewart v. Chicago & N. W. R. Co.*, 27 Iowa 282. REVIEWED IN *Lee v. Minneapolis & St. L. R. Co.*, 66 Iowa 131.

A company is bound by a covenant in a deed to "make and maintain good and sufficient fences on both sides" of its right of way through a certain tract, and when sued for killing stock by reason of not complying with the covenant, it is error for the court to instruct the jury "that a compliance by defendant with the statute as to fences exonerated it from liability." *Thompson v. New York & H. R. Co.*, 1 T. & C. (N. Y.) 411.

A company, in purchasing the right of way, bound itself by contract with the owner of land through which the road passed, to fence the road through his land. The company neglected to fence, and the owner's cattle being on his land, went upon the road and were killed by the engines. *Held*, that he could not recover damages for the injury in an action of tort. To render defendants liable, it must appear that the disaster was exclusively their neglect. *Drake v. Philadelphia & E. R. Co.*, 51 Pa. St. 240.

**139. Where by contract landowner must fence.**\*—(1) *Liability to contracting landowner.*—Where by contract with a company, the owner of the land through which the railroad passes has undertaken to maintain the fences, no recovery can be had by him against the company for an injury to his animals which resulted from a failure to perform the contract. *Indianapolis, P. & C. R. Co. v. Petty*, 25 Ind. 413.—DISTINGUISHED IN *Kansas Pac. R. Co. v. Peavy*, 29 Kan. 169, 44 Am. Rep. 630. OVERRULED IN *Hunt v. Lake Shore & M. S. R. Co.*, 35 Am. & Eng. R. Cas. 176, 112 Ind. 69, 11 West Rep. 100, 13 N. E. Rep. 263.—*Terre Haute & R. R. Co. v. Smith*, 16 Ind. 102.—QUOTING *Corwin v. New York & E. Co.*, 13 N. Y. 42. RECONCILING *New Albany & S. R. Co. v. Maiden*, 12 Ind. 10.

Where an adjoining landowner expressly or impliedly agrees to build and maintain fences between his lands and the railroad, as to him the track will be regarded as fenced, and he cannot recover from the company for the loss of ani-

\* See ante, 88, 89; post, 149, 156, 170, 175, 360, 523.

\* See ante, 93; post, 149, 306.

mals which, for the want of such fence, pass to the track and are injured or killed. *Bond v. Evansville & T. H. R. Co.*, 23 *Am. & Eng. R. Cas.* 200, 100 *Ind.* 301.—QUOTING *Indianapolis, P. & C. R. Co. v. Shimer*, 17 *Ind.* 295.

Though a statute makes it the imperative duty of a company to fence its track, still an owner who has contracted with the company to fence between his lands and the track cannot recover for stock killed by reason of such failure to fence. *Ellis v. Pacific R. Co.*, 48 *Mo.* 231.—QUOTED IN *Wymore v. Hannibal & St. J. R. Co.*, 79 *Mo.* 247.

Where an adjoining landowner has agreed with a company, for an adequate consideration, that he will fence between his lands and the track, a failure to fence for six years will not discharge him from the duty, so as to make the company liable for stock that may go upon the track through the neglect of the owner to build such fence. *Talmadge v. Rensselaer & S. R. Co.*, 13 *Barb. (N. Y.)*, 493.

Though the general railroad act of New York requires railroad companies to erect and maintain on either side of the track fences such as would be a lawful fence between adjoining owners, yet a landowner who has agreed with the company, for a valuable consideration, to fence between his lands and the track, cannot recover from the company for stock killed which go upon the track by reason of the owner failing to fence as he has agreed. *Talmadge v. Rensselaer & S. R. Co.*, 13 *Barb. (N. Y.)* 493.—DISTINGUISHING *Suydam v. Moore*, 8 *Barb. (N. Y.)* 358. REVIEWING *Waldron v. Rensselaer & S. R. Co.*, 8 *Barb. (N. Y.)* 390.—APPLIED IN *Terry v. New York C. R. Co.*, 22 *Barb. (N. Y.)* 574. NOT FOLLOWED IN *Washington v. Baltimore & O. R. Co.*, 17 *W. Va.* 100.

Where the owner of land through which a railroad runs agrees with the railroad company, for a valuable consideration, to build and keep up good and sufficient fences on both sides of the road through his lands, and fails to do so, and on account of the insufficiency of such fences his animals stray upon the track and are injured, he is not entitled to recover for such injury, although the insufficiency of the fences was caused by casualty and without negligence on his part, unless such injury is shown to be intentional or the result of gross carelessness on the part of the agents and servants of the

company. *Pittsburgh, C. & St. L. R. Co. v. Smith*, 26 *Ohio St.* 124.

(2) — to his lessee.\*—An adjoining property owner who has covenanted with a company to maintain fences along the track, cannot recover for stock killed by reason of his failure to do so; and this is so of his lessee. *Duffy v. New York & H. R. Co.*, 2 *Hill. (N. Y.)* 496.

Where cattle of a lessee of lands adjoining a track were killed by reason of a defective fence, in the absence of proof of gross negligence or carelessness on the part of the company, it will not be liable where it is shown that the lessor of the lands was under obligation to fence. *Cincinnati, H. & D. R. Co. v. Waterson*, 4 *Ohio St.* 424.—APPROVED IN *Gorman v. Pacific R. Co.*, 26 *Mo.* 441. DISTINGUISHED IN *Cincinnati & Z. R. Co. v. Smith*, 22 *Ohio St.* 227; *Gill v. Atlantic & G. W. R. Co.*, 27 *Ohio St.* 240; *Pittsburg, C. & St. L. R. Co. v. Allen*, 19 *Am. & Eng. R. Cas.* 657, 40 *Ohio St.* 206. QUOTED IN *Central Ohio R. Co. v. Lawrence*, 13 *Ohio St.* 66.

(3) — to his assignee.†—Where a railroad company is legally bound to fence its track, and is sued for killing stock, it cannot set up the defence that the owner of the stock was legally bound to fence under a covenant existing between the company and his assignor. *Shepard v. Buffalo, N. Y. & E. R. Co.*, 35 *N. Y.* 641.—FOLLOWING *Corwin v. New York & E. R. Co.*, 13 *N. Y.* 42; *Pohler v. New York C. R. Co.*, 16 *N. Y.* 476.—DISTINGUISHED IN *Diamond Brick Co. v. New York C. & H. R. R. Co.*, 28 *N. Y. S. R.* 95, 7 *N. Y. Supp.* 868, 5 *Silv. Supp.* 321, 55 *Hun (N. Y.)* 605 mem. FOLLOWED IN *Tracy v. Troy & B. R. Co.*, 38 *N. Y.* 433; affirmed in 55 *Barb.* 529.

(4) — to lessee of his grantee.‡—A landowner conveyed a right of way through his lands for a railroad, and covenanted for himself, his heirs, and assigns, to erect and maintain proper fences on each side of the track, but reserved the right to pass and repass across the track, so as not to interfere with the company's business. He afterward conveyed the land without any such reservation, and the tenant holding under such grantee sued the railroad company for killing his stock by reason of the track not being fenced. *Held*, that he could not take ad-

\* See ante, 94; post, 316.

† See post, 319.

‡ See ante, 94; post, 316.



vantage of a failure on the part of his landlord or of the former owner to keep the provision of the deed requiring the owner to fence. *Easter v. Little Miami R. Co.*, 14 Ohio St. 48.—DISTINGUISHED IN *Gill v. Atlantic & G. W. R. Co.*, 27 Ohio St. 240. QUOTED IN *Pittsburg, C. & St. L. R. Co. v. Bosworth*, 38 Am. & Eng. R. Cas. 290, 46 Ohio St. 81, 2 L. R. A. 199, 18 N. E. Rep. 533.

(5) *Liability to third persons.\**—Where a company is required to fence and has failed to do so, it cannot avoid liability for killing stock by showing a contract with an adjoining owner to maintain the fence, the owner of the stock killed not being a party to such contract. *Indianapolis, P. & C. R. Co. v. Thomas*, 11 Am. & Eng. R. Cas. 491, 84 Ind. 194.—APPLYING *New Albany & S. R. Co. v. Maiden*, 12 Ind. 10. CRITICISING *Indianapolis & C. R. Co. v. Lowe*, 29 Ind. 545. OVERRULING *Indianapolis & C. R. Co. v. Adkins*, 23 Ind. 340.

The fact that a company holds a contract or covenant against a third person, requiring him to maintain a fence, and that the cattle killed got upon the track through such person's failure to perform his engagement, does not shield the company from the statutory liability to the owner. *Gill v. Atlantic & G. W. R. Co.*, 27 Ohio St. 240.—DISTINGUISHING *Russell v. Hawley*, 30 Iowa 219; *Great Western R. Co. v. Helm*, 27 Ill. 198; *Indianapolis & C. R. Co. v. Adkins*, 23 Ind. 340; *Cincinnati, H. & D. R. Co. v. Waterson*, 4 Ohio St. 424; *Easter v. Little Miami R. Co.*, 14 Ohio St. 48.—DISTINGUISHED IN *Baltimore & O. R. Co. v. Wood*, 47 Ohio St. 431.

On the trial of a suit against a company to recover the value of the plaintiff's animals killed by the defendant's train of cars, the evidence established that said animals were so killed on the defendant's railroad, at a point where it was not but ought by law to have been fenced, and on the land of one whose grantor thereof had formerly, by a proper instrument and for a valuable consideration, granted to the defendant's predecessor the right of way, and had therein and thereby covenanted to build a good fence along said road, sufficient to prevent stock from entering thereon, and that he and his heirs and assigns would forever maintain the same in good repair. Held, that even if

such covenant was binding upon such covenantor's assigns, the defendant was not thereby relieved from liability for the value of the animals so killed. *Cincinnati, H. & D. R. Co. v. Ridge*, 54 Ind. 39.—DOUBTING *Indianapolis & C. R. Co. v. Adkins*, 23 Ind. 340.—FOLLOWED IN *Hunt v. Lake Shore & M. S. R. Co.*, 35 Am. & Eng. R. Cas. 176, 112 Ind. 69, 11 West. Rep. 107, 13 N. E. Rep. 263.

A landowner who has agreed with a company to fence the track cannot recover for stock killed where he has failed to fence; but this failure cannot relieve the company from liability for stock of others that may be killed for the lack of a fence. In such case the company must pay the damages and look to the one who had failed to fence according to contract for indemnity. *Warren v. Keokuk & D. M. R. Co.*, 41 Iowa 484.

An agreement between a company and an adjoining landowner, by which such owner shall fence between his lands and the track, will not relieve the company from liability for stock killed belonging to another person which pass through the lands of the one so contracting with the company, and are killed upon the track by reason of a defective fence along the track, unless it appears that the lands were properly inclosed with a lawful fence. *Berry v. St. Louis, S. & L. R. R. Co.*, 65 Mo. 172.—ADHERED TO IN *Harrington v. Chicago, R. I. & P. R. Co.*, 71 Mo. 384. DISTINGUISHED IN *St. Louis & S. F. R. Co. v. Dudgeon*, 28 Kan. 283; *Kaes v. Missouri Pac. R. Co.*, 6 Mo. App. 397. FOLLOWED IN *St. Louis & S. F. R. Co. v. Mossman*, 29 Kan. 694. QUOTED IN *Peddicord v. Missouri Pac. R. Co.*, 85 Mo. 160. REVIEWED IN *Emmerson v. St. Louis & H. R. Co.*, 35 Mo. App. 621.

#### 4. Failure to Repair or Rebuild Fences.\*

**140. Duty to keep fences in repair, generally.**—A company is liable under the statute for a failure to keep a fence in repair after it is built, if animals are killed on that account, to the same extent as if there had been a total failure to fence. In either event the road is not securely fenced as required by statute. *Lake Erie & W. R. Co. v. Fishback*, 5 Ind. App. 403, 31 N. E. Rep. 340.

Under the act of April 18, 1874 (71 Ohio Laws, 85), a company which has neglected to

\* See *ante*, 80, 94; *post*, 150, 154, 166, 172, 181, 237.

\* See *post*, 108, 220.



keep a fence at the side of its track in sufficient repair is liable to the owner of live stock injured by reason of such neglect, notwithstanding the fact that the owner pastured such live stock on the adjacent lands with knowledge of the insufficiency of the fence. By the terms of the statute the duty of maintaining the fence in sufficient repair is imposed upon the company, and it cannot escape responsibility by showing that it had no notice of the actual condition of the fence. *Pittsburgh, C. & St. L. R. Co. v. Smith*, 13 Am. & Eng. R. Cas. 579, 38 Ohio St. 410.—REVIEWING *Rogers v. Newburyport R. Co.*, 1 Allen (Mass.) 16.—FOLLOWED IN *Cleveland, C., C. & I. R. Co. v. Scudder*, 13 Am. & Eng. R. Cas. 561, 40 Ohio St. 173. RECONCILED IN *Baltimore & O. R. Co. v. Schultz*, 22 Am. & Eng. R. Cas. 579, 43 Ohio St. 270, 54 Am. Rep. 805.

A company is liable for stock killed which are placed in a field adjoining the track after the railroad fence had been partially destroyed by fire, as under the Wisconsin statute companies are liable for all damages to live stock occasioned by a failure to fence. *Sika v. Chicago & N. W. R. Co.*, 21 Wis. 370.

**141. Degree of care required.\*—A** company is only bound to use ordinary care in keeping in repair fences that it has erected along its track, and any evidence tending to show such care is admissible on behalf of the company. *Lemmon v. Chicago & N. W. R. Co.*, 32 Iowa 151, 10 Am. Ry. Rep. 32.

Having once built a sufficient fence a company may be liable for injuries to stock that go upon the track by reason of defects that afterward occur in the fence, if it appears that there was undue neglect in permitting the fence to get out of repair, and that it was so out of repair that a man of ordinary care would have anticipated danger to stock. *Gould v. Bangor & P. R. Co.*, 82 Me. 122, 19 Atl. Rep. 84.

A company, in maintaining fences along the track, is only bound to reasonable diligence, and is not liable for injuries to cattle which come upon the track through defects not traceable to want of care. *Grand Rapids & I. R. Co. v. Monroe*, 47 Mich. 152, 10 N. W. Rep. 179.

Where a company has properly fenced its track it is only required thereafter to use proper diligence to keep the fence in ordi-

nary repair, and it will not be liable where others break down the fence and cattle go upon the track and are killed. *Case v. St. Louis & S. F. R. Co.*, 13 Am. & Eng. R. Cas. 564, 75 Mo. 668.—FOLLOWED IN *Foster v. St. Louis, I. M. & S. R. Co.*, 44 Mo. App. 11. QUOTED IN *Walters v. Missouri Pac. R. Co.*, 78 Mo. 617.

Where a company has erected a fence in compliance with the law, it is held to a high degree of care in keeping the fence in repair, which means something more than ordinary care and diligence, though the company is not absolutely liable for injuries to stock, irrespective of negligence, which may happen where the fence was supposed to be sufficient. *Antisdel v. Chicago & N. W. R. Co.*, 26 Wis. 145, 2 Am. Ry. Rep. 467.

**142. Necessity of notice of defect by company.**—(1) *Generally.*—Where a company maintains a fence apparently good, it will not be liable for stock killed unless it has notice of defects. *Chicago, B. & Q. R. Co. v. Seirer*, 60 Ill. 295, 12 Am. Ry. Rep. 315.

Having erected a fence as required by law, the company is only liable for stock that go over the fence at a point where it is out of repair, and are killed on the track, where it has knowledge that the fence is out of repair. *Hodge v. New York C. & H. R. R. Co.*, 27 Hun (N. Y.) 394.—APPLIED IN *McGuire v. Ogdensburg & L. C. R. Co.*, 44 N. Y. S. R. 348, 63 Hun 632, 18 N. Y. Supp. 313.—*Heaton v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 403.

A company will be held responsible for cattle killed or injured by reason of a fence getting out of repair, such fence having been legally sufficient when erected, even though the company has no actual notice of the defects therein, when by the use of reasonable diligence a knowledge of the condition of the fence would have been acquired. *Vinyard v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 92.—FOLLOWING *Clardy v. St. Louis, I. M. & S. R. Co.*, 73 Mo. 576.—FOLLOWED IN *Foster v. St. Louis, I. M. & S. R. Co.*, 44 Mo. App. 11.—*Heaton v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 403.

To authorize a recovery for the killing or injuring of cattle by reason of defects in a fence, erected and maintained by a company, it must be shown that the company had actual notice of such defects, or that by the use of reasonable diligence it might have acquired such knowledge. *Davis v. Chicago, R. I. & P. R. Co.*, 40 Iowa 292.—

\* See *ante*, 48, 49, 58, 62, 116; *post*, 186.

FOLLOWING *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30 Iowa 459.—FOLLOWED IN *Brentner v. Chicago, M. & St. P. R. Co.*, 7 Am. & Eng. R. Cas. 574, 58 Iowa 625.—*Hilliard v. Chicago & N. W. R. Co.*, 37 Iowa 442. *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30 Iowa 459.—FOLLOWED IN *Brentner v. Chicago, M. & St. P. R. Co.*, 7 Am. & Eng. R. Cas. 574, 58 Iowa 625; *Davis v. Chicago, R. I. & P. R. Co.*, 40 Iowa 292; *Farley v. Chicago, R. I. & P. R. Co.*, 42 Iowa 234. NOT OVERRULED IN *Henderson v. Chicago, R. I. & P. R. Co.*, 48 Iowa 216.—*Laney v. Kansas City, St. J. & C. B. R. Co.*, 83 Mo. 466.—FOLLOWED IN *Foster v. St. Louis, I. M. & S. R. Co.*, 44 Mo. App. 11.—*Heaston v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 403.—FOLLOWING *Clardy v. St. Louis, I. M. & S. R. Co.*, 7 Am. & Eng. R. Cas. 555, 73 Mo. 576; *Morris v. Hannibal & St. J. R. Co.*, 19 Am. & Eng. R. Cas. 666, 79 Mo. 367.—FOLLOWED IN *Foster v. St. Louis, I. M. & S. R. Co.*, 44 Mo. App. 11.—*Clardy v. St. Louis, I. M. & S. R. Co.*, 7 Am. & Eng. R. Cas. 555, 73 Mo. 576.—APPLIED IN *King v. Chicago, R. I. & P. R. Co.*, 90 Mo. 520. FOLLOWED IN *Heaston v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 403; *Vinyard v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 92; *Foster v. St. Louis, I. M. & S. R. Co.*, 44 Mo. App. 11. QUOTED IN *Morris v. Hannibal & St. J. R. Co.*, 19 Am. & Eng. R. Cas. 666, 79 Mo. 367; *Walters v. Missouri Pac. R. Co.*, 78 Mo. 617; *Young v. Hannibal & St. J. R. Co.*, 82 Mo. 427.—*Wheeler v. Erie R. Co.*, 2 T. & C. (N. Y.) 634.

To recover double damages for killing stock, where the evidence shows that the company had erected lawful fences along its right of way, it devolves upon the plaintiff to show some neglect on the part of the defendant in maintaining its fences, that it had notice of their defective condition, or that they had been so long out of repair that such notice should be inferred. *Townslley v. Missouri Pac. R. Co.*, 89 Mo. 31, 1 S. W. Rep. 15.—QUOTED IN *Foster v. St. Louis, I. M. & S. R. Co.*, 44 Mo. App. 11.

A casual breach having occurred in a legally sufficient fence, without the knowledge or fault of the company, and stock having gotten upon the track and been killed, the company is not liable unless it has had a reasonable time to discover such breach, or has been notified and fails to repair before the injury occurred. *Indianapolis & St. L. R. Co. v. Hall*, 88 Ill. 368.

*Illinois C. R. Co. v. Swearingen*, 47 Ill. 206. *Brentner v. Chicago, M. & St. P. R. Co.*, 7 Am. & Eng. R. Cas. 574, 58 Iowa 625, 12 N. W. Rep. 615.—FOLLOWING *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30 Iowa 459; *Perry v. Dubuque S. W. R. Co.*, 36 Iowa 102; *Davis v. Chicago, R. I. & P. R. Co.*, 40 Iowa 292; *McCormick v. Chicago, R. I. & P. R. Co.*, 41 Iowa 193.

Though a company is not liable for injury to cattle caused by a defective fence unless it was negligent in failing to repair within a reasonable time after notice of its condition, it is not necessary that the notice should have been given by a plaintiff whose cattle have since been injured. *Dunn v. Chicago & N. W. R. Co.*, 7 Am. & Eng. R. Cas. 573, 58 Iowa 674, 12 N. W. Rep. 734.

(2) *Illustrations*.—Where a railroad is required to keep its track fenced, and a breach is made in the fence by parties not in the employ of the company, and the company have no knowledge of such breach, and there are no circumstances showing that it was authorized to anticipate the breach being made, and by reason of such breach stock get upon the track and are killed before the company have had a reasonable time to learn about the breach, the company will not be liable; and a covenant or condition, in a deed conveying land to the company for its track, to fence the same, will not add to defendant's liability under the statute. *Chicago & A. R. Co. v. Saunders*, 85 Ill. 288.

Where an employé of the company, whose duty it was to keep fences in repair, passes over the road at 4 o'clock P.M. on Saturday, and finds the fences in repair, and again on Monday morning passes over the road and finds that the fence has been recently broken, and that through such breach stock got upon the track and were injured—*held*, that the company had shown reasonable diligence in keeping the fence in repair, and was not liable. *Illinois C. R. Co. v. Swearingen*, 47 Ill. 206.—QUOTED IN *Chicago, B. & Q. R. Co. v. Kennedy*, 22 Ill. App. 308.

Where it is sought to charge a railroad company for killing stock that entered the track through a defect in the fence, by showing that the company had notice of the defect, an instruction is properly refused which states that the mere fact that hands working in a gravel-pit for the company had notice of the defect in the fence would not

bind the company, but to be binding the notice must be to some person or agent connected with the keeping up or repairing of fences. Such instruction is erroneous in assuming that a laboring hand could not be charged with the repair of fences, and was calculated to mislead the jury by creating the impression that the company was not bound to repair until it had notice. *Indianapolis, P. & C. R. Co. v. Truitt*, 24 Ind. 162. —*APPROVING Toledo & W. R. Co. v. Daniels*, 21 Ind. 256.

Michigan act 198 of 1873 gives damages against a railway company for cattle killed by reason of the company's negligence in not keeping up the fences along its track. *Held*, that where the fences had been accidentally destroyed by fire after the track inspector had made his daily inspection, and the fact was not known until after the injury had been done, the company was not guilty of negligence. *Toledo, C. S. & D. R. Co. v. Eder*, 45 Mich. 329, 7 N. W. Rep. 898.

A mere showing that the stock which was killed got upon the railway track owing to the fence being out of repair does not warrant a recovery. It must further appear that the railway company had notice of the condition of the fence, or that the fence was out of repair for such length of time that ignorance thereof could be deemed negligence. And *held*, that this requirement was satisfied by evidence that the fence had been down at least one day prior to the killing of the stock, and that it was in close proximity to a station and could easily have been repaired. *Foster v. St. Louis, I. M. & S. R. Co.*, 44 Mo. App. 11. —*QUOTING Townsley v. Missouri Pac. R. Co.*, 89 Mo. 31. *FOLLOWING Clardy v. St. Louis, I. M. & S. R. Co.*, 73 Mo. 576; *Case v. St. Louis & S. F. R. Co.*, 75 Mo. 668; *Fitterling v. Missouri Pac. R. Co.*, 79 Mo. 504; *Heaston v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 403; *Vinyard v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 92; *Young v. Hannibal & St. J. R. Co.*, 82 Mo. 427; *Laney v. Kansas City, St. J. & C. B. R. Co.*, 83 Mo. 466; *Maberry v. Missouri Pac. R. Co.*, 83 Mo. 667; *Wilson v. St. Louis, I. M. & S. R. Co.*, 87 Mo. 431.

In an action against a railroad company for killing some sheep and a heifer, it was shown that the part of the fence through which the sheep escaped was known to the company to be out of repair before the escape, but there was no evidence that the

fence was out of repair where the heifer escaped before such escape. *Held*, that the company was liable for the sheep but not for the heifer. *Wheeler v. Erie R. Co.*, 2 T. & C. (N. Y.) 634. —*DISTINGUISHED IN McGuire v. Ogdenburg & L. C. R. Co.*, 44 N. Y. S. R. 348, 63 Hun. 632, 18 N. Y. Supp. 313.

#### 143. Notice of defect presumed from length of time.\* —(1) Generally.

—The existence of defects in a fence for a long time will raise the inference that the company had, or should have had, knowledge of the defects, and that they could have repaired the fence. *Laney v. Kansas City, St. J. & C. B. R. Co.*, 83 Mo. 466.

Plaintiff may recover double damages for stock killed, under Missouri statute, by showing that their death was due to defects in condition of a fence, which had been out of repair so long that knowledge of its condition should have been acquired by the company. *Townsley v. Missouri Pac. R. Co.*, 89 Mo. 31, 1 S. W. Rep. 15.

Where stock are killed or injured by reason of the insufficiency of fences of a railway along its track, and the fences have been out of repair so long that the company must have known it, and the owner of the stock is guilty of no negligence, the company will be liable. *Ohio & M. R. Co. v. Clutter*, 82 Ill. 123.

A railroad company is liable for stock killed by reason of the fence being down, where it appears that it had remained down for a long time, which was known to the agent of the company, and that there had been full opportunity to repair. *Laude v. Chicago & N. W. R. Co.*, 33 Wis. 640.

(2) *Illustrations*.—A fence along a railroad track was burned on Thursday, and on the following Sunday a horse was killed by going upon the track through the opening. It appeared that an employé of the company who was charged with the duty of repairing fences had passed over the track twice a day between the time of the fire and the killing. *Held*, (1) that the company must be deemed to have had notice and a sufficient time to repair; (2) that, as its trains ran on Sunday, it could not be exempt on the ground that it was not lawful or right to repair the fence on Sunday. *Toledo, W. & W. R. Co. v. Cohen*, 44 Ind. 444.

\*See ante, 84, 128; post, 193, 207.

Inference of negligence from lapse of time during which fence is in bad repair, see note, 13 AM. & ENG. R. CAS. 561.

Where it is shown that the fence inclosing the railroad company's track had been down for more than a month, at a place where the road passed along cultivated fields, the company's agent having notice of the defect, and that cattle grazed at the place, these circumstances are sufficient from which to deduce the conclusion that the animal got upon the track at a place where the company was required to fence, and because of failure to repair after ample notice. *Mayfield v. St. Louis & S. F. R. Co.*, 91 Mo. 296, 3 S. W. Rep. 201.

The removal of a fence that a railroad company is required to erect, to allow persons to haul wood for the use of the company, in the months of January and February, and permitting such fence to remain down until April 10th following, is such negligence as to make the company liable for stock which go upon the track through such opening. *McDowell v. New York C. R. Co.*, 37 Barb. (N. Y.) 195.—FOLLOWING *Corwin v. New York & E. R. Co.*, 13 N. Y. 42.

The fact that an insufficient fence has, for several weeks, been maintained by a railroad along its right of way, is sufficient to justify a jury in finding it guilty of negligence; and the fact that the plaintiff's stock had, during all such time, been kept in a field adjoining the right of way, without escaping through such fence and passing upon the railroad track, is not sufficient to excuse the company from such neglect. *Baltimore & O. R. Co. v. Schultz*, 22 Am. & Eng. R. Cas. 579, 23 Id. 211, 43 Ohio St. 270, 54 Am. Rep. 805, 1 N. E. Rep. 324.

**144. Liability notwithstanding want of notice.\***—Where a company has erected a fence, which was insufficient at the time of construction, it cannot afterward avoid liability for stock killed by showing that it did not have knowledge of defects therein. *Dooley v. Missouri Pac. R. Co.*, 36 Mo. App. 381.

Where the immediate means or cause of stock passing over a fence and upon a railroad track is that, recently prior thereto, a board or rail had become detached and fallen from the fence, without the knowledge of the company, such company is not excused from liability, where there is evidence to justify the jury in finding that such spe-

cial defect was attributable to the generally defective condition of the fence. *Baltimore & O. R. Co. v. Schultz*, 22 Am. & Eng. R. Cas. 579, 23 Id. 211, 43 Ohio St. 270, 54 Am. Rep. 805, 1 N. E. Rep. 324.

In an action by an adjoining proprietor, for injury to his horses getting upon the track through defect of fences, it was a misdirection to tell the jury that, if the fences became out of repair, and before the plaintiff notified the defendant, or before a reasonable time for the defendant to repair it had elapsed, the horses got through, the defendant would not be liable. *Studer v. Buffalo & L. H. R. Co.*, 25 U. C. Q. B. 160.—QUOTED IN *McMichael v. Grand Trunk R. Co.*, 12 Ont. 547.

**145. Must repair or rebuild in a reasonable time.**—(1) *Company liable.*—

Where a company has constructed a sufficient fence, which gets out of repair, to avoid liability for animals killed or injured, it must repair the fence within a reasonable time after actual or implied notice of the defects. *Dunn v. Chicago & N. W. R. Co.*, 7 Am. & Eng. R. Cas. 573, 58 Iowa 674, 12 N. W. Rep. 734. *Davis v. Chicago, R. I. & P. R. Co.*, 40 Iowa 292.—FOLLOWING *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30 Iowa 459.—FOLLOWED IN *Brentner v. Chicago, M. & St. P. R. Co.*, 7 Am. & Eng. R. Cas. 574, 58 Iowa 625.—*Hilliard v. Chicago & N. W. R. Co.*, 37 Iowa 442. *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30 Iowa 459.—FOLLOWED IN *Brentner v. Chicago, M. & St. P. R. Co.*, 7 Am. & Eng. R. Cas. 574, 58 Iowa 625; *Davis v. Chicago, R. I. & P. R. Co.*, 40 Iowa 292; *Farley v. Chicago, R. I. & P. R. Co.*, 42 Iowa 234. NOT OVER- RULED IN *Henderson v. Chicago, R. I. & P. R. Co.*, 48 Iowa 216.—*Dewey v. Chicago, R. I. & P. R. Co.*, 31 Iowa 373. *Laney v. Kansas City, St. J. & C. B. R. Co.*, 83 Mo. 466.—FOLLOWED IN *Foster v. St. Louis, I. M. & S. R. Co.*, 44 Mo. App. 11.—*Clardy v. St. Louis, I. M. & S. R. Co.*, 7 Am. & Eng. R. Cas. 555, 73 Mo. 576.—APPLIED IN *King v. Chicago, R. I. & P. R. Co.*, 90 Mo. 520. FOLLOWED IN *Heaston v. Wabash & St. L. & P. R. Co.*, 18 Mo. App. 403; *Vinyard v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 92; *Foster v. St. Louis, I. M. & S. R. Co.*, 44 Mo. App. 11. QUOTED IN *Morris v. Hannibal & St. J. R. Co.*, 19 Am. & Eng. R. Cas. 666, 79 Mo. 367; *Walters v. Missouri Pac. R. Co.*, 78 Mo. 617; *Young v. Hannibal & St. J. R. Co.*, 82 Mo. 427.—

\*See ante, 34-36, 65, 136; post, 188, 194, 277, 279.

*Wheeler v. Erie R. Co.*, 2 T. & C. (N. Y.) 634. *Indianapolis & St. L. R. Co. v. Hall*, 88 Ill. 368. *Illinois C. R. Co. v. Swearingen*, 47 Ill. 206. *Brentner v. Chicago, M. & St. P. R. Co.*, 7 Am. & Eng. R. Cas. 574, 58 Iowa 625, 12 N. W. Rep. 615.—FOLLOWING *Aylesworth v. Chicago, R. I. & P. R. Co.*, 30 Iowa 459; *Perry v. Des Moines S. W. R. Co.*, 36 Iowa 102; *Davis v. Chicago, R. I. & P. R. Co.*, 40 Iowa 292; *McCormick v. Chicago, R. I. & P. R. Co.*, 41 Iowa 193.

If a railroad company fails to maintain in a proper condition a fence which it is required to maintain, it is liable to the adjoining proprietor for injury to stock going upon the track where it is not securely fenced, although the fence has been kept up by said adjoining proprietor without any contract with the company. The excuse that a reasonable time has not elapsed to repair the fence must be pleaded or proved. *Jeffersonville, M. & I. R. Co. v. Sullivan*, 38 Ind. 262, 10 Am. Ry. Rep. 279.

Where a portion of the fence of a railroad was burned, and one week thereafter cattle entered upon the track through the opening so caused, and were injured by a passing train—*held*, that the delay in repairing the fence was unreasonably long, and that the railroad company was liable for the injury to the cattle. *Cleveland, C., C. & I. R. Co. v. Brown*, 45 Ind. 90.—DISTINGUISHING *Toledo & W. R. Co. v. Daniels*, 21 Ind. 256; *Indianapolis, P. & C. R. Co. v. Truitt* 24 Ind. 162.

Where a railway track, roadbed, and bridges for fifty miles have been washed away and twelve miles of fences destroyed, a jury is authorized to find that the company did not exert ordinary diligence in repairing the fence where the gap at the point where the cattle were killed could have been closed by the sectionmen in an hour, it being also shown that sectionmen were at that point and drove cattle away from the track. *Peet v. Chicago, M. & St. P. R. Co.*, (Iowa) 55 N. W. Rep. 508.

The duty of a railroad company to maintain its fences already built is discharged by the exercise of reasonable care and diligence, and they may be temporarily prostrate or broken without a breach of such duty. But neglect to repair a breach that has been patent for two weeks is presumptively negligence. *Varco v. Chicago, M. & St. P. R. Co.*, 11 Am. & Eng. R. Cas. 419, 30 Minn. 18, 13 N. W. Rep. 921.

(2) *Company not liable*.—Where a company has securely fenced its track, and a small portion of the fence is afterward destroyed by fire, which is repaired within a reasonable time, the company is not liable for stock that went upon the track and were injured while the fence remained open. *Indianapolis, P. & C. R. Co. v. Truitt*, 24 Ind. 162.

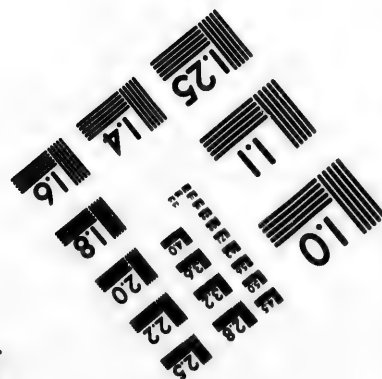
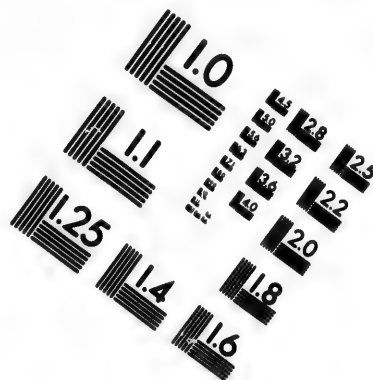
Where a railroad is kept securely fenced by the company, and the fence is destroyed by unavoidable accident, as by fire, and is repaired by the company within a reasonable time after its destruction, but before it is so repaired stock get upon the track and are injured, the company will not be liable therefor. *Toledo, & W. R. Co. v. Daniels*, 21 Ind. 256.—APPROVED IN *Indianapolis, P. & C. R. Co. v. Truitt*, 24 Ind. 162. DISTINGUISHED IN *Cleveland, C., C. & I. R. Co. v. Brown*, 45 Ind. 90.

A railroad company which has constructed proper side-fences, as required by Mich. Laws, 1873, 538, § 15, is not liable for damages for the destruction by passing train, without any neglect or wilfulness of the agents or servants of the company, of horses that escaped from an adjoining lot and got upon the track through a breach in the fence recently caused by a heavy wind in the night-time, in the absence of any evidence showing that the company had been negligent in regard either to the strength of the fence or to the length of time taken to restore it. *Robinson v. Grand Trunk R. Co.*, 32 Mich. 322.

As a rule, a railroad company is not liable for stock that go upon the track through a defective fence, unless it has had a reasonable time in which to repair after it has discovered, or might, with reasonable diligence, have discovered, that the fence is out of repair; but this rule has no application where it appears that there was no fence at all.\* *Morris v. Hannibal & St. J. R. Co.*, 19 Am. & Eng. R. Cas. 666, 79 Mo. 367.—QUOTING *Clardy v. St. Louis, I. M. & S. R. Co.*, 73 Mo. 576.—FOLLOWED IN *Heaston v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 403.

**146. Temporary defects, etc., in fences.**—A railroad company, wishing to build a small bridge, removed a small piece of fence and left gaps through which, subsequent to the promise of defendant's employes to repair the gaps, the plaintiff's hogs

\* See ante, 144.



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escaped, and were killed in the night by the cars. *Held*, the company was responsible. *Indianapolis & C. R. Co. v. Logan*, 19 *Ind.* 294.

The New York act of 1850, ch. 140, § 44, as amended in 1854, ch. 282, § 8, relating to fences, does not make railroad companies absolutely liable as insurers of stock that may go upon the track through a temporary defect in a fence; but their liability under the statute is a question of negligence. *Murray v. New York C. R. Co.*, 3 *Abb. App. Dec. (N. Y.)* 339, 4 *Keyes* 274.—DISTINGUISHED IN *McGuire v. Ogdensburg & L. C. R. Co.*, 44 *N. Y. S. R.* 348, 63 *Hun.* 632, 18 *N. Y. Supp.* 313. See also *Wheeler v. Erie R. Co.*, 2 *T. & C. (N. Y.)* 634. *Indianapolis & St. L. R. Co. v. Hall*, 88 *Ill.* 368. *Illinois C. R. Co. v. Swearingen*, 47 *Ill.* 206.

A railroad company is liable for killing a cow where she is sent by the owner to a lot adjoining a railroad track in charge of a small boy, who leaves her for a short time, and she goes upon the track where the railroad fence is down temporarily for the purpose of allowing the company to make certain improvements. *Brady v. Rensselaer & S. R. Co.*, 1 *Hun. (N. Y.)* 378, 3 *T. & C.* 537.—QUOTING *Bradley v. Buffalo, N. Y. & E. R. Co.*, 34 *N. Y.* 427. REVIEWING *Cornwin v. New York & E. R. Co.*, 13 *N. Y.* 42.

**147. Leaving openings in fence with consent of landowner.**—Where the evidence showed that open spaces had been left in a fence inclosing a track by consent of the landowner, for the purpose of allowing the passing through of his cattle, the company is held to have had the right to run its trains as if no such privilege had been granted to the landowner, and subject only to the duty on the part of the company to keep a look out for and avoid injuring the cattle after discovering them to be in danger. *Whittier v. Chicago, M. & St. P. R. Co.*, 26 *Minn.* 484, 5 *N. W. Rep.* 372.—APPROVED IN *Atchison, T. & S. F. R. Co. v. Walton*, 3 *N. Mex.* 319.

**148. Removal of fence by landowner.**\*—M., the owner of land adjoining a railway, put down the fence separating it from the track, with the assent of the railway company, in order to supply it with wood cut upon the land. He then sold the land to one C., stipulating that he should retain one or two acres on which this wood was piled. C. afterwards leased the east half of the land

to the plaintiff, containing part of the land retained by M., and C. allowed the plaintiff's cattle to run on the west half, there being no line fence between the two halves. The plaintiff's cattle escaped from this west half onto the railway where the fence had been removed by M., and were killed. *Held*, that the plaintiff could not recover, for the facts showed a license by implication from C. to leave the fence as it was, and the plaintiff, as C.'s licensee, could have no better right than C.\* *Held*, also, that as the fence was originally removed with the assent of the parties interested in it, the defendant could not be liable without a notice to erect it from some one duly authorized, of which there was no evidence. *Kilmer v. Great Western R. Co.*, 35 *U. C. Q. B.* 595.

**149. Rule where landowner is bound to maintain fence.**†—Where a company, by sparks from an engine, burns a fence between its track and adjoining lands, which it was the duty of the adjoining landowner to keep up, a failure on the part of the company to rebuild will not make it liable for stock killed that go upon the track through the burned portion of the fence. *Terry v. New York C. R. Co.*, 22 *Barb. (N. Y.)* 574.—APPLYING *Talmadge v. Rensselaer & S. R. Co.*, 13 *Barb.* 493; *Marsh v. New York & E. R. Co.*, 14 *Barb.* 364. REVIEWING *Tonawanda R. Co. v. Munger*, 5 *Den.* 255, 4 *N. Y.* 349; *Spencer v. Utica & S. R. Co.*, 5 *Barb.* 337; *Brand v. Troy & S. R. Co.*, 8 *Barb.* 368; *Clark v. Syracuse & U. R. Co.*, 11 *Barb.* 112; *Haring v. New York and E. R. Co.*, 13 *Barb.* 9; *Willett v. Buffalo & E. R. Co.*, 14 *Barb.* 585.—NOT FOLLOWED IN *Washington v. Baltimore & O. R. Co.*, 17 *W. Va.*, 190.

An adjoining landowner, under an agreement with a company, contracted to erect and maintain a proper fence between his lands and the track, and after the fence had been erected some time the company, for some purpose connected with its business, took the fence down and put it up again different from its original construction, which was done without objection from the landowner. Afterward he permitted the fence to get out of repair, and his cattle went over it and were killed on the track. It appeared that the company had made occasional repairs to the fence. *Held*, that by his acqui-

\* See *ante*, 94.

† See *ante*, 88, 89, 139; *post*, 156, 170, 175, 360, 393, 523.

\* See *post*, 150, 157.

escence in the act of the company in not rebuilding the fence as it was originally constructed, he was estopped from complaining of such failure, and that he could not recover for the loss of the stock unless the proof showed that it was due to negligence in the manner of running the train, the burden to show which was upon him. *Pittsburgh, C. & St. L. R. Co. v. Heiskell*, 13 Am. & Eng. R. Cas. 555, 38 Ohio St. 666.

**150. Fence destroyed or impaired by third persons.**\*—In the absence of negligence a railroad company is not liable if cattle go upon the track through a fence which the company has erected, but which has been broken down by third parties, and are killed. *Walters v. Missouri Pac. R. Co.*, 19 Am. & Eng. R. Cas. 662, 78 Mo. 617. —QUOTING *Clardy v. St. Louis, I. M. & S. R. Co.*, 73 Mo. 576; *Case v. St. Louis & S. F. R. Co.*, 75 Mo. 668.

Where a track is inclosed by a sufficient fence, and a breach occurs therein by reason of the unlawful act of a stranger, through which breach stock get upon the track and are injured, in the absence of negligence on its part the company will not be liable, unless the accident happened after the lapse of a sufficient time for the company, in the exercise of reasonable diligence, to have discovered and repaired the breach before the injury occurred. *Chicago & N. W. R. Co. v. Barrie*, 55 Ill. 226, 2 Am. Ry. Rep. 451.—DISTINGUISHED IN *Peoria, D. & E. R. Co. v. Aten*, 43 Ill. App. 68. QUOTED IN *Rockford, R. I. & St. L. R. Co. v. Connell*, 67 Ill. 216.

Where a company has caused its road to be securely fenced, and has exercised reasonable care and vigilance to keep it so, and the fence is thrown and left down by third persons, without the authority or knowledge of the company, whereby cattle stray upon the track and get killed or injured, before the company has notice, the company is without fault, and not liable for the stock thus killed or injured. *Toledo & W. R. Co. v. Fowler*, 22 Ind. 316.

**151. Defects in fences which were not required by law to be built.**†—Where a statute makes it the duty of railroad companies to fence, except where they pass through uninclosed or unimproved lands, where a fence has been erected but is allowed to get out of repair, so that stock go

over it and are injured, the company is liable, unless it shows that the land was not inclosed or improved, and therefore it was not required to erect and maintain fences. *New Brunswick R. Co. v. Armstrong*, 23 New Brun. 193.

5. *Animals Trespassing, Running at Large, or Coming from Lands not Belonging to Owner.\**

**152. Animals trespassing, generally.**—The trespass, if any, of cattle is not a defense to any action against a railroad company for their death, where they enter upon the road from the owner's premises by reason of the company's failure to fence its road. *Holland v. West End N. G. R. Co.*, 16 Mo. App. 172.

Where a railroad company neglects to build fences as required by statute, they will be liable for stock injured or killed, without reference to the right of the cattle to be where they could go upon the track, or whether the trains doing the injury were being operated with proper care or not. *McCall v. Chamberlain*, 13 Wis. 637.—APPLYING *Fawcett v. York & N. M. R. Co.*, 16 Q. B. 610, 71 E. C. L. 609. REVIEWING *Corwin v. New York & E. R. Co.*, 13 N. Y. 42.—DISTINGUISHED IN *Pitzner v. Shinnick*, 39 Wis. 129.

The fact that a horse escapes from the control of its owner, and passes from his land adjoining a railroad through an open gate, at his private crossing, onto the railroad tracks, does not make the horse a trespasser, or preclude the maintenance of an action against the railroad corporation for causing the horse's death. *Taft v. New York, P. & B. R. Co.*, 157 Mass. 297, 32 N. E. Rep. 168.

Under the provisions of section 1 of the Nebraska act of 1867 (Comp. St. 1885, 464), where a railroad corporation neglects to maintain fences and cattle-yards along its road, and horses get thereon and are injured or killed by the engines or trains running on the road, the railroad company is liable to the owner in damages therefor, and the negligence of the owner in allowing the horses to escape from him will constitute no defense to the action. *Burlington & M. R. R. Co. v. Webb*, 22 Am. & Eng. R. Cas. 617, 18 Neb. 215.—QUOTING

\* See post, 181, 237.

† See ante, 95-107, 117, 130; post, 212.

\* See ante, 43-60; post, 187, 205, 206, 243-276, 337-375, 376, 390, 411, 491, 503.

Corwin v. New York & E. R. Co., 13 N. Y. 42.

The mere fact that an animal which was killed or injured by a train of cars was a trespasser on defendant's road, or that it passed thereon from land not belonging to the plaintiff, will not defeat a recovery. *Curry v. Chicago & N. W. R. Co.*, 43 Wis. 665.

**153. — trespassing upon lands adjoining track.\***—(1) *General rule stated.*—The fact that plaintiff's horses entered the close of another through an insufficient fence upon the highway, and passed thence upon defendant's road, could not affect his right of recovery. *Chicago & N. W. R. Co. v. Harris*, 54 Ill. 528.

The company is liable, although the plaintiff was not an occupant or proprietor of the adjoining lands. *New Albany & S. R. Co. v. Aston*, 13 Ind. 545.

In an action for injuries to cattle on a track which the company has failed to fence, it is no defense that the cattle were trespassers upon the land whence they passed to the track. *Gillam v. Sioux City & St. P. R. Co.*, 26 Minn. 268, 3 N. W. Rep. 353.—FOLLOWED IN *Watier v. Chicago, M. & St. P. R. Co.*, 13 Am. & Eng. R. Cas. 582, 31 Minn. 91.

Where the plaintiff's horse was at large, in the night-time, on the premises of another, in violation of the night herd law, which was then in force in the county, and was killed by the defendants' train, without fault or negligence of defendant, at a point where it had the right to fence but did not—held, that defendant was liable, under § 1289 of the Kansas Code, for the value of the horse, in the absence of any showing that the plaintiff, by any wilful act, contributed to the injury. *Krebs v. Minneapolis & St. L. R. Co.*, 20 Am. & Eng. R. Cas. 478, 64 Iowa 670, 21 N. W. Rep. 131.—DISTINGUISHING *Pittsburgh, F. W. & C. R. Co. v. Methven*, 21 Ohio St. 586; *Kansas Pac. R. Co. v. Landis*, 24 Kan. 406. FOLLOWING *Spence v. Chicago & N. W. R. Co.*, 25 Iowa 139.—FOLLOWED IN *Lee v. Minneapolis & St. L. R. Co.*, 66 Iowa 131. REVIEWED IN *Timins v. Chicago, R. I. & P. R. Co.*, 31 Am. & Eng. R. Cas. 541, 72 Iowa 94, 33 N. W. Rep. 379.

Railroad fence laws are in the nature of a

\* See post, 166.

† Injury to cattle trespassing on adjoining land, see note, 19 AM. & ENG. R. CAS. 661.

police regulation, intended to protect domestic animals generally, and to promote the security of persons and property passing over the road, and are not designed merely for the benefit of the adjoining landowner. The company is, therefore, under a general obligation to the public; and, in an action under the statute, the mere fact that the animals were trespassers upon the adjoining land, from which they went onto the unfenced railroad track and were killed, will not, where they escaped from the plaintiff's enclosure without his fault, defeat a recovery. *Missouri Pac. R. Co. v. Roads*, 23 Am. & Eng. R. Cas. 165, 33 Kan. 640, 7 Pac. Rep. 213.

Under the New York general railroad act of 1850, requiring railroads to erect and maintain fences along their tracks, a failure to do so will render them liable for stock killed or injured, regardless of the fact whether the stock were lawfully on the adjoining lands or not. *Duffy v. New York & H. R. Co.*, 2 Hilt. (N. Y.) 496.—FOLLOWING *Corwin v. New York & E. R. Co.*, 13 N. Y. 42.—*Corwin v. New York & E. R. Co.*, 13 N. Y. 42.—DISTINGUISHING *Ricketts v. East & W. I. Docks*, 12 Eng. L. & Eq. 520. FOLLOWING *Tonawanda R. Co. v. Munger*, 5 Den. 255, 4 N. Y. 349; *Suydam v. Moore*, 8 Barb. 358; *Waldron v. Rensselaer & S. R. Co.*, 8 Barb. 390; *Fawcett v. York & N. M. R. Co.*, 2 Eng. L. & Eq. 289. NOT FOLLOWING *Brooks v. New York & E. R. Co.*, 13 Barb. 594.—APPROVED IN *Munch v. New York C. R. Co.*, 29 Barb. (N. Y.) 647. DISTINGUISHED IN *Bartlett v. Dubuque & S. C. R. Co.*, 20 Iowa 188; *Eames v. Salem & L. R. Co.*, 98 Mass. 560; *Heller v. Abbot*, 79 Wis. 409. EXPLAINED IN *Dent v. St. Louis, I. M. & S. R. Co.*, 83 Mo. 496. FOLLOWED IN *Spence v. Chicago & N. W. R. Co.*, 25 Iowa 139; *Hance v. Cayuga & S. R. Co.*, 26 N. Y. 428; *Tallman v. Syracuse, B. & N. Y. R. Co.*, 4 Abb. App. Dec. (N. Y.) 351; *McDowell v. New York C. R. Co.*, 37 Barb. (N. Y.) 195; *Rhodes v. Utica, I. & E. R. Co.*, 5 Hun (N. Y.) 344; *Graham v. Delaware & H. C. Co.*, 46 Hun (N. Y.) 386, 12 N. Y. S. R. 390; *Duffy v. New York & H. R. Co.*, 2 Hilt. (N. Y.) 496. QUOTED IN *Terre Haute & R. R. Co. v. Smith*, 16 Ind. 102; *Burlington & M. R. R. Co. v. Webb*, 22 Am. & Eng. R. Cas. 617, 18 Neb. 215; *Staats v. Hudson River R. Co.*, 33 How. Pr. (N. Y.) 139. RECONCILED IN *Pittsburgh, Ft. W. & C. R. Co. v.*

Methven, 21 Ohio St. 586. REFERRED TO IN *Brace v. New York C. R. Co.*, 27 N. Y. 269. REVIEWED IN *Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351; *Brady v. Rensselaer & S. R. Co.*, 1 Hun (N. Y.) 378, 3 T. & C. 537; *Crawford v. New York C. & H. R. R. Co.*, 18 Hun (N. Y.) 108; *Leggett v. Rome, W. & O. R. Co.*, 41 Hun (N. Y.) 80, 2 N. Y. S. R. 312; *Becker v. New York, L. E. & W. R. Co.*, 31 N. Y. S. R. 750, 57 Hun 585, 10 N. Y. Supp. 413; *McCall v. Chamberlain*, 13 Wis. 637.

Where animals escape from a field which does not adjoin the track to one which does, and go thence to the track at a point where the company has failed to maintain a sufficient fence, under the statute, and are killed, the owner may recover from the company, if it appears that he has used such reasonable care to restrain them as a prudent and cautious man would have used, with knowledge of the disposition of the stock to be breachy or unruly. *Pittsburgh, C. & St. L. R. Co. v. Howard*, 11 Am. & Eng. R. Cas. 488, 40 Ohio St. 6.

(2) *In Massachusetts*.—In Massachusetts one who permits his stock to go unlawfully on the lands of another adjoining a track cannot recover from the railroad if they go on the track and are killed, although the company may have failed to fence as required by law. *Eames v. Salem & L. R. Co.*, 98 Mass. 560.

Where a company is required by statute to maintain needful fences and cattle-guards, it will be liable for cattle killed that stray from the owner's premises through the lands of another, and thence onto the track, by reason of insufficient fences and cattle-guards. *Browne v. Providence, H. & F. R. Co.*, 12 Gray (Mass.) 55.—DISTINGUISHED IN *Eames v. Boston & W. R. Co.*, 14 Allen (Mass.) 151; *Eames v. Salem & L. R. Co.*, 98 Mass. 560.

(3) *In Missouri*.—The fact that the owner of an animal injured upon a railroad track was not the owner or occupant of the adjoining field, from which the animal came upon the track, will not affect the liability of the company on the ground of its failure to fence its road, unless the animal was a trespasser on the field from which it came. *Brandenburg v. St. Louis & S. F. R. Co.*, 44 Mo. App. 224.—APPLYING *Ferris v. St. Louis & H. R. Co.*, 30 Mo. App. 122; *Johnson v. Missouri Pac. R. Co.*, 80 Mo., 620.

Where the owner of a mare killed by  
1 D. R. D.—12.

the defendant's train was not an adjoining landowner or a next adjoining owner, and where the animal had strayed from the owner's field, four miles from the railroad, and passed, as a trespasser, over the lands of several intervening proprietors before reaching the railroad, there can be no recovery by such owner against the company on the ground of its failure to maintain a sufficient fence along the track, under the provisions of Revised Statutes, section 809. *Ferris v. St. Louis & H. R. Co.*, 30 Mo. App. 122.—APPLIED IN *Brandenburg v. St. Louis & S. F. R. Co.*, 44 Mo. App. 224. DISTINGUISHED IN *Board v. St. Louis, I. M. & S. R. Co.*, 36 Mo. App. 151; *Young v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 52; *Duke v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 105; *Kinion v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 382; *Kinion v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 574; *Jackson v. St. Louis, I. M. & S. R. Co.*, 43 Mo. App. 324.

The statute requires railroads to fence for the benefit of the adjoining proprietor, and if his field has, on its three sides, a lawful fence, it cannot avail a stranger, whose stock are injured, that the railroad track is defectively fenced from the field, or not fenced at all, unless he shows that his stock were in an adjoining field by some agreement with the owner thereof. *Hendrix v. St. Joseph & St. L. R. Co.*, 38 Mo. App. 520.

The owner of cattle trespassing on lands adjoining a railroad cannot recover of the railroad company by showing that the cattle got upon the track owing to the insufficiency of the railroad fence, where it appears that the other three sides of the land were surrounded by a lawful fence. *Smith v. St. Louis, I. M. & S. R. Co.*, 25 Mo. App. 113.—FOLLOWING *Carpenter v. St. Louis, I. M. & S. R. Co.*, 25 Mo. App. 110.—*Carpenter v. St. Louis, I. M. & S. R. Co.*, 25 Mo. App. 110.—FOLLOWED IN *Smith v. St. Louis, I. M. & S. R. Co.*, 25 Mo. App. 113.

In such actions for double damages under the Missouri statutes the plaintiff must show that the lands of the adjoining owner were not inclosed by lawful fences. *Har-rington v. Chicago, R. I. & P. R. Co.*, 71 Mo. 384.—ADHERING TO *Berry v. St. Louis, S. & L. R. R. Co.*, 65 Mo. 172.—APPROVED IN *Peddycord v. Missouri Pac. R. Co.*, 85 Mo. 160.

Where, in an action under the Missouri

double damage law, Rev. St. § 809, for the value of a bull killed by a train, the evidence shows that the bull was in a pasture which did not adjoin the railroad, and escaped therefrom into the pasture of one S., and thence onto the railroad track, there can be no recovery without proof also that the fence through which the bull escaped into the pasture of S. was a lawful fence. *Peddycord v. Missouri Pac. R. Co.*, 85 Mo. 160.—APPROVING *Harrington v. Chicago, R. I. & P. R. Co.*, 71 Mo. 384.—QUOTING *Berry v. St. Louis, S. & L. R. R. Co.*, 65 Mo. 172. REVIEWED IN *Emmerson v. St. Louis & H. R. Co.*, 35 Mo. App. 621.

(4) *In Nevada, New Hampshire, and Vermont.*—In an action for killing a domestic animal, which has strayed upon its track from land not belonging to its owner, it is incumbent on the plaintiff to show negligence on the part of the company. *Walsh v. Virginia & T. R. Co.*, 8 Nev. 110.

A railroad corporation is not liable for damages done to cattle unlawfully in a pasture adjoining, and escaping thence upon its road through defective fences which the railroad is bound to keep in repair. *Giles v. Boston & M. R. Co.*, 55 N. H. 552.—FOLLOWING *Cornwall v. Sullivan R. Co.*, 28 N. H. 161. REVIEWING *Midland R. Co. v. Daykin*, 17 C. B. 126, 33 Eng. L. & Eq. 193.

Where a company owned a piece of land adjoining their railway, and the plaintiff owned a track adjoining the company's piece, and there was no fence between the plaintiff's land and the land of the corporation, and no steps had been taken to have any division of fence between them, and there was no fence between the company's piece of land and the railway, and the plaintiff turned his sheep upon his own land, from which they strayed upon the land of the corporation, and thence upon the railroad track and were killed—*held*, that the plaintiff could not sustain an action against the company for the loss of the sheep. *Cornwall v. Sullivan R. Co.*, 28 N. H. 161.—FOLLOWED IN *Giles v. Boston & M. R. Co.*, 55 N. H. 552.

Although railroad companies are required to fence, yet a failure to fence will not render them liable for injuries to stock that unlawfully go on the adjoining close; but common care must always be used. *Morse v. Rutland & B. R. Co.*, 27 Vt. 49.—FOLLOWING *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150.

An owner of stock killed while trespassing on lands adjoining a track cannot recover from the company on proof that the company has failed to fence, as required by statute, but only on proof that they were killed through the negligence of those operating the train. *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150.—APPROVED IN *Berry v. St. Louis, S. & L. R. R. Co.*, 65 Mo. 172. FOLLOWED IN *Morse v. Rutland & B. R. Co.*, 27 Vt. 49. QUOTED IN *Illinois C. R. Co. v. Houghton*, 126 Ill. 233, 18 N. E. Rep. 301, 1 L. R. A. 213, 21 Ohio L. J. 310; *Chicago, S. F. & C. R. Co. v. McGrew*, 104 Mo. 282; *Chapin v. Sullivan R. Co.*, 39 N. H. 53, 564; *Troy & B. R. Co. v. Potter*, 42 Vt. 265.

(5) *In Canada.*—Where an owner of stock allows them to pasture on lands adjoining his, which he does not own or occupy, and which also adjoin a railroad track, he cannot complain if the stock pass from such lands to the track by reason of a failure on the part of the company to fence, and are injured. *Conway v. Canadian Pac. R. Co.*, 26 Am. & Eng. R. Cas. 576, 12 Ont. App. 708; *affirming* 19 Am. & Eng. R. Cas. 650, 7 Ont. 673.

Plaintiff, by permission of one H., put his horses into a pasture-field of H. adjoining defendant's railway, and the evidence went to show that they escaped thence into an adjoining field occupied by one J. and thence on to the track, where they were killed by a train passing. The plaintiff sued, alleging that the horses escaped from the field where they were pasturing by reason of defects in the railway fences. *Held*, that he could not recover, for the horses were not in the field from which they escaped by the owner's permission. *Wilson v. Northern R. Co.*, 28 U. C. B. Q. 274.

The declaration averred that it was defendants' duty to keep up sufficient fences along their line of railway, and that, by the neglect of such duty, the plaintiff's mare, which was lawfully depasturing on the adjoining land, got upon the track and was killed. No negligence was charged against defendants in the management of their train. It was proved that the mare had escaped from her stable on another farm and was trespassing on the lot from which she got upon the railway. *Held*, that the plaintiff could not recover, the defendants being bound to fence only as against the owner of the adjoining lands. *Gillis v. Great Western R. Co.*, 12 U. C. Q. B. 427.—FOLLOWING *Dolrey v. Ontario, S. & H. R. U. Co.*, 11 U.

C. Q. B. 600.—APPLIED IN *McDowell v. Great Western R. Co.*, 5 U. C. C. P. 130. APPROVED IN *Chisholm v. Great Western R. Co.*, 10 U. C. C. P. 324.

Where the plaintiff's cow, trespassing on A's close, strayed upon the defendants' railway adjoining, through a defect in the fence, which, in certain cases, as against A., the defendants were bound to make and maintain—*held*, on demurrer to the declaration, that the plaintiff could not recover; first, because both at common law and by their act of incorporation the obligation to make and maintain fences would apply only as against the owners of the adjoining close; and, second, because it was not clearly averred either that the owner of the land adjoining had requested the defendants to enclose their road or that they had thought proper to do so, on one of which facts the obligation is made by the statute to depend. *Dolrey v. Ontario, S. & H. R. U. Co.*, 11 U. C. Q. B. 600.—APPLIED IN *McDowell v. Great Western R. Co.*, 5 U. C. C. P. 130. FOLLOWED IN *Gillis v. Great Western R. Co.*, 12 U. C. Q. B. 427.

**154. Animals coming from another's lands, where they were not trespassing.**—Plaintiff was pasturing his horses in the field of a third party which adjoined a railroad track, and which was in the possession of a tenant, such third party having agreed with the company to maintain a fence between his field and the track. *Held*, that plaintiff could maintain an action against the company for killing his horses, which escaped from the field to the track by reason of a defective fence. *Warren v. Keokuk & D. M. R. Co.*, 41 Iowa 484.

Where a railroad runs through an inclosed field in which a cow was killed, and the owner of the cow had permission of the owner of the inclosed field to pasture his cow therein, the railroad company is liable if its road was not inclosed with a good and lawful fence to prevent animals from being on such road. *St. Louis & S. F. R. Co. v. Dudgeon*, 28 Kan. 283.—DISTINGUISHING *Berry v. St. Louis, S. & L. R. R. Co.*, 65 Mo. 172.—FOLLOWED IN *St. Louis & S. F. R. Co. v. Mossman*, 29 Kan. 694.

Plaintiff had the privilege of leading his horse along a path and stabling him on the lands of another, which lands adjoined a railroad track. The horse escaped and ran

over the land, but not on the path, to the track, and was killed. *Held*, that he was not unlawfully on the land of another in that sense that would defeat a recovery. *Sawyer v. Vermont & M. R. Co.*, 105 Mass. 196, 2 Am. Ry. Rep. 459.

A railroad cannot, in an action for killing stock, avail itself of the fact that the stock came upon its right of way over the premises of an adjoining proprietor, unless such premises were inclosed by a lawful fence. *Dean v. Omaha & St. L. R. Co.*, 54 Mo. App. 647.

A company is liable to the owner of a horse that is injured on the track while lawfully pasturing on lands adjoining the track, though the owner of the horse does not own the lands, if the injury is caused by a failure to maintain proper fences. *French v. Western N. Y. & P. R. Co.*, 25 N. Y. Supp. 229, 72 Hun 469, 54 N. Y. S. R. 762.—DISTINGUISHING *Knight v. New York, L. E. & W. R. Co.*, 99 N. Y. 25, 1 N. E. Rep. 108. FOLLOWING *Graham v. Delaware & H. C. Co.*, 46 Hun 386.

Where the landowner contracted to pasture the plaintiff's horse in an adjoining pasture, from which he suffered it to escape upon his meadow, the horse is lawfully in the meadow as regards the railroad company, and the plaintiff may recover if it passes therefrom on to the track, and is injured through the insufficiency of defendant's fence. *Smith v. Barre R. Co.*, 64 Vt. 21, 23 Atl. Rep. 632.

Plaintiff's horse, having a right to pasture in a pasture-field belonging to one M., escaped into a pea-field adjoining, also owned by M., owing to a defect in the fence dividing the two fields, and from the pea-field he got on to the defendant's track adjoining it, by reason of the insufficiency of the defendants' fence, and was killed. *Held*, that the defendants were liable, for the horse was not wrongfully in the pea-field as regarded M., having got there owing to M.'s defective fence, and it therefore was not wrongfully there as regarded the defendants, who were bound to fence as against M. *McAlpine v. Grand Trunk R. Co.*, 38 U. C. Q. B. 446.—APPLIED IN *Douglas v. Grand Trunk R. Co.*, 5 Ont. App. 585.

**155. — coming from highway where they have no right to be.**—Where a company has failed to fence its track where it runs alongside of a highway, it is liable for killing stock that is per-

\* See ante, 94, 139; post, 316.

mitted by the owner to stray upon the highway, and which passes from the highway to the track. *Indianapolis & C. R. Co. v. Guard*, 24 Ind. 222.—REVIEWED IN *Davis v. Burlington & M. R. R. Co.*, 26 Iowa 549.

As a general rule, where a horse is wrongfully in the highway and from thence strays onto a railroad track, and is killed by the engine in passing, the company is not liable to the owner of the horse for his value, unless the injury was the result of the gross negligence of the engineer; but if the railroad company has failed to comply with the directions of the New York act of March 27, 1848, by which all railroad companies are required to erect and maintain fences, etc., and to construct and maintain cattle-guards at all crossings, etc., it is chargeable with negligence in such a case, and responsible for the injury. *Waldron v. Rensselaer & S. R. Co.*, 8 Barb. (N. Y.) 390.—APPROVED IN *Gorman v. Pacific R. Co.*, 26 Mo. 441; *Brooks v. New York & E. R. Co.*, 13 Barb. (N. Y.) 594. DISTINGUISHED IN *Marsh v. New York & E. R. Co.*, 14 Barb. (N. Y.) 364. FOLLOWED IN *Corwin v. New York & E. R. Co.*, 13 N. Y. 42. REVIEWED IN *Talmadge v. Rensselaer & S. R. Co.*, 13 Barb. (N. Y.) 493.

By Pennsylvania act of March 28, 1868, entitled "An act for the protection of farmers and owners of cattle, horses, sheep, and swine, along the line of railroads in the county of Warren," railroad companies are required to erect and maintain fences along the tracks of their roads and to construct cattle-guards at all the public road-crossings, sufficient to prevent orderly cattle from straying upon said tracks; and by the act of April 17, 1869, a non-compliance with these requirements renders a company liable for the value of the animal injured or killed. Plaintiff was pasturing his cow upon land near to, though not directly abutting upon, the railroad. The cow escaped from the inclosure, and, passing out upon a public road, strayed on to the track of the railroad, where there were no guards, and was killed. *Held*, that plaintiff was entitled to recover. *Dunkirk & A. V. R. Co. v. Mead*, 1 Am. & Eng. R. Cas. 166, 90 Pa. St. 454.

The plaintiff's calves escaped from his pasture into an adjoining highway, which was intersected by a railroad, in land not owned by him, and they passed along the

highway in the direction of the plaintiff's residence, until they reached the place where it was thus intersected, and thence went upon the track through "gaps, openings, and defective places" in the fences and cattle-guards there constructed, and were killed by the defendant's engines. *Held*, that the corporation was not liable. *Woolson v. Northern R. Co.*, 19 N. H. 267.—REVIEWED IN *Towns v. Cheshire R. Co.*, 21 N. H. 363; *Chapin v. Sullivan R. Co.*, 39 N. H. 53, 564.

Where sheep escape from the owner's premises to a highway, and thence to a railroad track, and are killed, the company will not be liable on account of defects in its fence, as the sheep were trespassing on the highway. *Daniels v. Grand Trunk R. Co.*, 22 Am. & Eng. R. Cas. 609, 11 Ont. App. 471.—REVIEWING *Ricketts v. East & W. I. D. & B. J. R. Co.*, 12 C. B. 160.

**156. Rule where it was land-owner's duty to fence.\***—Where stock of a third person get upon the track of a railroad company by reason of fences not being built by the landowner, where the cost thereof has been estimated as part of the consideration of the right of way, the company is not, under § 3329, Rev. St. Ohio, in the absence of negligence in running its trains, liable to the owner for injury to them. The duty of the company is, in such case, to use ordinary care and prudence to avoid injuring the animals. *Baltimore & O. R. Co. v. Wood*, 45 Am. & Eng. R. Cas. 464, 47 Ohio St. 431, 24 N. E. Rep. 1077.—DISTINGUISHING *Gill v. Atlantic & G. W. R. Co.*, 27 Ohio St. 240; *Pittsburgh, C. & St. L. R. Co. v. Allen*, 40 Ohio St. 206.

Railroad companies are liable for stock killed on the track, whether it belongs to abutting owners or not; so a person who is not an abutting owner may recover from the company, where his stock strays upon a field which does abut the track, and thence onto the track by reason of a defect in the fence, and the liability of the company is not affected by showing that it has a contract by which the owner of such abutting field had agreed to fence between the field and the track. *Pittsburgh, C. & St. L. R. Co. v. Allen*, 19 Am. & Eng. R. Cas. 657, 40 Ohio St. 206.—DISTINGUISHING *Cincinnati, H. & D. R. Co. v. Waterson*, 4 Ohio St. 424.

\* See ante, 88, 89, 92-94, 131, 138, 139, 149.



FOLLOWING *Marietta & C. R. Co. v. Stephenson*, 24 Ohio St. 48.—DISTINGUISHED IN *Baltimore & O. R. Co. v. Wood*, 47 Ohio St. 431.

**157. Where landowner has waived requirements as to sufficiency of fence.\***—Where the owner of lands agreed with a company in fencing its track that the fence might terminate at a lake, and a neighbor's horse that a tenant of the lands was pasturing passed around the fence at a time of low-water and was killed on the track, the owner cannot recover from the company.—*Clayton v. Great Western R. Co.*, 23 U. C. C. P. 137.

**158. Animals running at large, generally.**—(1) *In Illinois—Iowa.*—Where a mule escaped from an inclosure without the fault of the owner, and got upon a railroad track at a point not fenced, but where it was the duty of the company to have had a fence, and the mule is injured by a train, the company will be liable. *Toledo, P. & W. R. Co. v. Delehanty*, 71 Ill. 615.

Where a railroad company has failed to erect a sufficient fence to turn hogs, under Iowa act, 1862, ch. 169, its liability for killing them, where they escape through an insufficient fence and are killed on the track, is not affected by the fact that there is a local regulation of the county making it unlawful for them to run at large. *Fritz v. Milwaukee & St. P. R. Co.*, 34 Iowa 337.—FOLLOWING *Stewart v. Burlington & M. R. Co.*, 32 Iowa 561; *Spence v. Chicago & N. W. R. Co.*, 25 Iowa 139.—DISTINGUISHED IN *Windsor v. Hannibal & St. J. R. Co.*, 45 Mo. App. 123. REVIEWED IN *Boyle v. Missouri Pac. R. Co.*, 21 Mo. App. 416.—*Stewart v. Chicago & N. W. R. Co.*, 27 Iowa 282.—FOLLOWING *Fernow v. Dubuque & S. W. R. Co.*, 22 Iowa 528; *Spence v. Chicago & N. W. R. Co.*, 25 Iowa 139.—FOLLOWING *Corwin v. New York & E. R. Co.*, 13 N. Y. 42; *Shepherd v. Buffalo, N. Y. & E. R. Co.*, 35 N. Y. 641; *Bradley v. Buffalo, N. Y. & E. R. Co.*, 34 N. Y. 427.—DISTINGUISHED IN *Hannibal & St. J. R. Co.*, 45 Mo. App. 123. FOLLOWED IN *Krebs v. Minneapolis & St. L. R. Co.*, 20 Am. & Eng. R. Cas. 478, 64 Iowa 670; *Stewart v. Chicago & N. W. R. Co.*, 27 Iowa 282; *Fritz v. Milwaukee & St. P. R. Co.*, 34

Iowa 337; *Stewart v. Burlington & M. R. Co.*, 32 Iowa 561. REVIEWED IN *Lee v. Minneapolis & St. L. R. Co.*, 66 Iowa 131; *Bowman v. Chicago & A. R. Co.*, 85 Mo. App. 416; *Burlington & M. R. Co. v. Brinkman*, 11 Am. & Eng. R. Cas. 438, 14 Neb. 70.

Where a statute makes railroad companies liable for injuries to live stock running at large, where such injuries result from a failure on the part of the company to fence its track, a company will be liable for killing sheep which go upon the track through a defective fence. *Hinman v. Chicago, R. I. & P. R. Co.*, 28 Iowa 491.—DISTINGUISHED IN *Grove v. Burlington, C. R. & N. R. Co.*, 75 Iowa 163, 39 N. W. Rep. 248. FOLLOWED IN *Swift v. North Mo. R. Co.*, 29 Iowa 243; *Hammond v. Chicago & N. W. R. Co.*, 43 Iowa 168. QUOTED IN *Smith v. Chicago, R. I. & P. R. Co.*, 34 Iowa 96.

A team of horses which are harnessed to a wagon, and which have escaped from the control of their owner, are included under the term "live stock running at large," as used in Iowa Code, § 1289; and a railway company whose train injures a team so running at large, at a place where it has the right to fence its track, is liable to the owner. *Inman v. Chicago, M. & St. P. R. Co.*, 60 Iowa 459, 15 N. W. Rep. 286.—REVIEWING *Welsh v. Chicago, B. & Q. R. Co.*, 53 Iowa 632.

(2) *In Kansas.*—Under the Kansas statute making railroad companies liable for every animal killed in the operation of the roads, except where the road is inclosed with a lawful fence, the company will be liable for the killing of a hog which is running at large in violation of the law. *Missouri Pac. R. Co. v. Bradshaw*, 33 Kan. 533, 6 Pac. Rep. 917.—FOLLOWED IN *Missouri Pac. R. Co. v. Roads*, 23 Am. & Eng. R. Cas. 165, 33 Kan. 640; *Missouri Pac. R. Co. v. Johnson*, 35 Kan. 58.

A railroad company is liable for killing stock that stray from the owner's lands to a railroad track which is unfenced, though the killing be where the herd law is in force, which prohibits cattle from running at large. *Atchison, T. & S. F. R. Co. v. Riggs*, 15 Am. & Eng. R. Cas. 531, 31 Kan. 622, 3 Pac. Rep. 305.—DISTINGUISHING *Central Branch R. Co. v. Lea*, 20 Kan. 353; *Kansas Pac. R. Co. v. Landis*, 24 Kan. 406; *Union Pac. R. Co. v. Dyche*, 28 Kan. 200; *St. Louis & S. F. R. Co. v. Mossman*, 30 Kan. 336.

\* See ante, 113.

† See ante, 53-60; post, 159, 187, 205, 243-276, 288.

An owner of stock where the herd law is in force, preventing cattle from running at large, is only required to use reasonable precautions to keep his cattle confined, and where after this they break away and go upon an unfenced railroad track and are killed, the company is liable. *Kansas Pac. R. Co. v. Wiggins*, 24 Kan. 588.—FOLLOWED IN *Missouri Pac. R. Co. v. Johnson*, 35 Kan. 58.

(3) *In Nebraska*.—Under the Nebraska statute, making it the duty for companies to fence their tracks against stock running at large, a failure to do so will render the company liable for all stock injured or killed. *Fremont, E. & M. V. R. Co. v. Lamb*, 5 Am. & Eng. R. Cas. 367, 11 Neb. 592.

Under the act of June 20, 1867, a railroad company is liable for stock killed upon its track while running at large in the night-time at a point where the company was required but failed to fence its track, notwithstanding stock are prohibited by statute from running at large in the night-time. *Burlington & M. R. R. Co. v. Brinkman*, 11 Am. & Eng. R. Cas. 438, 14 Neb. 70, 15 N. W. Rep. 197.—REVIEWING *Spencer v. Chicago & N. W. R. Co.*, 25 Iowa 139; *Corwin v. New York & E. R. Co.*, 13 N. Y. 42; *Fawcett v. York & N. M. R. Co.*, 2 Eng. Law & Eq. 289. QUOTING *Kansas Pac. R. Co. v. Landis*, 24 Kan. 406. DISTINGUISHING *Central Ohio R. Co. v. Lawrence*, 13 Ohio St. 66; *Pittsburgh, Ft. W. & C. R. Co. v. Methven*, 21 Ohio St. 586. REFERRING TO *Dayton & M. R. Co. v. Miami County Infirmary*, 6 Cent. L. J. 436.—FOLLOWED IN *Burlington & M. R. R. Co. v. Franzen*, 15 Am. & Eng. R. Cas. 530, 15 Neb. 365; *Chicago, B. & Q. R. Co. v. Sims*, 17 Neb. 691.—*Chicago, B. & Q. R. Co. v. Sims*, 17 Neb. 691, 24 N. W. Rep. 388.—FOLLOWING *Burlington & M. R. R. Co. v. Brinkman*, 14 Neb. 70.

In an action for killing, by means of an engine and train, certain hogs of the plaintiff, at a point on its line where said company had failed to comply with the law requiring it to fence its track, etc., it was stipulated that the hogs were killed by a passing train of defendant at a point on its road not within the limits of any town, city, or village, and at a point where said road was not fenced on either side; that said hogs had escaped from the inclosure of the plaintiff, and were at large without the actual fault of the plaintiff, in the day-time, at the

time they were killed, but that they were killed without any negligence on the part of said defendant and its agents or employes other than what may be implied from the neglect to fence the line of its road. *Held*, that a finding and judgment for the stipulated value of the hogs for the plaintiff was correct. *Union Pac. R. Co. v. High*, 14 Neb. 14, 14 N. W. Rep. 547.

(4) *In New York*.—Under the New York act of 1850, p. 233, making railroad companies liable for all the injuries to live stock that go upon the track by reason of the company failing to fence, the negligence of the owner in permitting his stock to stray upon lands of another which adjoins the track, or to run at large upon highways which lead to the track, is no defence. *Corwin v. New York & E. R. Co.*, 13 N. Y. 42.—DISAPPROVING *Marsh v. New York & E. R. Co.*, 14 Barb. (N. Y.) 364.—APPLIED IN *Fitch v. Buffalo, N. Y. & P. R. Co.*, 13 Hun (N. Y.) 668. DISTINGUISHED IN *Bowman v. Troy & B. R. Co.*, 37 Barb. (N. Y.) 516. FOLLOWED IN *Stewart v. Burlington & M. R. R. Co.*, 32 Iowa 561; *Shepard v. Buffalo, N. Y. & E. R. Co.*, 35 N. Y. 641; *Spinner v. New York C. & H. R. Co.*, 67 N. Y. 153; affirming 6 Hun 600. REVIEWED IN *Burlington & M. R. R. Co. v. Brinkman*, 11 Am. & Eng. R. Cas. 438, 14 Neb. 70.

(5) *In Canada*.—Plaintiff's horses were permitted to run at large, and went upon an unfenced track upon premises adjoining where the horses had been, without permission from the occupant. They were killed at a point where the company was required by statute to fence, and no legal by-law had been passed permitting horses to run at large. *Held*, that the company was not liable under 53 Vict. ch. 28, § 2 D, amending the Dominion Railway act of 1888, and enacting that "no animal allowed by law to run at large shall be held to be improperly on a place adjoining a railway merely for the reason that the owner or occupant of such place has not permitted it to be there." *Duncan v. Canadian Pac. R. Co.*, 21 Ont. 355.—DISTINGUISHING *Davis v. Canadian Pac. R. Co.*, 12 Ont. App. 724.

**159. Running at large on uninclosed lands.\***—In Kansas, where the herd law is enforced, the owner of cattle that escape, without his fault, from his

\* See ante, 100, 117.

premises over lawful fences, and pass through uninclosed lands, and go upon an unfenced track, may recover from the company that may kill them. *Missouri Pac. R. Co. v. Johnston*, 35 Kan. 58, 10 Pac. Rep. 103. FOLLOWING Kansas Pac. R. Co. v. Wiggins, 24 Kan. 588; Missouri Pac. R. Co. v. Bradshaw, 33 Kan. 533; Missouri Pac. R. Co. v. Roads, 33 Kan. 640. NOT FOLLOWING Central Branch Co. v. Lea, 20 Kan. 353.

In Missouri a company is liable for stock killed that belong to one whose lands do not adjoin the track, where it appears that they did not escape to the track through fields which were properly fenced and did adjoin the track, but went upon the track through uninclosed lands. *Young v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 52.—DISTINGUISHING *Ferris v. St. Louis & H. R. Co.*, 30 Mo. App. 122.—*Board v. St. Louis, I. M. & S. R. Co.*, 36 Mo. App. 151.

And all the decisions which restrict the right of recovery in such actions to cases where the animal got upon the track from land owned by the plaintiff are confined to those in which the lands adjoining the railway were inclosed. *Board v. St. Louis, I. M. & S. R. Co.*, 36 Mo. App. 151.—DISTINGUISHING *Ferris v. St. Louis & H. R. Co.*, 30 Mo. App. 122.

In Missouri there can be no such thing as a trespass by cattle upon uninclosed lands, and where cattle are killed by a locomotive on a railroad running along uninclosed lands, but not at a railroad crossing, the fact that the cattle got upon the track from land adjoining that of the owner of the cattle, and upon which they had strayed, is no defence to an action against the railroad. *Kaes v. Missouri Pac. R. Co.*, 6 Mo. App. 397.—DISTINGUISHING *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150; *Brooks v. New York & Erie R. Co.*, 13 Barb. (N. Y.) 594; *Berry v. St. Louis, S. & L. R. R. Co.*, 65 Mo. 172.—QUOTING *Gorman v. Pacific R. Co.*, 26 Mo. 441. REVIEWING *Ricketts v. East & W. I. D. & B. J. R. Co.*, 12 Eng. Law & Eq. 520.

When stock get upon the track at a point where the track runs through uninclosed lands which are not fenced as required by law, proof that the land of the owner of the stock adjoins or is next adjoining to the railway is not essential. *Duke v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 105.—DISTINGUISHING *Ferris v. St. Louis & H. R. Co.*, 30 Mo. App. 122.

#### 6. Cattle guards.\*

##### 100. Where must be constructed.

—The company must construct and maintain proper cattle-guards at public crossings to keep stock off the track. *Evansville & C. R. Co. v. Barbee*, 74 Ind. 169. But see *Chapin v. Sullivan R. Co.*, 39 N. H. 564.

To keep its road "securely fenced," according to the requirements of the statute, a railroad company must construct and keep in repair sufficient cattle-guards on each side of highways crossing its track. *Pittsburgh, C. & St. L. R. Co. v. Eby*, 55 Ind. 567, 16 Am. Ry. Rep. 244.—FOLLOWING *Indianapolis, P. & C. R. Co. v. Irish*, 26 Ind. 268.

101. — and where not.—Where plaintiff's contention is that his horse came upon defendant's track between the head of a switch and a cattle-guard, and the undisputed evidence shows that placing the cattle-guard any nearer the head of the switch would endanger the lives of defendant's employes in the switching necessary to the transaction of station or depot business, plaintiff, under such a state of case, ought not to recover. *Pearson v. Chicago, B. & K. C. R. Co.*, 33 Mo. App. 543.—FOLLOWING *Evansville & T. H. R. Co. v. Willis*, 93 Ind. 507.—FOLLOWED IN *Jennings v. St. Joseph & St. L. R. Co.*, 37 Mo. App. 651.

Prior to New Hampshire act of 1850, a company was not bound to provide cattle-guards at places where its track crossed the highway, and no action could be maintained against it for injury to cattle which, having escaped from the close of their owner, had gone upon the track. *Towns v. Cheshire R. Co.*, 21 N. H. 363.—REVIEWING *Woolson v. Northern R. Co.*, 19 N. H. 267.—FOLLOWED IN *Cornwall v. Sullivan R. Co.*, 28 N. H. 161.

Where a railroad track runs from a street onto a bridge it is not the duty of the company to erect cattle-guards between the street and the bridge, and it will not be liable for stock killed on the bridge in the absence of a charge of negligence. *Vanderkar v. Rensselaer & S. R. Co.*, 13 Barb. (N. Y.) 390.—FOLLOWED IN *Parker v. Rensselaer & S. R. Co.*, 16 Barb. (N. Y.) 315. NOT FOLLOWED IN *Brace v. New York C. R. Co.*, 27 N. Y. 269.

102. Sufficiency.—A cattle-guard sufficient to turn ordinary cattle is sufficient.

\* See ante, 79, and also CATTLE GUARDS.

† See ante, 109-113.

*Chicago, B. & Q. R. Co. v. Farrelly*, 3 Ill. App. 60.

If a cattle-guard be in such condition that stock can pass over it from a highway onto the track of the railroad upon which it is situated, such road is not "securely fenced" within the meaning of the statute. *Pittsburgh, C. & St. L. R. Co. v. Eby*, 55 Ind. 567, 16 Am. Ry. Rep. 244.—FOLLOWING *Indianapolis, P. & C. R. Co. v. Irish*, 26 Ind. 268.

Where, at a highway crossing, cattle-guards are placed sixty feet from the boundary of the highway, and it is not shown by the railroad company that the guards, if placed at the boundary of the highway, would interfere with the use of the highway or endanger the safety of persons operating or managing the trains, or would obstruct the transaction of the company's business, or the discharge of its duty to the public, it is liable, under the statute, for animals killed by its engines or cars, and which entered upon its track from the unfenced space between the highway and the cattle-guards. That it would be difficult or expensive to inclose is no excuse. *Ft. Wayne, C. & L. R. Co. v. Herbold*, 23 Am. & Eng. R. Cas. 221, 99 Ind. 91.

Where a company places cattle-guards 50 feet distant from a highway crossing, when it appears that they might have been placed at the crossing without any inconvenience to any one, the company will be liable for stock killed that go upon the track on the space between the crossing and the cattle-guards. *Louisville, N. A. & C. R. Co. v. Porter*, 20 Am. & Eng. R. Cas. 446, 97 Ind. 267.—DISTINGUISHING *Bellefontaine R. Co. v. Suman*, 29 Ind. 40; *Jeffersonville, M. & I. R. Co. v. Lyon*, 72 Ind. 107; *Toledo, W. & W. R. Co. v. Howell*, 38 Ind. 447; *Wabash R. Co. v. Forshee*, 77 Ind. 158.

**163. Effect of performance of duty with respect to cattle-guards, generally.\***—When the usual and ordinary cattle-pit has been constructed as near the highway as can conveniently be done, the company is not liable, without proof of negligence, for an injury happening to an animal between the highway and the pit. *Indianapolis, P. & C. R. Co. v. Irish*, 26 Ind. 268.—FOLLOWED IN *Pittsburgh, C. & St. L. R. Co. v. Eby*, 55 Ind. 567.

Nor is the company responsible for an injury happening to an animal, under such

circumstances, which strays upon the track. *Indianapolis, P. & C. R. Co. v. Irish*, 26 Ind. 268.

**164. — as affecting duty to keep a look out.\***—The cattle were running at large in violation of the law. *Held*, that as the cattle-guard was not in an unlawful or forbidden condition, under the circumstances, and as the cattle were at large contrary to law, and trespassers upon defendant's right of way, the defendant's servants, engaged in operating its trains, were not bound to anticipate such trespassing by looking ahead, or by managing a train with reference to such a contingency. *Stacey v. Winona & St. P. R. Co.*, 40 Am. & Eng. R. Cas. 217, 42 Minn. 158, 43 N. W. Rep. 905.

**165. Liability for failure to construct, generally.†**—A company which, in constructing its road, omitted to make sufficient cattle guards, is liable to one whose cattle sustained damage therefrom, although the road at the time was leased to and run by another company, which, under its lease, had contracted to discharge all statutory obligations and duties imposed upon its lessor. *St. Louis, W. & W. R. Co. v. Curl*, 11 Am. & Eng. R. Cas. 458, 28 Kan. 622.—DISTINGUISHED IN *Missouri Pac. R. Co. v. Morrow*, 19 Am. & Eng. R. Cas. 630, 32 Kan. 217.

The liability imposed on companies for not erecting a cattle-guard where the road passes through inclosed fields, by section 51 of the Missouri general railroad act of February 24, 1853, is not affected by the degree of care exercised by the company. *Gorman v. Pacific R. Co.*, 26 Mo. 441.—FOLLOWED IN *Trice v. Hannibal & St. J. R. Co.*, 35 Mo. 188.—REVIEWED IN *Rodemacher v. Milwaukee & St. P. R. Co.* 41 Iowa 297.

The New Hampshire act of 1850, ch. 593, § 5, provides that every railroad corporation in that state shall make and maintain all necessary cattle-guards, cattle-passes, and farm-crossings for the convenience and safety of the landowners along the side of the road: provided that the provisions of the section should not apply in any case where the corporation should settle with the landowner in relation to such guards, passes, and farm-crossings. *Held*, that where a railroad divides the pasture of a

\* See ante, 114-121.

\* See ante, 62-64, 115, 120; post, 195.

† See ante, 122-139.

landowner, and a crossing is made by the corporation according to the act, the landowner may let his cattle run in the pasture without a herdsman; and that the corporation will be liable for their destruction while crossing the track from one pasture to the other, unless it appear that the injury was caused by accident, or by the fault of the owner; or unless it be shown that the corporation has settled with the landowner in relation to such guards, passes, and farm-crossings. *White v. Concord R. Co.*, 30 N. H. 188.—*FOLLOWED IN Horn v. Atlantic & St. L. R. Co.*, 35 N. H. 169.

A company is liable for animals and cattle killed or injured by getting on the track of the railway in consequence of the absence of cattle guards, without reference to whether such animals were, as between their owners and the public, lawfully on the highway. *Pontiac Pac. J. R. Co. v. Brady*, 4 *Montr. L. R. (Q. B.)* 346.

A declaration charged defendants with neglecting to maintain cattle-guards, by means whereof the plaintiff's ox, lawfully being on the said highway, got upon the railway and was killed by the train. It appeared that there were no cattle-guards at the time of the accident, and that the ox got from the highway onto the track. *Held*, that a good cause of action was stated, as in the absence of cattle-guards, defendants, under 14 and 15 Vic. ch. 51, §. 13, were liable, without reference to the question whether the ox was lawfully on the highway or not. *Huist v. Buffalo & L. H. R. Co.*, 16 U. C. *Q. B.* 299.

**106. — where animal comes from lands of third person.\***—The plaintiffs' mare escaped from their pasture into an adjoining highway, which was crossed by a railroad, in land not owned by the plaintiffs, and went thence upon the track at a place where it crossed the highway and where there was no cattle-guard or fence, and was killed by the engine. *Held*, that the corporation was not liable. *Town v. Cheshire R. Co.*, 21 N. H. 363.

**107. — where animal escapes from owner's poorly-fenced field.**—A failure on the part of a company to erect cattle-guards at highway crossings, as required by the New York act of 1848, p. 221, § 42, will not make it liable for injury to stock that go from a field to the track

through the lack of a fence, which it is the duty of the owner of the stock to erect and keep in repair. *Talmadge v. Rensselaer & S. R. Co.*, 13 *Barb. (N. Y.)* 493.

**108. Liability for failure to keep in repair.**—Where a company has properly constructed its cattle-guards, it is liable only for negligence in maintaining them and keeping them in repair. *Wait v. Bennington & R. R. Co.*, 61 *Vt.* 268, 17 *Atl. Rep.* 284.

Where a company constructs cattle-guards on a street within the limits of a town, they must keep them in proper order, or be liable for stock killed by reason of such failure. *Chicago & R. I. R. Co. v. Reid*, 24 *Ill.* 144.

If, by reason of a company's neglect to repair a cattle-guard accidentally put out of repair, of which it has had reasonable notice, stock enter upon its track, over such cattle-guard, from a highway, and are killed, such company is liable therefor. *Pittsburgh, C. & St. L. R. Co. v. Eby*, 55 *Ind.* 567.

Where plaintiff bases his right of recovery for injury to cattle upon a defect in the cattle guard, he must show that defendant had notice, or by the exercise of ordinary diligence might have had notice, of the defect, and have repaired the same before the injury was inflicted. *Chubbuck v. Hannibal & St. J. R. Co.*, 77 *Mo.*, 591.

Plaintiff's cattle were turned out upon the public highway for the purpose of being driven to pasture, and while there, unattended, got upon the defendant's line of railway, in consequence of the defective condition of the cattle-guard at the intersection of the railway with the highway, and one of the cattle was killed by a passing train. *Held* (1), that the clause of the railway act of 1880, requiring guards at crossings, could not be construed to render the company liable to owners of cattle unlawfully on the highway; (2) that the damage not having been done at the point of intersection, plaintiff was not absolutely precluded from recovering, but was subjected to the onus of showing that defendant might, by the exercise of ordinary care and diligence, have avoided the mischief, and having failed to do so, the verdict in his favor could not stand. *Whitman v. Windsor & A. R. Co.*, 18 *Nov. Sc.* 271.

\* See ante, 153, 154.

\* See ante, 140-151.

**169. Permitting cattle-guards to remain filled with ice and snow.\***—

A railroad company permitting its cattle-guards to remain filled with snow, so that animals which have strayed upon the highway without any negligence on the part of the owner, pass over the guards, and in consequence of being thus upon the track are injured by a train, is liable for the injuries that may be sustained by the animals. *Dunnigan v. Chicago & N. W. R. Co.*, 18 Wis. 28.—CRITICISED IN *Blais v. Minneapolis & St. L. R. Co.*, 22 Am. & Eng. R. Cas. 571, 34 Minn. 57, 57 Am. Rep. 36. DISTINGUISHED IN *Fisher v. Farmers' L. & T. Co.*, 21 Wis. 73. FOLLOWED IN *Chicago, B. & Q. R. Co. v. Kennedy*, 22 Ill. App. 308. QUOTED IN *Indiana, B. & W. R. Co. v. Drum*, 21 Ill. App. 331. See also on this point *Wait v. Bennington & R. R. Co.*, 61 Vt. 268, 17 Atl. Rep. 284.

**7. Duty as to Farm and Private Crossings—  
Gates—Bars.†**

**170. Duty to construct farm crossings.**—Railroad companies must construct and maintain safe farm crossings, to avoid liability for injuring or killing live stock. *Cotton v. New York, L. E. & W. R. Co.*, 48 N. Y. S. R. 89, 20 N. Y. Supp. 347.

Where the plaintiff gave a railroad corporation a deed of part of the railroad, which contained this clause: "Said corporation to fence the land and prepare a crossing with cattle-guards at the present travelled path, on a level with the track," and it appeared that the railroad divided the plaintiff's pasture into two, in one of which there was no water, and that the crossing connected the two—*held*, that the clause in the deed was not a settlement between the parties in relation to the crossings required by law, and that the legal position of the parties was not changed thereby; and that where the plaintiff turned his cattle loose into one of the pastures, and they were subsequently killed in attempting to cross the track, the defendants were liable for the damage, unless it should appear that it was done by accident, or by some fault of the plaintiff. *White v. Concord R. Co.*, 30 N. H. 188.†—FOLLOWED IN *Smith v. Eastern R. Co.*, 35 N. H. 356.

\* See ante, 121.

† See also FARM AND PRIVATE CROSSINGS.

‡ See ante, 88, 89, 138, 149, 156.

**171. Liability for failure to perform this duty.\***—It is the duty of railway companies to maintain safe farm crossings, and proof that plaintiff's horse caught his hoof between a rail and a plank, and was held until struck by an engine and killed, is sufficient to show a breach of this duty, and make the company liable. *Cotton v. New York, L. E. & W. R. Co.*, 48 N. Y. S. R. 89, 20 N. Y. Supp. 347.

*Quare*, whether a company can relieve itself from liability to all persons for killing stock at a strictly private farm crossing by putting in cattle-pits and other safeguards, either instead of or in addition to gates in its fences? *Wabash R. Co. v. Williamson*, 23 Am. & Eng. R. Cas. 203, 104 Ind. 154, 3 N. E. Rep. 814.—EXPLAINING *Grand Rapids & I. R. Co. v. Jones*, 81 Ind. 523.

**172. Failure to fence at farm crossings.†**—A company may lawfully fence across a private roadway maintained by the owner of the land for his own use for farm purposes, and, failing to do so, is liable for killing stock at such crossing. *Indianapolis & C. R. Co. v. Lowe*, 29 Ind. 545.—FOLLOWING *Indiana C. R. Co. v. Leamon*, 18 Ind. 173.—CRITICISED IN *Indianapolis, P. & C. R. Co. v. Thomas*, 11 Am. & Eng. R. Cas. 491, 84 Ind. 194.—*Indiana C. R. Co. v. Leamon*, 18 Ind. 173.—DISTINGUISHING *Lafayette & I. R. Co. v. Shriner*, 6 Ind. 141.—FOLLOWED IN *Indianapolis & C. R. Co. v. Lowe*, 29 Ind. 545.—*Baltimore, O. & C. R. Co. v. Kreiger*, 13 Am. & Eng. R. Cas. 602, 90 Ind. 380.—OVERRULING *Indianapolis & C. R. Co. v. Adkins*, 23 Ind. 340.

The company was liable for the loss of a steer which went upon the track at a farm crossing which the company had failed to fence as required by law, and was killed by a passing train; and this liability did not depend on any consideration of negligence on the part of either party. *Fanning v. Long Island R. Co.*, 2 T. & C. (N. Y.) 585.

**173. Liability for injuries at farm crossings.—(1) Constructed by company.**—

In the absence of negligence on its part, a company is not liable for injuring animals which go upon the track at a private farm crossing, authorized by the Indiana act of April 8, 1885. *Louisville, N. A. & C. R. Co. v. Etzler*, 40 Am. & Eng. R. Cas. 205, 119 Ind. 39, 19 N. E. Rep. 615, 21 N. E. Rep. 466.

\* See ante, 122-139, 165-167.

† See ante, 95-108.



Where a company has no right by fencing in its track to exclude proprietors from their private passage to the highway, it is not liable, under the statute, for injury to cattle. *Croy v. Louisville, N. A. & C. R. Co.*, 19 Am. & Eng. R. Cas. 608, 97 Ind. 126.—DISTINGUISHING *Louisville, N. A. & C. R. Co. v. White*, 94 Ind. 257; *Louisville, N. A. & C. R. Co. v. Shanklin*, 94 Ind. 297.—DISTINGUISHED IN *Louisville, N. A. & C. R. Co. v. Shanklin*, 98 Ind. 573.

The Indiana acts of 1885 (Acts 1885, Sess. Laws Ind. pp. 148 and 224) do not absolve railroad corporations from liability under the police laws for killing stock which enter upon the track where it is unfenced, through uninclosed lands. These acts provide for farm crossings, and for fencing railroads for the benefit of the adjoining proprietor whose land is inclosed, and the liability for injury to stock remains the same as it was prior to the passage of such acts, except to such as enter upon the track at farm crossings. *Ohio & M. R. Co. v. Wrape*, 4 Ind. App. 108, 30 N. E. Rep. 427.

The Maryland statute making railroads liable for all stock negligently injured, does not apply to a team injured at a farm crossing while in charge of a driver. *Annapolis & B. S. L. R. Co. v. Pumphrey*, 42 Am. & Eng. R. Cas. 599, 72 Md. 82, 19 Atl. Rep. 8.

Where by law the animals of a party are rightfully upon a farm crossing on a railroad, and are killed by the engines of the corporation, gross negligence need not be shown in order to sustain an action for the injury. *White v. Concord R. Co.*, 30 N. H. 188.—DISTINGUISHED IN *Laird v. Connecticut & P. R. R. Co.*, 43 Am. & Eng. R. Cas. 63, 62 N. H. 254.

Ordinary care and diligence do not require that a landowner should keep a "look-out" at a private crossing, or an attendant to watch the cattle. *White v. Concord R. Co.*, 30 N. H. 188.\*

(2) *Erected by third persons.*†—Where a private crossing has been erected by third persons which is of no service to the company, and has never been used or repaired by it, the company is not liable for an injury to plaintiff's horse, caused by its foot being caught between a rail and a projecting spike. *Pratt C. & I. Co. v. Davis*, 79 Ala. 308.

\* See ante, 62-64, 115, 120, 164; post, 195.

† See ante, 89, 94, 139, 150, 154, 166; post, 181, 237.

**174. Duty to erect gates, generally.**—Where a private way crossed a railroad on lands inclosed on the outside, under the laws of Illinois it was the duty of the company to erect bars or gates to protect stock within the inclosure, and a failure to do so would render it liable for stock killed. *Peoria, P. & F. R. Co. v. Barton*, 80 Ill. 72.—REVIEWED IN *Omaha & R. V. R. Co. v. Severin*, 30 Neb. 318.—*Chicago, B. & Q. R. Co. v. Finch*, 42 Ill. App. 90.

So held, also, under the Iowa Revision, § 1329, requiring railroad companies to fence at a private crossing. *McKinley v. Chicago, R. I. & P. R. Co.*, 47 Iowa 76.—DISTINGUISHED IN *Bothwell v. Chicago, M. & St. P. R. Co.*, 7 Am. & Eng. R. Cas. 570, 59 Iowa 192. REVIEWED IN *Timins v. Chicago, R. I. & P. R. Co.*, 31 Am. & Eng. R. Cas. 541, 72 Iowa 94, 33 N. W. Rep. 379.

A lane leading from the highway to plaintiff's residence crossed a track, and at each end of the lane were gates, which, with the inclosing fences, were maintained by him. His cow having been killed upon the private crossing—held, that the company was justified in assuming that he preferred the open crossing, and that he could not recover for the killing of the cow. *Tyson v. Keokuk & D. M. R. Co.*, 43 Iowa 207.—DISTINGUISHING *Bartlett v. Dubuque & S. C. R. Co.*, 20 Iowa 188; *Russell v. Hanley*, 20 Iowa 219; *Gray v. Burlington & M. R. R. Co.*, 37 Iowa 119.

The plaintiff's farm was divided by the defendant's railroad, and fences were made along the sides of the road, and also two farm crossings, but no gates were put up at the crossings. The plaintiff, with the knowledge that there were no gates, turned his sheep into his field, and afterwards, in attempting to pass over the road at one of the crossings, they were killed by the defendant's engine. Held, that the defendant was liable for the damages. *Horn v. Atlantic & St. L. R. Co.*, 35 N. H. 169.—FOLLOWING *White v. Concord R. Co.*, 30 N. H. 188.

**175. This duty as affected by contract.**\*—Where lessees, with the consent of the railroad company, made an opening in a fence, through which the sheep strayed, and upon its agreement to replace the opening with a gate, it was the duty of the company to put up the gate within a reasonable time, and if it failed to do so, it would be

\* See ante, 88, 89, 138, 139, 149, 154, 170.



liable for the loss of the stock occasioned by such neglect, precisely as if it had left the opening without the consent of the adjoining owner when it constructed the fence. *McCoy v. Southern Pac. R. Co.*, 56 *Am. & Eng. R. Cas.* 132, 94 *Cal.* 568, 29 *Pac. Rep.* 1110.

It was agreed between a landowner and a company that the latter should fix the crossing to a lane, and that the former should occupy the lane as an open lane, as he had always done. Subsequently the corporation requested the landowner to go on and fix the crossing at the lane as he wished to have it, and he did so, but did not erect gates or bars, and the corporation paid him for it. The company was not liable for the killing of a cow belonging to a tenant having strayed upon the railroad track from the lane where she was allowed to run. *Tombs v. Rochester & S. R. Co.*, 18 *Barb. (N. Y.)* 583.

**176. Liability for defectively-constructed gates.**—A company cannot be released from liability by ignorance of a defect in the gate at a farm crossing, where, by exercising reasonable care, it would have acquired knowledge of the defect. *Hammond v. Chicago & N. W. R. Co.*, 43 *Iowa* 168, 14 *Am. Ry. Rep.* 412.

Nor would such liability be discharged or affected by proof that plaintiff's tenant was in the habit of leaving the gate open, nor even that plaintiff himself was in the habit of doing so. *Hammond v. Chicago & N. W. R. Co.*, 43 *Iowa* 168, 14 *Am. Ry. Rep.* 412.

A defect in the gate as originally constructed is presumed to be known to defendant, and plaintiff need not notify the company of its existence, nor need he repair it, even though it could be done at small expense. *Hammond v. Chicago & N. W. R. Co.*, 43 *Iowa* 168, 14 *Am. Ry. Rep.* 412.—APPROVED IN *Cleveland, C., C. & I. R. Co. v. Scudder*, 13 *Am. & Eng. R. Cas.* 561, 40 *Ohio St.* 173.

While the adjoining landowner may be held responsible for the closing of a gate constructed for his convenience and at his request, he can only be charged with such responsibility when it was so constructed that it would remain closed if so left by him. *Hammond v. Chicago & N. W. R. Co.*, 43 *Iowa* 168.—DISTINGUISHING *Eames v. Boston & W. R. Co.*, 14 *Allen (Mass.)* 151.

**177. Duty to keep gates in good**

**condition.**—A company which erects a fence and gate along its right of way, a few feet beyond the same and upon the land of the adjoining owner, and keeps the same in repair for some time and then suffers them to get out of repair, whereby stock escapes through the same and strays upon the track and is killed, cannot escape liability to the owner of the stock on the ground that such fence and gate are not on its right of way, when it has given no prior notice that it will not keep up such repairs any longer. *Chicago & E. I. R. Co. v. Guertin*, 24 *Am. & Eng. R. Cas.* 385, 115 *Ill.* 466, 4 *N. E. Rep.* 507.

Where the evidence tended to show that the cow got upon the track of the company through the negligence of its servants in failing to keep a gate at a farm crossing in repair—*held*, that a verdict finding the company liable would not be disturbed. *Toledo, W. & W. R. Co. v. Nelson*, 77 *Ill.* 160. *Illinois C. R. Co. v. McKee*, 43 *Ill.* 119.

In an action brought to recover from a railroad company for injuries to a horse alleged to have occurred through its negligence, the jury may be justified in finding defendant guilty of wilful negligence in permitting the gate to remain insecure and unfit for the use it was put to, by the length of time it was maintained in that condition after notice. *Louisville & N. R. Co. v. Shelton*, 43 *Ill. App.* 220.

The gates which a company is required to maintain at private crossings constitute a part of its fence, and the company is liable, under Iowa Code, § 1289, for injuries to stock by reason of the defective condition of such gates. *Mackie v. Central R. Co.*, 54 *Iowa* 540, 6 *N. W. Rep.* 723.

The defendant's line of railway ran through the plaintiff's farm, and the plaintiff's mare escaped from a field adjoining the railway through a gate opposite a farm crossing which the defendants had erected, and which was out of repair, and was killed on the railway. *Held*, that it was the duty of the defendants to keep the gate in repair, and that they were liable, whether they were bound to erect such farm crossing or not. *Murphy v. Grand Trunk R. Co.*, 1 *Ont.* 619.—REVIEWING *Brown v. Toronto & N. R. Co.*, 26 *U. C. C. P.* 206.

**178. Insecure fastenings.**—(1) *Company liable.*—A company is liable for cattle killed by reason of its failure to keep a gate furnished with secure fastenings, which it

\*See *ante*, 142.

was bound by contract to do, although the owner of the cattle, as well as the company, had known for two months that the gate fastenings were insecure, and used no effort to provide proper or sufficient fastenings. *Chicago & A. R. Co. v. Barnes*, 38 *Am. & Eng. R. Cas.* 297, 116 *Ind.* 126, 18 *N. E. Rep.* 459.

To recover for stock killed by reason of defective fastenings to a gate, or lack of any fastening at all, it must appear that the gate on which there was no fastening was at a point where the company was required to maintain a fence. *Vaughn v. Missouri Pac. R. Co.*, 17 *Mo. App.* 4.

It is the duty of railway companies to erect and maintain suitable gates at farm crossings, and knowledge by a landowner that a gate has not secure fastenings, and a failure to notify the company, will not prevent a recovery for cattle that go upon the track and are injured. *Dunsford v. Michigan C. R. Co.*, 20 *Ont. App.* 577.—DISAPPROVING *McMichael v. Grand Trunk R. Co.*, 12 *Ont.* 547.

Plaintiffs' horses, in consequence of the insecure fastening of the gates at a farm crossing where the defendant's railway crossed their farm, got through the gates and on the railway track, and were killed by a passing train. Held, that the plaintiffs, by reason of the continued use of the faulty fastenings, could not be deemed to have adopted them as sufficient, and that it was the duty of the defendant to provide and maintain proper fastenings for the gate. *McMichael v. Grand Trunk R. Co.*, 12 *Ont.* 547.—QUOTING *Studer v. Buffalo & L. H. R. Co.*, 25 *U. C. Q. B.* 160.

(2) *Company not liable.*—A company, which has constructed a private farm crossing and erected gates for the convenience of a landowner, is not liable to the latter for animals which escaped through the gates by reason of defective fastenings, and are injured upon its track, unless it has contracted to keep the gates closed and in proper repair. *Evansville & T. H. R. Co. v. Mosier*, 114 *Ind.* 447, 14 *West. Rep.* 299, 17 *N. E. Rep.* 109.

A company is not necessarily responsible by reason of the fact that a gate in a fence is so constructed as to swing toward the track, and is fastened with a hook on the side toward the pasture, but the question of negligence in such a case is one of fact. *Payne v. Kansas City, St. J. & C. B. R.*

*Co.*, 35 *Am. & Eng. R. Cas.* 113, 72 *Iowa* 214, 33 *N. W. Rep.* 633.

In an action under Missouri Rev. St. § 809, for double damages for killing stock, the railroad company is liable if the stock entered upon its track through a gate at a farm crossing which was open for want of proper fastening; but if the gate was propped open or left open by third parties when the cattle entered through it, the finding should be for the defendant.\* *Binicker v. Hannibal & St. J. R. Co.*, 83 *Mo.* 660.

A company is not liable for killing or injuring live stock coming upon the track through a gate with a latent defect in the fastening, without proof that the company knew of the defect. *Fitterling v. Missouri Pac. R. Co.*, 20 *Am. & Eng. R. Cas.* 454, 79 *Mo.* 504.—QUOTING *Bothwell v. Chicago, M. & St. P. R. Co.*, 59 *Iowa* 192.—FOLLOWED IN *Ridenore v. Wabash, St. L. & P. R. Co.*, 81 *Mo.* 227; *Foster v. St. Louis, I. M. & S. R. Co.*, 44 *Mo. App.* 11.

A company is not guilty of negligence in using on a crossing-gate a fastening in which there is nothing intrinsically dangerous, and which has been for years in use without causing damage, and which is a kind of fastening in general use elsewhere. Accordingly, where cows are being driven through the gate, and one of them drives another against the fastening, causing its death, the company is not liable. *Great Western R. Co. v. Davies*, 39 *L. T.* 475.

Although a company has provided an insufficient fastening for a gate at a private crossing, yet if the landowner uses it notwithstanding its insufficiency, and thereby a horse strays onto the track and is killed, the company is not liable. *Haigh v. London & N. W. R. Co.*, 1 *F. & F.* 646, 8 *W. R.* 6.

**179. Liability where animal enters through gate, generally.**†—(1) *Gate erected by company.* Under the Indiana acts of April 8, 1885, a company is not liable, in the absence of negligence, for the injury or killing of animals going upon its track through gates at private farm crossings, whether such crossings were constructed prior to those acts, or under the power given by the first section of the act of April 8, or since the passage of those acts. *Hunt v. Lake Shore & M. S. R. Co.*, 35 *Am. & Eng.*

\* See post, 182.

† Gates in fences, animals entering on track through, see note, 23 *AM. & ENG. R. CAS.* 206.

*R. Cas.* 176, 112 *Ind.* 69, 11 *West. Rep.* 107, 13 *N. E. Rep.* 263.—FOLLOWING *Cincinnati, H. & I. R. Co. v. Ridge*, 54 *Ind.* 39. OVER-RULING *Indianapolis & C. R. Co. v. Adkins*, 23 *Ind.* 340; *Indianapolis & C. R. Co. v. Adkins*, 23 *Ind.* 345; *Indianapolis, P. & C. R. Co. v. Petty*, 25 *Ind.* 413; *Bellefontaine R. Co. v. Suman*, 29 *Ind.* 40.—REFERRED TO IN *Pennsylvania Co. v. Spaulding*, 35 *Am. & Eng. R. Cas.* 184, 112 *Ind.* 47.

Under the Indiana acts of April 8 and 13, 1885, where a gate is erected at a farm crossing by a railroad company, for the convenience of an adjacent landowner, with the consent of the company, the company is not liable, in the absence of negligence, for the injury or killing of cattle belonging to such landowner or other persons which enter upon the track through such gate. *Louisville, N. A. & C. R. Co. v. Thomas*, 1 *Ind. App.* 131, 27 *N. E. Rep.* 302.

(2) *Gate erected by landowner*.—One who maintains for his own convenience a gate between his land and a railroad track cannot recover of the company if his cattle stray through the gate onto the track and are killed by a train. *Louisville, N. A. & C. R. Co. v. Goodbar*, 102 *Ind.* 596, 2 *N. E. Rep.* 337, 3 *N. E. Rep.* 162.—FOLLOWING *Bond v. Evansville & T. H. R. Co.*, 100 *Ind.* 301; *Evansville & T. H. R. Co. v. Mosier*, 101 *Ind.* 597.—QUOTED IN *Ft. Wayne, C. & L. R. Co. v. Woodward*, 31 *Am. & Eng. R. Cas.* 546, 112 *Ind.* 118, 11 *West. Rep.* 101, 13 *N. E. Rep.* 260.

Where permission has been given to a landowner to erect a gate at a private farm crossing, the company is not liable to him if his stock pass through the gate onto the track; but it is liable if the stock of a third person go through the gate and are injured on the track. *Wabash R. Co. v. Williamson*, 23 *Am. & Eng. R. Cas.* 203, 104 *Ind.* 154, 3 *N. E. Rep.* 814.\*

**180. Liability where gate is left open by company.**—(1) *Generally*.—Under the Missouri statute requiring companies to erect and maintain fences with gates, such gates must be maintained closed. *West v. Missouri Pac. R. Co.*, 26 *Mo. App.* 344.

Plaintiff pastured his horses in a field adjoining a track which he owned in common with others. There were two gates at private crossings, a north and a south one, the

south one only being used by plaintiff. His horses escaped from the north gate and were killed on the track. *Held*, that the company owed an equal duty to keep both gates closed, and, having failed to do so, was liable. *Evansville & T. H. R. Co. v. Mosier*, 22 *Am. & Eng. R. Cas.* 569, 101 *Ind.* 597.—FOLLOWED IN *Louisville, N. A. & C. R. Co. v. Goodbar*, 102 *Ind.* 596.

The company is liable where sheep entered upon the track through the gate to the field in which the sheep were pasturing adjoining the track, and were run over and killed by the cars, it being proved that the gate was opened through the negligence or carelessness of the defendant or its servants. *Leman v. Chicago & G. T. R. Co.*, 59 *Mich.* 618, 26 *N. W. Rep.* 791.

Where a company has erected gates and fences as required by law, it is not liable for stock that go upon the track, where the evidence failed to show that the gate through which the stock entered was left open, or, if opened, that it had been opened for a sufficient time for the company to have known it by the exercise of reasonable diligence. *Ridenore v. Wabash, St. L. & P. R. Co.*, 81 *Mo.* 227.—DISTINGUISHED IN *Morrison v. Kansas City, St. J. & C. B. R. Co.*, 27 *Mo. App.* 418.

(2) *Liability to persons other than adjacent landowners*.—Where plaintiff's horses escaped from him, and he followed them until night trying to reclaim them, and the last seen of them they were going in the opposite direction from defendant's railroad, but later passed to adjoining close, and thence through a gate at a farm crossing that the company knowingly permitted to remain open to defendant's road—*held*, that plaintiff's negligence was slight as compared with defendant's, making it liable for injury to the horses, though it was unlawful for stock to run at large. *Chicago & N. W. R. Co. v. Harris*, 54 *Ill.* 528.—QUOTED IN *Ewing v. Chicago & A. R. Co.*, 72 *Ill.* 25.

The maintenance of gates in a railroad fence for the convenience of the farmer owning the adjoining land does not change the company's liability to third persons; as to them, it must keep the gates closed. *Wabash R. Co. v. Williamson*, 23 *Am. & Eng. R. Cas.* 203, 104 *Ind.* 154, 3 *N. E. Rep.* 814.

The Indiana act of April 13, 1885, providing that gates at farm crossings shall be constructed and kept closed by the owner

\* See *post*, 181.

of such crossing, does not relieve a company from liability for injury to animals which enter upon the track through a gateway to such private way, left open in a fence separating the railroad from a public highway; for where the farm lies entirely on one side the owner thereof could not keep shut the gate on the other side of the track. *Louisville, N. A. & C. R. Co. v. Hughes*, 2 Ind. App. 68, 28 N. E. Rep. 158.

Cattle of the plaintiff strayed upon the highway and passed from thence through a gate in a fence erected by the defendant, in pursuance of the laws of this state, upon its tracks, where they were killed. At the place where the gate was situated the land on both sides of the road was owned by one F., for whose convenience it was built. Evidence was given to show that the gate was used by persons in passing to and from the freight depot of the defendant. *Held*, that if the defendant was accustomed to use the gate for its accommodation, or for the accommodation of persons doing business at its depot, and on the night in question it was left unclosed through the carelessness of any of its agents, such negligence would be the negligence of the defendant. *Spinner v. New York C. & H. R. Co.*, 2 Hun (N. Y.) 421, 4 T. & C. 595.

**181. — by landowner.**—(1) *Cattle of landowner.*—A landowner whose farm is divided by a railroad is entitled to necessary crossings; and where the railroad company fences its track through his farm, and constructs gates in the fences at such crossings for the accommodation of the landowner or his tenant, the duty rests upon him to keep the gates closed; and if he neglects to do so, and his animals pass through them upon the track and are killed, without the negligence of those operating the trains, the company is not liable for the loss. *Adams v. Atchison, T. & S. F. R. Co.* 49 Am. & Eng. R. Cas. 579, 46 Kan. 161, 26 Pac. Rep. 439. *Illinois C. R. Co. v. McKee*, 43 Ill. 119. *Jeffersonville, M. & I. R. Co. v. Dunlap*, 31 Am. & Eng. R. Cas. 512, 112 Ind. 93, 13 N. E. Rep. 403.

It appearing that the track-walker, an employé of the company, had shut the gate in question—one constructed for the adjacent farm-owner's convenience at a farm crossing—some time after midday, it was error to instruct the jury that the farm-owner was under no obligation to keep the gate closed. *Diamond Brick Co. v. New*

*York C. & H. R. Co.*, 28 N. Y. S. R. 95, 7 N. Y. Supp. 868, 5 Silv. Sup. 321, 55 Hun 605, mem.

(2) *Cattle of third person.*\*—Where the animals of a third person jump into the inclosure, and are wrongfully upon the premises of an adjacent landowner, and then pass through the gate left open by such landowner, and are killed by a train, without the negligence of those in charge of the same, the owner of such trespassing animals is entitled to no greater rights than the landowner, and cannot recover from the company. *Adams v. Atchison, T. & S. F. R. Co.*, 49 Am. & Eng. R. Cas. 579, 46 Kan. 161, 26 Pac. Rep. 439.—*APPROVING Indianapolis & C. R. Co. v. Adkins*, 23 Ind. 340.

And this rule is not affected by the fact that the railroad company has not complied with the general railroad act, with respect to fences at other points on the railroad. *Brooks v. New York & E. R. Co.*, 13 Barb. (N. Y.) 594.—*APPROVING Waldron v. Saratoga & W. R. Co.*, 8 Barb. 390.—*APPROVED IN Cecil v. Pacific R. Co.*, 47 Mo. 246. *DISTINGUISHED IN Bartlett v. Dubuque & S. C. R. Co.*, 20 Iowa 188; *Kaes v. Missouri Pac. R. Co.*, 6 Mo. App. 397. *NOT FOLLOWED IN Corwin v. New York & E. R. Co.*, 13 N. Y. 42. *QUOTED IN Berry v. St. Louis, S. & L. R. R. Co.*, 65 Mo. 172; *Dent v. St. Louis, I. M. & S. R. Co.*, 83 Mo. 496; *Omaha & R. V. R. Co. v. Severin*, 30 Neb. 318.

**182. Gate left open by third persons.**†—A company is not liable, under the Missouri railroad law, § 43, for killing stock which come upon its track through a gate at a private crossing left open without the consent of the company. *Harrington v. Chicago, R. I. & P. R. Co.*, 71 Mo. 384.—*DISTINGUISHED IN Parks v. Hannibal & St. J. R. Co.*, 20 Mo. App. 440. *FOLLOWED IN Ridenore v. Wabash, St. L. & P. R. Co.*, 81 Mo. 227. *QUOTED AND FOLLOWED IN Johnson v. Missouri Pac. R. Co.*, 23 Am. & Eng. R. Cas. 180, 80 Mo. 620.

After a company has erected the gate required by statute, it is not expected to stand perpetual guard over it to keep it closed against the act of third parties in leaving it open; and if stock escape thus, before the servants of the company have notice of the fact of the gate being open, or

\* See ante, 94, 130, 154, 166.

† See ante, 178; post, 237.

reasonable time in which to discover the fact, no liability attaches. But the gate must "be hung and have latches or hooks, so that it may be easily opened and shut," pursuant to the statute, in order to be entitled to such exemption from liability. *Morrison v. Kansas City, St. J. & C. B. R. Co.*, 27 Mo. App. 418.—DISTINGUISHING *Ridenore v. Wabash, St. L. & P. R. Co.*, 81 Mo. 227.

One whose cattle have gone upon a track through open bars or gates at a railroad farm crossing on the land of another, cannot recover from the one by whose fault such bars or gates were open, if the owner negligently allowed the stock to stray upon another's land, under the Wisconsin act 1872, ch. 119, § 32, making any one liable who leaves open any gate or bars at a railroad farm crossing. *Pitner v. Shinnick*, 39 Wis. 129.—DISTINGUISHING *McCall v. Chamberlain*, 13 Wis. 637.

A gate in a railroad fence when properly closed was of legal height, but it might be closed in such a way as to leave it much lower at one end. It having been so closed one evening by a third person, one of the plaintiff's horses jumped over the lower end, and in doing so unfastened the gate so that another horse escaped upon the track, and both were killed on the following morning by a locomotive. One of the hooks upon which the gate rested when closed was out of place, but its absence did not interfere with the proper closing of the gate or impair its sufficiency when so closed. *Held*, that neither the absence of the hook nor the negligence of the third person rendered the railroad company liable for the killing of the horses. *Davenport v. Chicago, B. & N. R. Co.*, 76 Wis. 399, 45 N. W. Rep. 215.

**183. Rule where gate has been open for a long time.**\*—It is error to instruct the jury that, if the road was not so fenced as to prevent the horse from getting upon it, they were bound, under any circumstances, to find for plaintiff. There was evidence tending to show that the horse came upon the road through an open gate. If this was true, plaintiff could not recover, unless the gate had been so long open as to raise the presumption that the servants of the company knew it, or to charge them

with negligence. *Chicago, B. & Q. R. Co. v. Magee*, 60 Ill. 529.

Two horses having been injured by a train on defendant's road, where the horses passed upon the track through an open gate at a farm crossing, where the company permitted the gate to remain open for a week previous to the accident, the company was regarded as guilty of such negligence as rendered them liable. *Chicago & N. W. R. Co. v. Harris*, 54 Ill. 528.

In an action to recover double damages for the killing of stock, if the evidence tends to show that the stock passed through a gate in the railroad fence, which had been open for about thirty-six hours before the accident, what constitutes the proper exercise of care, and whether a failure to inspect the gate for three or four days, or for a longer or shorter time, is negligence, or whether the gate being open for thirty-six hours will raise a presumption of negligence against the company, are matters for the determination of the jury. *Wait v. Burlington, C. R. & N. R. Co.*, 35 Am. & Eng. R. Cas. 194, 74 Iowa 207, 37 N. W. Rep. 159.—FOLLOWING *Perry v. Dubuque S. W. R. Co.*, 36 Iowa 102; *Bell v. Chicago, B. & Q. R. Co.*, 64 Iowa 321.

**184. Liability for leaving bars down.**—Under a statute requiring a company to erect and maintain a sufficient fence, bars therein for the convenience of an adjoining landowner constitute an essential part, and the company in allowing such bars to remain down for a period of three months is liable for stock killed having come upon the track through the opening at the bars. *Illinois C. R. Co. v. Arnold*, 47 Ill. 173.

Where a company has erected a fence with bars therein, according to provisions of the statute, it is further required to use ordinary care and reasonable diligence in keeping the bars up, and is consequently liable for injury to stock, from failure to perform this duty. *Perry v. Dubuque S. W. R. Co.*, 36 Iowa 102.—FOLLOWED IN *Brentner v. Chicago, M. & St. P. R. Co.*, 7 Am. & Eng. R. Cas. 574, 58 Iowa 625; *Wait v. Burlington, C. R. & N. R. Co.*, 35 Am. & Eng. R. Cas. 194, 74 Iowa 207, 37 N. W. Rep. 159.

Bars in fences between a track and adjoining farm for the convenience of the land owner may be left down for such a length of time as to raise the inference that the company has been negligent in failing to

\* See ante, 143.

keep them up. *Perry v. Dubuque S. W. R. Co.*, 36 Iowa 102.

A company is not liable for injuries occasioned to stock having come upon the right of way through bars in fence between the track and adjoining farms, where it appears that the bars were left down by the plaintiff himself or by a third party. *Perry v. Dubuque S. W. R. Co.*, 36 Iowa 102.

It seems that if bars have been taken down by the owner or occupant of the farm for whose use they were made and the crossing was permitted by the railroad company, and he has neglected to replace them, his own act will prevent a recovery in a suit brought by him. *Illinois C. R. Co. v. Arnold*, 47 Ill. 173.

If bars are erected in the line of a railroad fence, at the instance and for the accommodation of the owner of land, the responsibility of keeping them up devolves on him; and if he neglects to do so, and his stock passes through the bar-way upon the line of railroad and is killed, he cannot recover therefor against the company. And if, in such case, the animals of a third person should trespass on the lands and inclosure of such owner, and pass through the bars so erected upon the track of the railroad, and be killed by the train, the owner of such animals could not recover. *Indianapolis & C. R. Co. v. Adkins*, 23 Ind. 340.—APPROVED IN *Adams v. Atchison, T. & S. F. R. Co.* 46 Kan. 161. DISTINGUISHED IN *Gill v. Atlantic & G. W. R. Co.*, 27 Ohio St. 240; *Bartlett v. Dubuque & S. C. R. Co.*, 20 Iowa 188. FOLLOWED IN *Indianapolis & C. R. Co. v. Adkins*, 23 Ind. 345. DOUBTED IN *Cincinnati, H. & I. R. Co. v. Ridge*, 54 Ind. 39. OVERRULED IN *Indianapolis, P. & C. R. Co. v. Thomas*, 11 Am. & Eng. R. Cas. 491, 84 Ind. 194; *Hunt v. Lake Shore & M. S. R. Co.*, 35 Am. & Eng. R. Cas. 176, 112 Ind. 69, 11 West Rep. 107, 13 N. E. Rep. 263.

Where the evidence showed that the company had fulfilled the requirements of the statute with reference to erecting and maintaining a fence along the right of way, with bars therein between the track and an adjoining pasture, which bars were for the convenience of the landowner; and it further appeared that a cow belonging to the owner of the pasture escaped upon the track by reason of the bars being down, but was afterward turned from the right of

way into another pasture from which, in some way or other, she again came upon the track and was killed—it was held that there could be no recovery unless the bars were shown to have been left down without fault of the pasture-owner, and that by reason of the company's negligence the cow was enabled to reach the track a second time. *Eames v. Boston & W. R. Co.*, 14 Allen (Mass.) 151.—FOLLOWING *Waldron v. Portland, S. & P. R. Co.*, 35 Me. 422. DISTINGUISHING *Browne v. Providence R. Co.*, 12 Gray (Mass.) 55. —DISTINGUISHED IN *Hammond v. Chicago & N. W. R. Co.*, 43 Iowa 168. FOLLOWED IN *Keliher v. Connecticut River R. Co.*, 107 Mass. 411.

#### 8. Injuries at Public Crossings.\*

##### 185. The rule of liability stated.—

(1) *Generally.*—Where an animal passes upon a track at the crossing of a public street or highway, or other place where, from any cause, it would be improper that the railroad should be fenced, and is killed by the locomotive or cars, the company is not liable, except for the negligence or misconduct of those having charge of the train. *Indianapolis & C. R. Co. v. McKinney*, 24 Ind. 283. *Logansport, P. & B. R. Co. v. Caldwell*, 38 Ill. 280.

There can be no recovery from a company for killing stock at a highway crossing where it appears that the track is fenced on either side with proper cattle-guards at the crossing, and where there is no evidence of negligence on the part of the company. *Galveston, H. & S. A. R. Co. v. Moeser*, 3 Tex. App. (Civ. Cas.) 295.

Where animals are struck by an engine and killed at a public crossing, having come from the highway into which they had been turned by their owner, there being no negligence on the part of the engineer in giving the proper signals, there can be no recovery against the company. *Miller v. Wabash R. Co.*, 47 Mo. App. 630.

An owner of mules killed upon the track by an engine and cars cannot recover damages therefor, though they escaped from a properly fenced enclosure without his knowledge, and were on the highway at its intersection with the track at the time of

\*See CROSSING OF STREETS AND HIGHWAYS, and also *ante*, 108, 117.

the accident. *North Pa. R. Co. v. Rehman*, 49 Pa. St. 101.—APPLYING *New York & E. R. Co. v. Skinner*, 19 Pa. St. 298. DISAPPROVING *Bulkley v. New York & N. H. R. Co.*, 27 Conn. 479.—QUOTED IN *Pittsburgh, C. & St. L. R. Co. v. Stuart*, 71 Ind. 500.

(2) *Where highway is abandoned*.—The general rule of non-liability for killing cattle at a public crossing applies even though the highway has been changed and the old crossing abandoned by the public for more than two years, when it does not appear that it was vacated in the mode prescribed by law. *Indiana C. R. Co. v. Gapen*, 10 Ind. 292.

Before a highway can be vacated by the opening of a new road, in accordance with the Missouri statute (2 Wag. St. 1229, § 58) for changing and vacating roads, the county court must be satisfied that the new road is open and in good condition, and must have made an order vacating the old road. So held, where defendant claimed that the place where a cow was killed was a public crossing where it was not required to fence, and that hence it was not liable without proof of actual negligence. *Phelps v. Pacific R. Co.*, 51 Mo. 477.

(3) *Road used but not established as a highway*.—Under Kansas statute a railroad company is not liable for stock killed at the crossing of a road used and travelled by the public as a highway, though not established and laid out as a highway. *Atchison, T. & S. F. R. Co. v. Griffiths*, 13 Am. & Eng. R. Cas. 532, 28 Kan. 539.—FOLLOWED IN *Missouri Pac. R. Co. v. Kocher*, 46 Kan. 272.

Where an action is brought under ch. 94, Kansas Laws of 1874 (pp. 1252-1257, Gen. St. of 1889), for damages for stock killed at a place where the road is not inclosed with a good and lawful fence, the company may show as a defence that the stock was killed at a crossing of the road used and travelled by the public as a highway, although not established or regularly laid out by the county authorities. *Missouri Pac. R. Co. v. Kocher*, 46 Kan. 272, 26 Pac. Rep. 731.—FOLLOWING *Atchison, T. & S. F. R. Co. v. Griffiths*, 28 Kan. 539.

The rule is also applied under the Iowa acts where stock were killed at the crossing of a road used and travelled by the public as a highway, though the route thus travelled was in fact outside of the survey

or line of the highway, as established by the county authorities. *Soward v. Chicago & N. W. R. Co.*, 33 Iowa 386.—FOLLOWING *State v. Kimball*, 23 Iowa 531.—APPROVED IN *Brown v. Kansas City, St. J. & C. B. R. Co.*, 20 Mo. App. 427. FOLLOWED IN *Luckie v. Chicago & A. R. Co.*, 76 Mo. 639.

**186. Degree of care required of company.**\*—Railroad tracks are not public highways in the sense that a wagon-road is, and the law makes a distinction as to the amount of care required of railroads with respect to persons and property on the track; but where the track crosses public highways and streams others have a common right with the company, and it must exercise the same care, and its liability will be the same, as others passing and doing business thereon. *Central M. T. R. Co. v. Rockafellow*, 17 Ill. 541.—FOLLOWED IN *Toledo, P. & W. R. Co. v. Pence*, 68 Ill. 524. QUOTED IN *Galena & C. U. R. Co. v. Jacobs*, 20 Ill. 478.

A company is bound to exercise ordinary and reasonable care to prevent injury to an animal upon a highway crossing without the owner's fault. *Chicago, St. L. & P. R. Co. v. Fenn*, 3 Ind. App. 250, 29 N. E. Rep. 790.—FOLLOWING *Chicago, St. L. & P. R. Co. v. Nash*, 1 Ind. App. 298.—FOLLOWED IN *Ohio & M. R. Co. v. Craycraft*, 5 Ind. App. 335.—*Balcom v. Dubuque & S. C. R. Co.*, 21 Iowa 102.

A railroad has not the exclusive right to the possession of a public crossing. It has the right of passage, and it may drive or frighten an animal from its track, but in doing so it is not relieved from the obligation to exercise ordinary care. It is not bound to undergo unreasonable delay which will prevent the making of connections or the keeping of schedule time or to risk the danger of collision between its trains. It is simply bound to deal with the animal with reasonable care. *Chicago, St. L. & P. R. Co. v. Nash*, 1 Ind. App. 298, 27 N. E. Rep. 564.

A company, in operating its road across a public highway, is required to exercise ordinary care and diligence, and is liable for killing cattle which are rightfully upon such highway if it fails to exercise such care and diligence. *Lane v. Kansas City, Ft. S. & G.*

\* See ante, 48, 49, 58, 62, 116, 141.



R. Co., 15 Am. & Eng. R. Cas. 526, 31 Kan. 525, 3 Pac. Rep. 341.

**187. Liability for actual negligence—Gross negligence.**—(1) *Generally.*\*—Where a moving train causes an injury at a public street crossing there can be no recovery therefor without proof of actual negligence. *McPheeters v. Hannibal & St. J. R. Co.*, 45 Mo. 22.—QUOTED IN *Pryor v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 215.

And to recover in such cases the owner must prove, by a preponderance of evidence, that the stock were killed through negligence. *Terre Haute & I. R. Co. v. Tutewiler*, 16 Ill. App. 197.

To recover the value of a heifer belonging to the plaintiff, alleged to have been injured so that it would have necessarily died from such injury, if it had not been actually killed by the employés of the company—*held*, that though the injury complained of occurred at the railroad crossing over a public highway, and at a place where the company was not bound to fence, yet, if such an injury was the result of the negligent and careless operation of the train on defendant's railroad, the company is liable for damages sustained. *Missouri Pac. R. Co. v. Wilson*, 11 Am. & Eng. R. Cas. 447, 28 Kan. 637.—FOLLOWED IN *Missouri Pac. R. Co. v. King*, 15 Am. & Eng. R. Cas. 529, 31 Kan. 500.

Under the Missouri railroad act, § 43, however, the owner of stock is not entitled to recover double damages where they are killed at a public crossing through the negligence of the employés of a railroad company. *Sullivan v. Hannibal & St. J. R. Co.*, 72 Mo. 195.—APPLIED IN *Miller v. Wabash R. Co.*, 47 Mo. App. 630.

(2) *Gross or wilful negligence.*†—Where an animal is killed on a railroad at a point where the railroad crosses a public highway, and where the road cannot be legally fenced, the owner of the animal cannot recover on account of the road not being fenced; he must show negligence on the part of the company, and the absence of it on his own part. If he knowingly allows it to stray upon the track of a railroad at a point where it cannot be legally fenced, and the animal is killed, he cannot recover unless it was killed by the gross negligence or wilfulness of the railroad company. *Jeffer-*

*sonville, M. & I. R. Co. v. Huber*, 42 Ind. 173.—REVIEWING *Indianapolis, C. & L. R. Co. v. Harter*, 38 Ind. 557.

If the statutory signals are given, and reasonable efforts made, in the customary manner, to frighten away animals which are seen upon a public crossing, the railroad company has done all it is required to do, so far as the owner of the animals is concerned. To make it liable, an actual or constructive intent to commit the injury must be alleged and proved. *Hanna v. Terre Haute & I. R. Co.*, 119 Ind. 316, 21 N. E. Rep. 903.

To recover for the killing of a horse by defendant's train, brought under the Illinois act of 1855, concerning the fencing of railroads, where the evidence showed the sufficiency of the fences, and that the horse was killed at the crossing of a public road, where the company had constructed and maintained suitable cattle-guards, and that he got upon the track from the road—*held*, that the company could not be held liable, except upon the ground that the act was wilful or the result of actual negligence. *Chicago & A. R. Co. v. McMorrow*, 67 Ill. 218.

(3) *Cattle running at large.*\*—If, after an owner has carefully confined an animal in a properly secured place, it escapes therefrom without his knowledge or fault, and wanders unattended to the public railway crossing and is there negligently injured by the company, he may recover for such injury whether there be an order of the board of commissioners allowing animals to run at large or not. *Ohio & M. R. Co. v. Craycraft*, 5 Ind. App. 335, 32 N. E. Rep. 297.—FOLLOWING *Chicago, St. L. & P. R. Co. v. Nash*, 1 Ind. App. 298; *Chicago, St. L. & P. R. Co. v. Fenn*, 3 Ind. App. 250.—*Chicago, St. L. & P. R. Co. v. Nash*, 1 Ind. App. 298, 27 N. E. Rep. 564.

When cattle running at large are killed by a company at a public crossing, the company is liable when the killing is caused by its culpable negligence or by that of its agents or employés. *Missouri Pac. R. Co. v. King*, 15 Am. & Eng. R. Cas. 529, 31 Kan. 500, 3 Pac. Rep. 371.

Where plaintiff's horse escapes into the highway without his fault, and is killed upon a crossing by a train run in a negligent manner, he can recover. *Clark v. Boston & M. R. Co.*, 31 Am. & Eng. R. Cas. 548, 64 N. H. 323, 5 N. Eng. Rep. 48, 10 Atl. Rep. 676.

\* See ante, 53-60, 152-159; post, 205, 206, 243-276, 288.

\* See ante, 29-32, 47, 57; post, 200, 204.

† See ante, 37, 50, 60; post, 217, 218, 284.

Where cattle running at large on a public highway are negligently killed by a locomotive, without any fault of the owner, the railroad company is liable. *Rehman v. Railroad Co.*, 5 Phila. (Pa.) 450.—APPROVING *Bulkeley v. New York & N. H. R. Co.*, 27 Conn. 479. DISTINGUISHING *New York & E. R. Co. v. Skinner*, 19 Pa. St. 298.

**188. Proximate cause.\***—Where it is not claimed that there was any culpable negligence on the part of the servants of a railroad company in operating a train which causes injury to stock, to fix upon the company a liability it must be maintained, first, that it was violating a duty in obstructing a way; and, second, that this wrongful act was the proximate cause of the injury. *Held*, that here there was no natural or necessary connection between the obstruction of the street crossing and the injury. *Brown v. Wabash, St. L. & P. R. Co.*, 20 Mo. App. 222.—APPLYING *Bosch v. Burlington & M. R. R. Co.*, 44 Iowa 402.

**189. Defective crossings.**—(1) *Company's duty and liability.*—The owner of the stock has the right to expect that a railroad company will exercise ordinary care to prevent injury to his property in the construction of crossings. *Kuhn v. Chicago, R. I. & P. R. Co.*, 42 Iowa 420.—EXPLAINING *Smith v. Chicago, R. I. & P. R. Co.*, 34 Iowa 506.

Under the statute railroad companies are required to so construct crossings as to not materially impair their usefulness; and a company is therefore liable for such defects therein as cause injury to live stock lawfully thereon. *Atchison, T. & S. F. R. Co. v. Miller*, 35 Am. & Eng. R. Cas. 190, 39 Kan. 419, 18 Pac. Rep. 486.

Where a railroad fails to keep its crossings over a public road in repair, and in consequence thereof a team is stalled and struck by a passing train, it is liable for the injury. *Kimes v. St. Louis, I. M. & S. R. Co.*, 85 Mo. 611.

The state has power to construct highways in the Cattaraugus Indian reservation, and a railroad company is therefore liable for injuries to a horse caused by its failure to keep its crossing over such highway in proper repair. *France v. Erie R. Co.*, 2 Hun (N. Y.) 513, 5 T. & C. 12.

The rails of defendant's track, where it crossed a highway, projected from eight to

nine inches above the level, and while plaintiff, with a pair of horses and wagon, was crossing over, an engine standing close by whistled to give notice of the train starting. This caused the horses to start forward, striking the wagon against the projecting rails and breaking the whipple-tree, in consequence of which the horses ran away, and one of them was injured. *Held*, that defendant would not be liable if the whipple-tree was broken by the sudden starting of the horses, without reference to the state of the track, for it was not proved that the blowing of the whistle was an unnecessary and unlawful act; but that if the accident happened through the defective state of the track it would be liable, and the case should have been left to the jury, without any evidence on plaintiff's part to show what the state of the highway was before defendant's railway intersected it. *Thompson v. Great Western R. Co.*, 24 U. C. C. P. 429.

(2) *Sufficiency of crossing.*—If railroad crossings at highways are so constructed that the public can cross with teams and vehicles with reasonable safety and convenience, such crossings are sufficient in law to protect the company from liability for damages for stock killed at such crossings. *Meeker v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 477, 64 Iowa 641, 21 N. W. Rep. 120.

A track constructed across a highway some 9 inches above the level of the highway is not so dangerous in itself as to require persons with knowledge of it to abandon driving over it, or to prevent a recovery for an injury to a horse while driving over it. *Evansville & T. H. R. Co. v. Carvener*, 32 Am. & Eng. R. Cas. 134, 113 Ind. 51, 14 N. E. Rep. 738, 12 West. Rep. 203.

Where, in a suit to recover the value of an ox killed on a highway crossing, it appeared that the defendant's railroad was fenced at said crossing, and furnished with cattle-guards, and that its alleged negligence consisted in its failure to cover a ditch running along its track and across the highway, and which it has bridged at said crossing, but not to the full width of the highway—*held*, that there is nothing in the statute requiring a railroad company to cover such ditches the full width of the highway. *Whitsky v. Chicago & G. T. R. Co.*, 62 Mich. 245, 28 N. W. Rep. 811.

Where a company planks a crossing, it will

\* See *ante*, 34-36, 65, 130, 144; *post*, 194, 277-279.

be liable for a horse which is injured by catching his foot in a space that is unnecessarily large between a rail and a plank. *Cuddeback v. Jewett*, 20 Hun (N. Y.) 187.

**190. Failure to fence at crossing.\***

—A company may be held liable for killing stock between a highway crossing and a cattle-guard 75 feet away, where it appeared that a fence was necessary and might have been constructed. *Peoria, D. & E. R. Co. v. Shelly*, 25 Ill. App. 141.

**191. Duty as to gates at grade crossings.**—Where a company is required by statute to keep the gates at grade crossings constantly closed, and owing to its failure to do so, horses which escaped from a neighboring field get upon the track and are killed, it is liable, such horses, as to it, being lawfully on a highway. *Fawcett v. York & N. M. R. Co.*, 16 Q. B. 610, 15 Jur. 173, 20 L. J. Q. B. 222.

Under § 9, 5 & 6 Vict. c. 55, an obligation is imposed upon railway companies to keep crossing gates closed against stray cattle. Accordingly, if a horse is killed by the negligence of a company in this respect it is liable, although the horse escaped onto the track owing to the negligence of the plaintiff in fastening him. *Dickinson v. London & N. W. R. Co.*, 1 H. & R. 399.

Where a company negligently leaves open a gate at a crossing of its track and a tramroad, it is liable to the person having a license to use such tramroad with his carts and horses, for killing a horse which escapes through such gate onto the track. *Marfell v. South Wales R. Co.*, 8 C. B. N. S. 525, 7 Jur. N. S. 240, 29 L. J. C. P. 315, 8 W. R. 765, 2 L. T. 629.

**192. Duty to give signals, generally.**—(1) *Generally.*—Where a locomotive on the defendant's railroad ran against and injured the plaintiff's mare upon a bridge in a public highway, and it appeared that no bell was rung or whistle sounded, and the speed of the train was not slackened—held, that the company was liable for damages. *Springfield & I. S. E. R. Co. v. Andrews*, 68 Ill. 56.

Where stock are killed near a crossing,

\* See ante, 108, 117.

† See ante, 35, 65; post, 208, 209.

Signals as to cattle at crossings, see notes, 13 Am. & Eng. R. Cas. 506, 15 Id. 549, 35 Id. 448; 38 Id. 307, abstr.

Statute requiring signals at crossings. Whether injuries to cattle are included, see 45 Am. & Eng. R. Cas. 491, abstr.

but before the train reaches it, and no signals are given, as required by the general railroad act, § 38, a company is liable. The questions, in such case, as to whether the rate of speed of the train was too great and as to the exact place where the injury occurred, are for the jury. *Toledo, P. & W. R. Co. v. Foster*, 43 Ill. 415.

Where an animal is killed at a crossing where the statute requires a bell to be rung or a whistle sounded, and the jury find that neither was done, and that the injury occurred by reason of such failure, the company will be held liable. *Great Western R. Co. v. Geldis*, 33 Ill. 304.—DISTINGUISHING *Illinois C. R. Co. v. Phelps*, 29 Ill. 447; *Illinois C. R. Co. v. Goodwin*, 30 Ill. 117.

To render a company liable for stock killed by one of its trains at a public crossing, it must be shown that neither of the statutory signals was given. A train is not required to both sound the whistle and ring the bell on approaching a crossing. *Halferty v. Wabash, St. L. & P. R. Co.*, 82 Mo. 90.—QUOTING *Turner v. Kansas City, St. J. & C. B. R. Co.*, 78 Mo. 578.

Section 806 of the Missouri Rev. St. was amended in 1881 (Laws of 1881, 79), so that in an action against a railroad company for the killing of stock, the plaintiff is relieved from the necessity of showing that the injury resulted "by reason of the neglect of the company," and he is only required to show, in the first instance, that his animal was killed by the railroad company's cars, at the crossing of a public highway, and that the defendant neglected to ring the bell or sound the whistle as required by the statute. But the railroad company may show "that the failure to ring such bell or sound such whistle was not the cause of such injury." *Smith v. Wabash, St. L. & P. R. Co.*, 19 Mo. App. 120.

A railroad company that has killed stock at a highway crossing cannot avoid liability for failure to use the statutory signals by showing that the owner in charge of the stock knew the train was coming when a half a mile away, and might have removed the stock. *Missouri Pac. R. Co. v. Stevens*, 35 Kan. 622, 12 Pac. Rep. 25.

Where a railway train in approaching a crossing neglects to give the proper signals, the company will not be relieved from liability because the person whose cattle were run over did not take the best means to avoid the accident, or because his horses

were unmanageable. *Tyson v. Grand Trunk R. Co.*, 20 U. C. Q. B. 236.

Where the plaintiff's mule escaped from him, and, straying upon a railroad company's track at a public crossing, was struck by a locomotive and killed, the failure of the engineer to ring the bell and sound the whistle as the engine approached the crossing was not negligence on the part of the company; and the mule being a trespasser, the plaintiff could not recover. *Fisher v. Pennsylvania R. Co.*, 126 Pa. St. 293, 17 Atl. Rep. 607.

(2) *Liability though signals are given.*—The observance of the regulations required by Alabama Code, § 1699, of those in charge of trains approaching "any public road crossing, or any depot or stopping-place on such road," will not relieve the company of liability, if there is negligence in other respects. *South & N. Ala. R. Co. v. Thompson*, 62 Ala. 494.—FOLLOWED IN *Alabama G. S. R. Co. v. Hawk*, 18 Am. & Eng. R. Cas. 194, 72 Ala. 112, 47 Am. Rep. 403.

(3) *Illustrations.*—If the employés of a company operating the engine of the train see cattle, unattended, upon or about to go upon the railroad crossing over a public highway, at a distance of three hundred yards before reaching the crossing, and fail to sound the whistle to frighten them away from the track, and fail to slacken the speed of the train, and otherwise fail to take any steps to avoid running over the cattle, such omissions and conduct of the employés are sufficient to authorize a jury to render a verdict against the railroad company for the damages sustained by the owner of the cattle thrown from the track by the engine and train. *Missouri Pac. R. Co. v. Wilson*, 11 Am. & Eng. R. Cas. 447, 28 Kan. 637.

In a common-law action against a railroad for negligently running over and killing plaintiff's cattle on a highway crossing, the evidence tended to show that the cattle were killed by defendant's train at the crossing; that the servants of defendant having the management of the train failed to ring the bell or to blow the whistle as it approached the crossing; that the cattle had freely approached the crossing a short time before the train arrived, and that there was nothing in their condition or situation to prevent them from escaping the train if the required signals had been given. *Held*, that these facts made out a *prima facie*

case for plaintiff, and that a demurrer to the evidence by defendant was properly overruled. *Taylor v. St. Louis, I. M. & S. R. Co.*, 83 Mo. 386.

**193. Presumption of negligence from failure to signal.**\*—Under Alabama Code, §§ 1699, 1700, the failure of an engineer to observe the statutory precautions on approaching a highway crossing or depot is negligence *per se*, making the company liable for stock killed or injured; and when sued, the burden is on it to show that the statute was complied with. *East Tenn. V. & G. R. Co. v. Deaver*, 79 Ala. 216. *Alabama, G. & S. R. Co. v. McAlpine*, 22 Am. & Eng. R. Cas. 602, 75 Ala. 113.

A failure to give the signals before approaching a crossing, as required by California Civ. Code, § 486, is presumptive negligence, and where such failure is proved, evidence is immaterial whether the engineer could have seen the animals before they came upon the track only a few feet away, after which he did all that he could to avoid the injury. *Orcutt v. Pacific Coast R. Co.*, 85 Cal. 291, 24 Pac. Rep. 661.

When stock killed or injured at a crossing are in a condition and situation to escape if the required signal is given, a *prima facie* case is made against the company if it has failed to give such signal as is required by § 38 of the Missouri railroad act. *Turner v. Kansas City, St. J. & C. B. R. Co.*, 78 Mo. 578.—APPROVED IN *Keim v. Union R. & P. Co.*, 90 Mo. 314. QUOTED IN *Halferty v. Wabash, St. L. & P. R. Co.*, 82 Mo. 90.—*Howenstein v. Pacific R. Co.*, 55 Mo. 33.—FOLLOWED IN *Holman v. Chicago, R. I. & P. R. Co.*, 62 Mo. 562. QUOTED IN *Stoneman v. Atlantic & P. R. Co.*, 58 Mo. 503.—*Illinois C. R. Co. v. Gillis*, 68 Ill. 317.

And in order to rebut this presumption, the company must show that the men discharged every duty imposed by law, unless it be shown that the injured party has in some way contributed to the injury or the circumstances rebut the presumption that the injury resulted from neglect of duty on the part of the company. *Howenstein v. Pacific R. Co.*, 55 Mo. 33.

In Indiana, the omission of the employés of a company to give the statutory signals at a highway crossing is conclusive evidence of negligence on the part of the railroad company, and gives rise to a right of action

\* See *ante*, 84, 126, 143; *post*, 207.

for injuries to animals upon highway crossings, without contributory negligence on the part of the owner, resulting from a failure to give the statutory signals. *Chicago, St. L. & P. R. Co. v. Fenn*, 3 Ind. App. 250, 29 N. E. Rep. 790.—QUOTING *Hill v. Louisville & N. R. Co.*, 9 Heisk. (Tenn.) 823.

**104. Failure to signal must be proximate cause.\***—A failure on the part of those in charge of a train to ring a bell or sound a whistle at a crossing will not render the company liable for stock killed, unless it appears that such ringing or sounding would have prevented the killing. *Illinois C. R. Co. v. Phelps*, 29 Ill. 447.—DISTINGUISHED IN *Great Western R. Co. v. Geddis*, 33 Ill. 304; *Toledo, W. & W. R. Co. v. Fergusson*, 42 Ill. 449; *St. Louis, J. & C. R. Co. v. Terhune*, 50 Ill. 151; *Illinois C. R. Co. v. Phillips*, 55 Ill. 194.

Alabama Code 1876, § 1699, makes it the duty of railroad employes to blow a whistle or ring a bell before reaching crossings and other places; and if the proof shows that stock are injured, and that the cause could reasonably be traced to a failure to observe the requirements of the statute, the company, to avoid liability, must prove that they had been complied with; but this rule does not apply where the injuries are not caused by a failure to observe the requirements of the statute. *Alabama G. S. R. Co. v. McAlpine*, 22 Am. & Eng. R. Cas. 602, 75 Ala. 113.

The failure of the engineer to give the crossing signals required by Indiana statute (§ 4020, Rev. St. 1881), will not enable a party to recover for a cow killed by a passing train upon a highway crossing, although she escaped from a sufficient enclosure without the fault of the plaintiff, who made diligent efforts to find her, unless the facts authorize the conclusion that the failure to give the signals caused the death of the animal. Such a conclusion is not justified on account of a failure to sound the whistle, if the other statutory signals are given. *Louisville, N. A. & C. R. Co. v. Green*, 120 Ind. 367, 22 N. E. Rep. 327.

If an animal is killed at a public crossing by reason of a failure or neglect to blow the whistle or ring the bell, as required by the Indiana statute, the company is liable; but the omission to give these signals will not authorize the rendition of a judgment against the company, unless the facts found

show that the killing was caused by the failure to give them as required by the statute. *Lake Shore & M. S. R. Co. v. VanAuken*, 1 Ind. App. 492, 27 N. E. Rep. 119.

The omission to sound the whistle of an engine, in accordance with the provisions of § 60, c. 23, Comp. Laws Kansas 1879, is negligence; but in an action to recover damages for stock injured on the crossing of a highway over the railroad track, if it appears by facts and circumstances proved that the injuries complained of were not caused by or attributed to such omission or neglect, the negligence is immaterial, and creates no liability against the railroad company for damages to the stock upon the track. *Atchison, T. & S. F. R. Co. v. Morgan*, 13 Am. & Eng. R. Cas. 499, 31 Kan. 77, 1 Pac. Rep. 298.

Where a company is sued for killing stock at a crossing, and there is no proof except of the killing and that no signals were given, the company is not liable, and the court should so declare as a matter of law. *Holman v. Chicago, R. I. & P. R. Co.*, 62 Mo. 562.—FOLLOWING *Owens v. Hannibal & St. J. R. Co.*, 58 Mo. 386; *Howenstein v. Pacific R. Co.*, 55 Mo. 33.—DISTINGUISHED IN *Goodwin v. Chicago, R. I. & P. R. Co.*, 11 Am. & Eng. R. Cas. 460, 75 Mo. 73. OVERRULED IN *Keim v. Union R. & T. Co.*, 90 Mo. 314. QUOTED IN *Braxton v. Hannibal & St. J. R. Co.*, 13 Am. & Eng. R. Cas. 494, 77 Mo. 455.

Although failure of the persons in charge of a railroad train to ring a bell or blow a whistle when within eighty rods of a public crossing is negligence, yet such negligence is not, by itself, sufficient to authorize a recovery for damages for an animal killed at such place, unless it is shown, by sufficient testimony, that such killing was attributable to such negligence. *Stoneman v. Atlantic & P. R. Co.*, 58 Mo. 503.—QUOTING *Karle v. Kansas City, St. J. & C. B. R.*, 55 Mo. 476; *Howenstein v. Pacific R. Co.*, 55 Mo. 33.—DISTINGUISHED IN *Goodwin v. Chicago, R. I. & P. R. Co.*, 11 Am. & Eng. R. Cas. 460, 75 Mo. 73. FOLLOWED IN *Harlan v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 483. QUOTED IN *Braxton v. Hannibal & St. J. R. Co.*, 13 Am. & Eng. R. Cas. 494, 77 Mo. 455; *Holman v. Chicago, R. I. & P. R. Co.*, 62 Mo. 562. REVIEWED AND DISTINGUISHED IN *Alexander v. Hannibal & St. J. R. Co.*, 76 Mo. 494.

In order to recover for stock killed by a

\* See ante, 35, 65.

train at a public crossing, under Missouri Rev. St. 1879, § 806, proof of the killing and that no signals were given is not sufficient, unless it appears that the accident resulted from the failure to give such signals. *Braxton v. Hannibal & St. J. R. Co.*, 13 *Am. & Eng. R. Cas.* 494, 77 *Mo.* 455.—QUOTING *Holman v. Chicago, R. I. & P. R. Co.*, 62 *Mo.* 563; *Stoneman v. Atlantic & P. R. Co.*, 58 *Mo.* 503.—EXPLAINED IN *Wight v. Missouri Pac. R. Co.*, 20 *Mo. App.* 481.

If horses driven along a public highway become unmanageable from fright, and thus rushing to a road crossing are killed by a passing train, if their fright and unmanageable state were occasioned by the near approach of the train, and that near approach was caused by a failure to give the signals of approach prescribed by statute, the company would be liable in damages, there being no contributory negligence on the part of the driver. *Texas & P. R. Co. v. Chapman*, 57 *Tex.* 75.

In a suit for killing a cow, alleged to have been caused by negligence, the evidence showed that the county board had passed an order allowing animals to run at large, and that the killing occurred at a highway crossing, that the whistle was not sounded nor the bell rung, and that the train was running at an unusual rate of speed, and that it was storming at the time, so that one could not see or hear at any great distance. *Held*, that the company, being in the lawful use of its property, was not liable. *Michigan, S. & N. I. R. Co. v. Fisher*, 27 *Ind.* 96.

**195. Duty to keep a lookout \*—** While railroad are entitled to a clear and unobstructed track for the running of their trains, still it is their duty to keep a sharp lookout to avoid collisions at their crossings. *Garland v. Maine C. R. Co.*, 85 *Me.* 519, 27 *Atl. Rep.* 615.

A railway company is liable for the killing of an animal by one of its trains at a public crossing of its road, if the engineer in charge of the train saw, or by the exercise of reasonable care could have seen, the exposed condition of the animal in time to have averted the accident by the exercise of like care, and without risk of injury to the train or passengers. *Igo v. Chicago & A. R. Co.*, 38 *Mo. App.* 377.—REVIEWING *Kelly v. Union R. & T. Co.*, 95 *Mo.* 279.

An engineer in charge of a train must use reasonable diligence to discover animals near or approaching crossings; and if the animal could have been seen by the use of ordinary diligence in time to have avoided the injury, the company will be liable, the owner of the animal not being guilty of contributory negligence. *Chicago, St. L. & P. R. Co. v. Nash*, 1 *Ind. App.* 298, 27 *N. E. Rep.* 564.—FOLLOWED IN *Chicago, St. L. & P. R. Co. v. Fenn*, 3 *Ind. App.* 250.

**196. — and attempt to prevent collisions.\*—**In case of an animal trespassing upon a track at a public railroad crossing without the fault of the company, there is no duty of watchfulness on the part of those in charge of its trains to ascertain if the animal be there; and the rule that their duty of care with respect to it arises only upon their discovering its peril, applies as well in the case of an animal wrongfully upon a highway at a railroad crossing. *Palmer v. Northern Pac. R. Co.*, 31 *Am. & Eng. R. Cas.* 544, 37 *Minn.* 223, 33 *N.W. Rep.* 707, 5 *Am. St. Rep.* 839.—FOLLOWING *Locke v. First Div. St. P. & P. R. Co.*, 15 *Minn.* 283; *Witherell v. Milwaukee & St. P. R. Co.*, 24 *Minn.* 410.

A company is not necessarily exempt for killing stock because the train was too near, when the stock was discovered, to stop it in time to avoid a collision, as there may have been negligence in not discovering the stock sooner. *Kendig v. Chicago, R. I. & P. R. Co.*, 19 *Am. & Eng. R. Cas.* 493, 79 *Mo.* 207.—DISTINGUISHING *Wallace v. St. Louis, I. M. & S. R. Co.*, 74 *Mo.* 594.

The engineer of a railroad train is not guilty of gross negligence which will render the company liable for the death of a horse upon its track at a highway crossing, notwithstanding the negligence of the owner, where, after seeing that the horse is determined to go down the road and cross the track ahead of the train, he tries to scare him off, but, when he sees that he cannot do it, applies the brake and brings the train to a dead stop at the crossing, and there is an open field near the road into which he may suppose that the horse will pass. *Lynch v. Northern Pac. R. Co.*, 84 *Wis.* 348, 54 *N. W. Rep.* 610.

**197. Duty to stop train,†—**An engineer is not bound to stop or slow up his

\* See *ante*, 62-64, 115, 120, 164, 173.

\* See *ante*, 49, 51, 52, 63, 64.

† See *ante*, 66, 67.



train upon seeing stock grazing near the track and a crossing, with nothing else to indicate danger. *St. Louis, A. & T. H. R. Co. v. Russell*, 39 Ill. App. 443.

When a team has become stalled on a highway crossing, or so near to their track as to be in danger of being struck by a passing train, railway employes must be prompt and energetic in their efforts to stop the train in season to avoid a collision. *Garland v. Maine C. R. Co.*, 85 Me. 519, 27 Atl. Rep. 615.

**198. Duty to slacken speed.\***—If an engineer discovers stock on the track at a crossing, or so near thereto that a collision may be expected, it is his duty to stop or slow his train and use such care as is necessary to avoid a collision. *St. Louis, A. & T. H. R. Co. v. Russell*, 39 Ill. App. 443.

When an engine-driver sees, or can see, in time to slacken the speed of his train, a lot of cattle crossing the track upon a highway, but does not stop the train or slacken its speed, and kills an animal which has escaped from the owner's inclosure, this will show negligence on his part of a high degree, and the company will be liable for the animal killed. Such a case is not like cases where the cattle were quietly grazing alongside the track when discovered. *Chicago & A. R. Co. v. Kellam*, 92 Ill. 245.—DISTINGUISHING *Peoria, P. & J. R. Co. v. Champ*, 75 Ill. 577; *Chicago, B. & Q. R. Co. v. Bradfield*, 63 Ill. 220.

Due diligence in operating night passenger trains does not require that their usual high rate of speed shall be reduced at every public crossing to fifteen miles an hour in order to avoid injury to cattle which may possibly be found thereon. *Connyers v. Sioux City & P. R. Co.*, 78 Iowa 410, 43 N. W. Rep. 267.

In an action to recover for a heifer which ran before defendant's train from a highway crossing into a cattle-guard, and was killed, defendant asked the following instructions: "Unless you find that the engineer, in the exercise of ordinary prudence, was bound to anticipate that the heifer would stay on the track, or run into the cattle-guard, your verdict should be for the defendant;" and, "if you find that the natural thing for cattle on a crossing, under such circumstances as shown in this

case, would be for them to leave the track, instead of running into the cattle guard, then the engineer was justified in thinking that the cattle would leave the track, and it was not negligence for him not to stop or reverse his engine sooner than he did, and the defendant would not be liable in this case." Held, that the instructions were properly refused, because it is not enough always for an engineer in such a case to provide against what he believes or anticipates will happen, but it is his duty to provide against what he anticipates may happen. *Grimmell v. Chicago & N. W. R. Co.*, 31 Am. & Eng. R. Cas. 537, 73 Iowa 93, 34 N. W. Rep. 758.

Where an animal is seen approaching a crossing only 30 or 40 feet away from it, the road being fenced on either side, it is such negligence as to make the company liable, where the engineer does not sound an alarm, check the speed of his train, nor do anything to prevent injury to the animal. *Illinois C. R. Co. v. Person*, 65 Miss. 319, 3 So. Rep. 375.

In an action for the negligent killing of plaintiff's cows by defendant's trains, on a public crossing, mere proof that the speed of the trains was not checked, and that the cattle could have been seen eighty rods off, does not establish defendant's negligence. *Milburn v. Kansas City, St. J. & C. B. R. Co.*, 29 Am. & Eng. R. Cas. 244, 86 Mo. 104.

The Great W. R. crosses a highway on a level, and one of their trains going at its usual rate of speed ran into and killed two cows, which were passing along the highway at their usual pace but without an attendant. The owner of the cows sued the company in an action on the case, founding his claim to damages solely on the ground of their neglect in not slackening speed at the crossing. It appeared in evidence that the track was not fenced. Held, that if the company were bound to fence in their road where the accident occurred, it was by their default the cows got upon the track, and therefore they could not object that the cows were not legally on the highway. That if the company were not bound to fence, still they were guilty of negligence as charged in the declaration, and therefore as against them the cows were legally there. *Renaud v. Great Western R. Co.*, 12 U. C. Q. B. 408.—REVIEWING *Ricketts v. East & W. I. D. & R. Co.*, 12 C. B. 160.—APPROVED IN *Ham v. Grand Trunk R. Co.*, 11 U. C. C. P. 86.

\* See ante, 69.

Duty to check speed of train at public crossings, see 38 AM. & ENG. R. CAS. 307 abstr.



—DISTINGUISHED IN *McFie v. Canadian Pac. R. Co.*, 2 Man. 6.

9. *Injuries at Station Grounds.—Yards.\**

**199. Generally.**—(1) *Statement of rule.*

—A railroad company is not liable in damages, under the statute, for stock killed by its trains on depot grounds. *Kyser v. Kansas City, St. J. & C. B. R. Co.*, 56 Iowa 207, 9 N. W. Rep. 133.

Where the board of county commissioners has not, under Indiana Rev. St. 1881, § 2637, made an order specifying the animals that may run at large, the common-law rule as to trespassing animals remains in force, and a railway company is not liable for killing a mule which strayed on its station grounds. *Cincinnati, W. & M. R. Co. v. Stanley (Ind. App.)*, 27 N. E. Rep. 316.—FOLLOWING *Indianapolis, C. & L. R. Co. v. Harter*, 38 Ind. 557; *Jeffersonville, M. & I. R. Co. v. Huber*, 42 Ind. 173; *Jeffersonville, M. & I. R. Co. v. Adams*, 43 Ind. 402; *Stone v. Kopka*, 100 Ind. 458.

Section 1289, Iowa Code, providing a remedy for animals killed on railways at places where the companies have the right to fence but fail to do so, and upon depot grounds by trains operated at a speed exceeding eight miles per hour, applies only to stock running at large, and not to the case of a horse killed while being driven across the track upon the grounds of a depot. *Johnson v. Chicago & N. W. R. Co.*, 35 Am. & Eng. R. Cas. 131, 75 Iowa 157, 39 N. W. Rep. 242.

The provisions of the Oregon statute (§§ 4044 and 4045) providing that, if a railroad fails to fence its road against live stock, it shall be liable for the injuries resulting from such failure, etc., does not extend or apply to depot grounds; and in the absence of negligence the company is not liable for stock killed thereon. *Moses v. Southern Pac. R. Co.*, 42 Am. & Eng. R. Cas. 555, 18 Oreg. 385, 23 Pac. Rep. 498.—QUOTING *Davis v. Burlington & M. R. R. Co.*, 26 Iowa 554.

(2) *Sidings—Switch limits—Approaches, etc.*—Under the statute railway companies are required to receive and discharge passengers and freight at sidings, and a company is not liable for killing stock at a place where there is a flag station, siding, and highway crossing, unless there was other

negligence besides a failure to fence. *Gulf, C. & S. F. R. Co. v. Wallace*, 2 Tex. Civ. App. 270, 21 S. W. Rep. 973.—QUOTING *International & G. N. R. Co. v. Cocke*, 64 Tex. 150.

Railroads are not bound to fence within the switch limits of stations where it is necessary to receive and discharge freights; and no recovery can be had for stock killed within such limits. *Cleveland, C., C. & St. L. R. Co. v. Roper*, 47 Ill. App. 320.—FOLLOWING *Louisville, E. & St. L. Con. R. Co. v. Scott*, 34 Ill. App. 635; *Cleveland, C., C. & St. L. R. Co. v. Abney*, 43 Ill. App. 92; *Cleveland, C., C. & St. L. R. Co. v. Myers*, 43 Ill. App. 251.

In the absence of anything to show negligence in the management of the train, a company is not liable for killing a horse near its depot, and within switch limits, where it was not practicable to maintain a fence. *Swanson v. Melton*, 4 Tex. App. (Civ. Cas.) 459, 17 S. W. Rep. 1088.

A company is not liable for the value of a cow killed on one of the approaches to a station by an engine run without negligence. *Chicago & G. T. R. Co. v. Campbell*, 7 Am. & Eng. R. Cas. 545, 47 Mich. 265, 11 N. W. Rep. 152.

A team was injured on ground adjacent to a railroad station which was left unfenced for the accommodation of adjoining owners and the public, but which was not strictly station grounds on a highway. *Held*, that the company was not liable, independent of the question of the negligence of the driver of the team. *Dolan v. Newburgh, D. & C. R. Co.*, 42 Am. & Eng. R. Cas. 611, 120 N. Y. 71, 24 N. E. Rep. 824, 31 N. Y. S. R. 852; reversing 46 Hun 681, *mem.*

**200. Liability for negligence—Gross negligence.\***—There can be no recovery for stock killed on depot grounds, where the company has no right to fence, without proof of negligence. *Cleveland v. Chicago & N. W. R. Co.*, 35 Iowa 220; *Packard v. Illinois C. R. Co.*, 30 Iowa 474.—FOLLOWING *Davis v. Burlington & M. R. R. Co.*, 26 Iowa 549; *Rogers v. Chicago & N. W. R. Co.*, 26 Iowa 558; *Durand v. Chicago & N. W. R. Co.*, 26 Iowa 559.—*Moses v. Southern Pac. R. Co.*, 42 Am. & Eng. R. Cas. 555, 18 Oreg. 385, 23 Pac. Rep. 498. *Flattes v. Chicago, R. I. & P. R. Co.*, 35 Iowa 191.—

\* See STATIONS and DEPOTS; also *ante*, 107.

\* See *ante*, 37, 50, 60, 187; *post*, 217, 218, 284.

APPROVED IN *Atchison, T. & S. F. R. Co. v. Walton*, 3 N. Mex. 319.

Unless there be proof of a want of ordinary care on the part of those in charge of a train killing stock while running at large on depot grounds in a town, the company is not liable. *International & G. N. R. Co. v. Dunham*, 31 Am. & Eng. R. Cas. 530, 68 Tex. 231, 4 S. W. Rep. 472.

There can be no recovery for stock killed on station grounds which it is necessary to leave open, where there is no negligence charged except a failure to fence. *Cleveland, C., C. & St. L. R. Co. v. Abney*, 43 Ill. App. 92.—QUOTING *Chicago, B. & Q. R. Co. v. Hans*, 111 Ill. 114.—FOLLOWED IN *Cleveland, C., C. & St. L. R. Co. v. Roper*, 47 Ill. App. 320.

A railroad company is not liable for killing stock on depot grounds which are necessarily left unfenced, without proof of negligence on the part of the trainmen. *Swearingen v. Missouri, K. & T. R. Co.*, 64 Mo. 73, 17 Am. Ry. Rep. 291.—DISTINGUISHING *Tiarks v. St. Louis & I. M. R. Co.*, 58 Mo. 45. FOLLOWING *Lloyd v. Pacific R. Co.*, 49 Mo. 199; *Morris v. St. Louis, K. C. & N. R. Co.*, 58 Mo. 78.

Neither under the Missouri damage act, § 5, nor under the general railroad act, § 43, are railroad companies liable for killing stock on depot grounds in incorporated towns or cities by reason of such grounds not being fenced, unless there be negligence. *Lloyd v. Pacific R. Co.*, 49 Mo. 199.—FOLLOWED IN *Swearingen v. Missouri, K. & T. R. Co.*, 64 Mo. 73; *Edwards v. Hannibal & St. J. R. Co.*, 66 Mo. 567; *Pryor v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 215; *Pearson v. Chicago, B. & K. C. R. Co.*, 33 Mo. App. 543. QUOTED IN *Wymore v. Hannibal & St. J. R. Co.*, 79 Mo. 247. REVIEWED IN *Morris v. St. Louis, K. C. & N. R. Co.*, 58 Mo. 78.

Where a railway company has brought cattle to its station-yard, a place not fenced from its track, and a porter comes out of the office in the night-time with a lantern, and the light startles some of the cattle and causes a bull to run upon the track, where it is killed by a passing train, the company is not liable, there being no evidence to show negligence on the part of its servants. *Roberts v. Great Western R. Co.*, 4 C. B. N. S. 506, 4 Jur. N. S. 1240, 27 L. J. C. P. 266.

In an action to recover for injury to the plaintiff's team, which he had driven be-

tween tracks in a railway-yard, in a space not designated for standing room—held, that the company was liable if, after becoming aware of his danger, its engineer failed to use ordinary care to avoid doing injury. *Kansas Pac. R. Co. v. Cranmer*, 4 Colo. 524.

In an action for killing stock at a depot, it was held that it is the duty of those operating the train, if they discover the perilous condition of the stock in time to avert the injury, to use every reasonable effort at their command consistent with the safety of the train, etc., and that if they failed to do so and injury thereby resulted, the plaintiff is entitled to recover. *Senate v. Chicago, M. & St. P. R. Co.*, 41 Mo. App. 295.

Where the owner of stock turns them out upon commons near depot grounds, and they stray therefrom to the track on the depot grounds and are killed, there can be no recovery without proof of wilful killing or gross negligence. *Bennett v. Chicago & N. W. R. Co.*, 19 Wis. 145.—APPROVED IN *Cecil v. Pacific R. Co.*, 47 Mo. 246. DISTINGUISHED IN *Bostwick v. Minneapolis & P. R. Co.*, 2 N. Dak. 440.

**201. Rate of speed.**—Cattle which are by law permitted to run at large are not trespassers by going upon depot grounds; but if the owner turns them out where they are liable to go upon such grounds, the company is not bound to stop its trains and drive them off, nor even slacken the speed or change its time-table, in order to avoid injuring them. *Smith v. Chicago, R. I. & P. R. Co.*, 34 Iowa 506, 5 Am. Ry. Rep. 535.—FOLLOWED IN *Connors v. Sioux City & P. R. Co.*, 78 Iowa 410, 43 N. W. Rep. 267.

Where by the unlawful speed of a train upon station grounds animals at large thereon are stamped and run upon the track beyond the grounds, whether by breaking down fences or otherwise, and, without checking the speed of the train, they are run down and killed the unlawful speed of the train may fairly be said to be the proximate cause of the injury, and the company is liable therefor. *Story v. Chicago, M. & St. P. R. Co.*, 79 Iowa 402, 44 N. W. Rep. 690.—DISTINGUISHING *Monahan v. Keokuk & D. M. R. Co.*, 45 Iowa 523.

Iowa Code, § 1289, providing that railroad companies shall be liable for stock killed on depot grounds by trains running faster than eight miles an hour, imposes no rate of

\* See ante, 36, 69-72, 198; post, 210, 211.

speed upon trains while not running on depot grounds. So held in a case where stock were killed just outside the depot grounds. *Monahan v. Keokuk & D. M. R. Co.*, 45 Iowa 523.

**202. Injuries in inclosed railroad-yards.**—The yard of defendant, a railroad company, was full of timber, pitfalls, etc., and was a dangerous place for cattle; it was inclosed by a high fence, with proper gates, which during the day were opened and shut for the passage of cars and at night were closed by a watchman. One afternoon a cow of plaintiff's strayed into the yard; she was not discovered by the watchman, who searched the yard before closing the gates. At night he turned dogs loose in the yard. They chased the cow, she fell, broke her thigh, and died. Held, that the company was not liable for the cow. *Leseman v. South Carolina R. Co.*, 4 Rich. (S. C.) 413.

One who has often been in a railway-yard and knows the place well cannot complain of the insufficiency of a fence to such yard, whereby his horse, having been frightened by a train, received injury, there being no proof of want of reasonable care on the part of the company to prevent damage from unusual danger. *Manchester, S. & L. R. Co. v. Woodcock*, 25 L. T. N. S. 333.

A company is liable for killing a horse which strays from a field onto a public road and thence into a yard not fenced from a railway, the gate of which was open through the neglect of the company's servants. *Midland R. Co. v. Daykin*, 17 C. B. 126, 25 L. J. C. P. 73.

#### 10. Injuries in Cities, Villages, etc.

**203. Generally.**—The Indiana act of 1853, § 3, as to the absolute liability of a company for animals killed by cars, is not applicable to a case where the injury is done by the cars at the crossing of a public street in a city, the company having no right to erect a fence thereon. *Lafayette & I. R. Co. v. Shriner*, 6 Ind. 141.—REVIEWED IN *Davis v. Burlington & M. R. R. Co.*, 26 Iowa 549.

When stock are killed by a railroad train the company is not necessarily absolved from liability under ch. 94 of the Kansas laws of 1874, by proof that the place of injury was within the territorial limits of an incorporated city, or even that it was within such portion of those limits as is regularly laid off into blocks and lots, surrounded by streets and alleys. *Union Pac. R. Co. v.*

*Dyche*, 11 Am. & Eng. R. Cas. 427, 28 Kan. 200.—DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Riggs*, 15 Am. & Eng. R. Cas. 531, 31 Kan. 622.

In Missouri a railroad company is not liable for killing stock within the limits of an incorporated city, under *Wagn. Mo. St. p. 310, § 43. Cousins v. Hannibal & St. J. R. Co.*, 66 Mo. 572.—FOLLOWING *Edwards v. Hannibal & St. J. R. Co.*, 66 Mo. 567; *Elliot v. Hannibal & St. J. R. Co.*, 66 Mo. 683.

The general terms of the Texas statute imposing a liability on railway companies for injuries to animals unless the tracks are fenced, do not apply to such places as public necessity or convenience requires shall be left unfenced, such as the streets of a city or town, depot and contiguous grounds, the crossings of highways and other like places. *International & G. N. R. Co. v. Dunham*, 31 Am. & Eng. R. Cas. 530, 68 Tex. 231, 4 S. W. Rep. 472.—FOLLOWING *International & G. N. R. Co. v. Cocke*, 64 Tex. 151.

**204. No liability without proof of actual negligence.**\*—In a suit in Illinois against a company for injury to stock by its train within the limits of a city, town, or village, there can be no recovery without an averment and proof that the servants of the company were guilty of negligence in running the train through such city, town, or village. *Peoria, P. & F. R. Co. v. Barton*, 80 Ill. 72.

Where stock are killed by a railroad at a place where the law does not require the company to fence, the party seeking a recovery must prove that the killing of the stock was caused through the negligence of the company; and where the proof shows that the stock were killed within the limits of a city, and there is no evidence of negligence on the part of the company, no recovery can be had. *Illinois C. R. Co. v. Bull*, 72 Ill. 537.

There can be no recovery in Missouri for the killing by a railroad train of a domestic animal within the limits of an incorporated city, without allegation and proof of negligence. *Evans & H. F. Brick Co. v. St. Louis & S. F. R. Co.*, 21 Mo. App. 648.

To hold a company liable for injuries to live stock inflicted within the corporate limits of a city and near its depot, the plaintiff must prove actual negligence on the part of the company, as, for instance, that, after

\* See *ante*, 29-32, 47, 57, 187, 200.

the stock were discovered, the company could, without imperilling the persons or property intrusted to it for transportation, have avoided the injury. *Fitzgerald v. Chicago, R. I. & P. R. Co.*, 18 Mo. App. 391.—FOLLOWING *Wallace v. St. Louis, I. M. & S. R. Co.*, 74 Mo. 594.—*Wallace v. St. Louis, I. M. & S. R. Co.*, 74 Mo. 594.—DISTINGUISHED IN *Kendig v. Chicago, R. I. & P. R. Co.*, 19 Am. & Eng. R. Cas. 493, 79 Mo. 207. FOLLOWED IN *Fitzgerald v. Chicago, R. I. & P. R. Co.*, 18 Mo. App. 391. NOT FOLLOWED IN *Wymore v. Hannibal & St. J. R. Co.*, 79 Mo. 247.

Where nothing is shown by the plaintiff save the injury and the passing of the train, at the rate of twenty or twenty-five miles an hour, over a tract of land within a village, midway between public thoroughfares nine hundred feet apart, and there is no evidence that those in charge of the train saw the cow before or after she was killed, or that they might, with due care, have seen her in time to prevent the injury, there can be no recovery, and a demurrer to the evidence should be sustained. *Lord v. Chicago, R. I. & P. R. Co.*, 82 Mo. 139.—FOLLOWED IN *Sloop v. St. Louis, I. M. & S. R. Co.*, 22 Mo. App. 593.

A company is not liable for killing stock by reason of a failure to fence where its track runs through grounds that are platted for a town, where streets are laid off and dedicated to public use, unless there be proof of actual negligence, where the town exists otherwise than on paper; but it is not necessary that it be incorporated. *Gerren v. Hannibal & St. J. R. Co.*, 60 Mo. 405.

**205. Rule as to animals lawfully running at large.\***—Where a city ordinance permits cattle to run at large during certain hours of the day, it is not negligence *per se* for the owner of a cow to turn her loose upon the street, unattended and near a railroad track, and it is the duty of the company to operate its trains with reference to the right of the owner to permit his cow to go at large, and to use reasonable and ordinary diligence to avoid injuring her. *Fritz v. First Div. St. Paul & P. R. Co.*, 22 Minn. 404, 19 Am. Ry. Rep. 404.

**206. Rule as to animals unlawfully running at large†—Gross negligence.‡**—If there be a city ordinance mak-

ing it unlawful for stock to run at large at the time and place where the injury occurs, the railroad will only be liable for gross negligence. *International & G. N. R. Co. v. Cocke*, 23 Am. & Eng. R. Cas. 226, 64 Tex. 151.

When the owner of stock knowingly permits it to run at large in a town, city, or village in violation of statute, and it is injured by a railway train at a place where the railway company is not under legal obligation to fence its road, the railway company is responsible to the owner if the injury was caused by the gross, wanton, or wilful negligence of its employes, but not if such injury resulted merely from the violation of a municipal ordinance limiting the rate of speed of railroad trains. *Windsor v. Hannibal & St. J. R. Co.*, 45 Mo. App. 123.—DISTINGUISHING *Spence v. Chicago & N. W. R. Co.*, 25 Iowa 139; *Fritz v. Milwaukee & St. P. R. Co.*, 34 Iowa 337. REVIEWING *Bowman v. Chicago & A. R. Co.*, 85 Mo. 533; *Schwarz v. Hannibal & St. J. R. Co.*, 58 Mo. 207; *Owens v. Hannibal & St. J. R. Co.*, 58 Mo. 386.

**207. Presumption as to place of killing.\***—While a company is not required to fence its track within the limits of a village, yet when an animal is killed near the village by cars, the presumption is that the houses compose the village, and if the place where the animal is killed is beyond them, it is beyond the village; and if the town extends beyond the houses the company must prove it in order to relieve itself of the necessity of fencing its roads at such point. *Ewing v. Chicago & A. R. Co.*, 72 Ill. 25.—FOLLOWED IN *Rockford, R. I. & St. L. R. Co. v. Irish*, 72 Ill. 404.

**208. Right to sound alarm to drive stock from track.**—It is not negligence, affirmative or negative, for a locomotive engineer to blow the stock alarm-whistle in a town or city to frighten an animal from the track, in case of a sudden emergency, more especially where the scene of the occurrence, though within the corporate limits, is not in a populous quarter, but in the woods or fields adjacent to the city proper. *Port Royal & W. C. R. Co. v. Phinizy*, 40 Am. & Eng. R. Cas. 212, 83 Ga. 192, 9 S. E. Rep. 609.

**209. Failure to give signals.†**—Where it appeared that plaintiff's gate

\* See *post*, 243-259.

† See *ante*, 53-60, 152-159, 187; *post*, 260-276.

‡ See *ante*, 37, 50, 60, 200; *post*, 217, 218, 284.

\* See *ante*, 128.

† See *ante*, 35, 65, 192.

was broken open in the night, so that his mule escaped and got upon defendant's track, where it was killed; that the train passed over two public streets in the village without ringing a bell or sounding a whistle, just before reaching the mule; and that the only signal given was that something was upon the track—held, that the company was liable. *Chicago & A. R. Co. v. Henderson*, 66 Ill. 494.

But if an animal suddenly leap upon the track, so near in front of an engine that it is impossible to stop, within a village, where fencing the track is not required, and where cattle are accustomed to graze, it is not negligence on the part of the engineer to omit to sound the alarm-whistle or "slow" the train, although he may have seen the animal grazing near the track from a distance of sixty rods. *Chicago, B. & Q. R. Co. v. Bradfield*, 63 Ill. 220.\*—DISTINGUISHED IN *Chicago & A. R. Co. v. Kellam*, 92 Ill. 245.

Where no statute requires a bell to be rung or a whistle to be blown, a company is not liable for failing to ring a bell or blow a whistle while going through a town at the rate of twenty-five miles per hour, in the night-time, under which circumstances a horse was killed. *Potter v. Hannibal & St. J. R. Co.*, 18 Mo. App. 694.

**210. Rate of speed, generally.**†—As a matter of law no rate of speed is prescribed at which a train may run. No rate of speed is *per se* negligence. Where a horse was killed in a town at 9 o'clock at night by a train running 25 miles an hour, it was held that negligence could not be inferred from the rate of speed, nor from the fact that no signals were given, in the absence of a statute requiring them. *Potter v. Hannibal & St. J. R. Co.*, 18 Mo. App. 694.

A company is not liable for killing a cow at a crossing which was lawfully allowed to run at large, where her escape was prevented by a rope attached to her being caught around a loose board on the crossing, where the speed of the train was a reasonable one, considering the place of the killing, it being in a sparsely-settled suburb of a town. *Peoria, D. & E. R. Co. v. Miller*, 11 Ill. App. 375.—QUOTED IN *Wabash, St. L. & P. R. Co. v. Hicks*, 13 Ill. App. 407.

The evidence showed that the engine, at the moment it struck the horse, was thrown

from the track, and that the momentum of the train carried it forward for a distance of more than ninety paces, with the flanges of the wheels striking almost squarely against the ties, from which fact it appeared that the train must have been running at a very high rate of speed. The employés of the company certainly knew that the track was not fenced through the village through which the train was running. They also knew that persons, cattle, or horses might be on the track or crossing over it. Knowing this danger, it was their duty to have run whilst in the village at such a rate of speed as to have their train under control, and, failing to do this, the company was guilty of gross negligence, and the jury were warranted in so finding. *Chicago & A. R. Co. v. Engle*, 84 Ill. 397.

**211. Running at a prohibited rate of speed.**—(1) *Generally.*—In Illinois, where a company runs trains through an incorporated city or village at a greater rate of speed than the ordinances of such city or village permit, if any live stock is killed by such trains, the killing, by the statute, will be presumed to have been done through negligence; and proof of the killing and violation of the ordinance will make out a *prima-facie* case and throw the *onus* upon the company. *Toledo, P. & W. R. Co. v. Deacon*, 63 Ill. 91. *Cleveland, C. & St. L. R. Co. v. Ahrens*, 42 Ill. App. 434.

Under the Mississippi Code 1880, § 1047, where an animal is killed by a train running at a greater rate of speed than six miles an hour within the corporate limits of a city the company is liable. *Louisville & N. R. Co. v. Saucier*, (Miss.) 1 So. Rep. 511.

And the company is liable in such cases, under Mississippi Code 1880, § 1047, although the engine is checked when the animal is seen, and collides with less momentum. *New Orleans, M. & T. R. Co. v. Toulmé*, 59 Miss. 284.

Nor is it a defence in such cases, under Mississippi Code 1880, § 1047, that a train which killed a horse in a town was not running at a greater rate at the actual time of killing, where it appeared that just previous to the killing it had been running at a much greater rate. *Illinois C. R. Co. v. Jordan*, 63 Miss. 458.

Running a train in an incorporated town at a greater rate of speed than six miles an hour does not, under § 1047 of the Mississippi Code, impose absolute liability on a

\* See ante, 52.

† See ante, 36, 69-72, 198, 201.

railroad company for killing cattle. It is negligence on the part of the company to so run its train, but unless the killing of the cattle resulted from, or was rendered unavoidable by, the rate of speed at which the train was running, the company was not liable. *Louisville, N. O. & T. R. Co. v. Caster*, (Miss.) 5 So. Rep. 388.

Running a railroad train within the limits of a municipal corporation at a greater rate of speed than permitted by its ordinance is negligence *per se*, and the road is liable for the killing of stock occasioned by reason of such illegal rate of speed. *Bowman v. Chicago & A. R. Co.*, 85 Mo. 533.—FOLLOWING *Karle v. Kansas City, St. J. & C. B. R. Co.*, 55 Mo. 476; *Kelley v. Hannibal & St. J. R. Co.*, 75 Mo. 138.—REVIEWED IN *Boyle v. Missouri Pac. R. Co.*, 21 Mo. App. 416; *Windsor v. Hannibal & St. J. R. Co.*, 45 Mo. App. 123. See also *Robertson v. Wabash, St. L. & P. R. Co.*, 84 Mo. 119.

The railroad would still be liable when running in a city at a greater speed than by ordinance allowed, although the stock were running at large in violation of the city ordinance, provided they had escaped from the owner's inclosure without his knowledge or consent, and the defendant, by the exercise of ordinary care and prudence, could have stopped the train so as to prevent the killing. *Bowman v. Chicago & A. R. Co.*, 85 Mo. 533.—REVIEWING *Spence v. Chicago & N. W. R. Co.*, 25 Iowa 139.

The imposition of a fine by an ordinance for running a train at a rate of speed prohibited by the ordinance does not relieve the company so violating the ordinance of pecuniary liability for an injury done to another by so doing. On the contrary, the imposition of the fine prohibited the act, and such prohibition by a valid ordinance rendered such an act negligent *per se*, and the one doing the act liable for all injury caused thereby. *Backenstoe v. Wabash, St. L. & P. R. Co.*, 23 Mo. App. 148; *affirmed* in 86 Mo. 492, 1 West. Rep. 743.

(2) *Illustrations*.—Proof that stock were killed on a street where there was nothing to obstruct the view for two hundred and fifty feet; that the speed of the train, which was running at a rate prohibited by a city ordinance, was not slackened; that no signals were given; and that the trainmen were looking at a gathering of people at the side of the car, is sufficient to render the company

liable. *Colorado C. R. Co. v. Caldwell*, 11 Colo. 545, 19 Pac. Rep. 542.

Where stock is killed within the corporate limits of a village by a train that is running at a prohibited rate of speed, to relieve the company from liability there must be a preponderance of evidence showing that the killing did not result from such wrongful act of the company. *St. Louis, V. & T. H. R. Co. v. Morgan*, 12 Ill. App. 256.

Proof that stock were killed within city limits by a train running at a prohibited rate of speed raises a presumption of negligence, yet it is error to instruct the jury that the company must show by a preponderance of evidence that the injury was not caused by the excessive speed of the train. *Chicago & N. W. R. Co. v. Carpenter*, 45 Ill. App. 294.

Where in an action for the killing of an animal at a street crossing the evidence showed that the plaintiff was without fault or negligence, that the defendant's train was running at the time at a greater rate of speed than that allowed by the city ordinance, and that the bell was not rung while passing over said street, it was a question of fact to be determined by the jury whether said failure to ring the bell or the rate of speed caused the injury to the animal. *Ohio & M. R. Co. v. Craycraft*, 5 Ind. App. 335, 32 N. E. Rep. 297.

A company was sued for killing a cow at a street crossing where cattle were permitted to run at large under an ordinance of the city. It appeared that the train at the time was running at a rate of speed much greater than the limit fixed by an ordinance, and there was a conflict of evidence as to whether a bell was rung or a whistle sounded. *Held*, sufficient evidence to show negligence, and a verdict for plaintiff would not be disturbed. *Fritz v. First Div. St. Paul & P. R. Co.*, 22 Minn. 404, 19 Am. Ry. Rep. 404.

**212. Rule where company can but does not fence.**—A company is liable for killing stock within city and village limits, under the laws of Indiana, if it appears that it was at a place where the company might have fenced but failed to do so. *Pittsburgh, C. & St. L. R. Co. v. Laufman*, 78 Ind. 319.

For the statute making railroad companies liable for injuries to animals, without regard to wilful misconduct, negligence, or acci-

\* See *ante*, 99, 117.



dent, where the railroad is not fenced, applies to a place within the limits of a city where it would not be illegal or improper to maintain a fence. *Jeffersonville, M. & I. R. Co. v. Parkhurst*, 34 Ind. 501.

The Indiana statute of 1881, not being repealed by act of 1885, the corporation owning a railroad and its lessee, etc., are jointly and severally liable for the killing of animals upon the track thereof within such portions of an incorporated town as are laid out and platted, if the right of way could have been fenced at the place of the killing; and the manner of commencing and prosecuting actions and of collecting judgments is the same as formerly. *Jeffersonville, M. & I. R. Co. v. Dunlap*, 31 Am. & Eng. R. Cas. 512, 112 Ind. 93, 13 N. E. Rep. 403.

The evidence showed that the stock were killed between two streets of a city on defendant's track, which was not there fenced, though a fence might have been built there without interfering with any street or alley, or with the usual running of the road. *Held*, that the company was liable. *Indianapolis, P. & C. R. Co. v. Lindley*, 11 Am. & Eng. R. Cas. 495, 75 Ind. 426.

The Missouri damage act, § 5 (Rev. St. 1879, § 2124), making railroad companies liable for stock killed through a failure to fence without proof of negligence, applies to cases arising within the corporate limits of a town or city where the track might have been fenced but is not. *Wymore v. Hannibal & St. J. R. Co.*, 13 Am. & Eng. R. Cas. 524, 79 Mo. 247.—FOLLOWING *Edwards v. Hannibal & St. J. R. Co.*, 66 Mo. 567; *Tiarks v. St. Louis & I. M. R. Co.*, 58 Mo. 45. QUOTING *Lloyd v. Pacific R. Co.*, 49 Mo. 199; *Ells v. Pacific R. Co.*, 48 Mo. 231. NOT FOLLOWING *Wier v. St. Louis & I. M. R. Co.*, 48 Mo. 558; *Wallace v. St. Louis, I. M. & S. R. Co.*, 74 Mo. 594.—FOLLOWED IN *Young v. Hannibal & St. J. R. Co.* 79 Mo. 336; *Lane v. Chicago, R. I. & P. R. Co.*, 18 Mo. App. 555; *Vanderwerker v. Missouri Pac. R. Co.*, 48 Mo. App. 654. QUOTED IN *Rhea v. St. Louis & S. F. R. Co.*, 84 Mo. 345.

So that if stock are killed within the corporate limits of a town or city, at a place where the track might have been fenced, it is not necessary to prove actual negligence to hold the company liable. *Young v. Hannibal & St. J. R. Co.*, 19 Am. & Eng. R. Cas. 512, 79 Mo. 336.—FOLLOWING *Wymore v. Hannibal & St. J. R. Co.*, 79 Mo. 247.—FOL-

LOWED IN *Lane v. Chicago, R. I. & P. R. Co.*, 18 Mo. App. 555. See also *Iba v. Hannibal & St. J. R. Co.*, 45 Mo. 469.

A company is liable for killing stock, without proof of actual negligence, by reason of a failure to fence at a point within the limits of a municipal corporation, as shown by a plat, but in fact only unimproved prairie-lands lying open, and where the municipal corporation was at the time dissolved or suspended. *Iba v. Hannibal & St. J. R. Co.*, 45 Mo. 469.—CRITICISED IN *Gerren v. Hannibal & St. J. R. Co.*, 60 Mo. 405. EXPLAINED IN *Ells v. Pacific R. Co.*, 48 Mo. 231. REVIEWED IN *Wier v. St. Louis & I. M. R. Co.*, 48 Mo. 558.

Under the New York act of 1850, ch. 140, § 44, making it the duty of railroad companies to fence their track at all points where it can be done, a company may be liable for stock killed by reason of a failure to fence a vacant lot in a city. *Crawford v. New York C. & H. R. R. Co.*, 18 Hun (N. Y.) 108.—REVIEWING *Corwin v. New York & E. R. Co.*, 13 N. Y. 42.—FOLLOWED IN *Lackin v. Delaware & H. C. Co.*, 22 Hun (N. Y.) 309.

#### IV. CONTRIBUTORY NEGLIGENCE.\*

##### 1. In General.†

##### a. What is Contributory Negligence and Its Effect.

##### 213. Effect of owner's negligence.

—(1) Generally.—If the negligence of the owner of stock contributed to the immediate injury causing the loss, he cannot recover for it against the company. *Toledo & W. R. Co. v. Thomas*, 18 Ind. 215.

Where the negligence of the owner of stock has contributed directly to an injury to his cattle, there can be no recovery without proof of gross carelessness or wilful misconduct on the part of the company injuring them; and a mere mistake of judgment on the part of an engineer as to what measures would best prevent an injury will not render the company liable. *Fisher v. Farmers' L. & T. Co.*, 21 Wis. 73.

Under the Maryland acts of 1838 and 1846, railroad companies are bound to show that the injury to animals was the result of inevitable accident only in cases where the

\* See ante, 126, 148; post, 364, 373, 374, 396, 397, 483.

† Contributory negligence of owner of cattle killed or injured by trains, see notes, 20 AM. & ENG. R. CAS. 473; 1 L. R. A. 449.



party complaining has not contributed in any manner, by his own negligence or violation of law, to the injury complained of. *Baltimore & O. R. Co. v. Lamborn*, 12 Md. 257.

Although a person has a right to use the highway for the passage of his cows to and from the pasture, yet he must use ordinary and proper care and diligence in driving them, having reference to the situation of the road and the manner in which it is used. *Clark v. Syracuse & U. R. Co.*, 11 Barb. (N. Y.) 112.

(2) *Where company has failed to fence.\**—Railroad companies are not liable by reason of a failure to fence where cattle go upon the track through the negligence of their owner. *Marsh v. New York & E. R. Co.*, 14 Barb. (N. Y.) 364.—FOLLOWED IN *Halloran v. New York & H. R. Co.*, 2 E. D. Smith (N. Y.) 257.

Under the New York act of 1850, requiring the owners of railroads to properly fence the same, a foreign railroad company that has the privilege of running its cars over the track of a domestic corporation is not liable for killing stock thereon by reason of a failure to fence. There can be no common-law recovery in such case; and the owner's contributory negligence may defeat a recovery. *Shanahan v. New York & N. H. R. Co.*, 10 Abb. Pr. (N. Y.) 398.

In an action against a company for injury to stock occasioned by failure to erect or to maintain fences on the line of its road, as in other actions for negligence, contributory negligence of the plaintiff is a defense. *Curry v. Chicago & N. W. R. Co.*, 43 Wis. 665.—QUOTED IN *Murphy v. Chicago & N. W. R. Co.*, 45 Wis. 222; *McCandless v. Chicago & N. W. R. Co.*, 45 Wis. 365.

(3) *Where company has failed to repair.†*—A railroad company is not liable for injuries to live stock that go upon the track over a fence that is allowed to become defective, where it appears that the owner's negligence contributed to the injury. *Jones v. Sheboygan & F. du L. R. Co.*, 42 Wis. 306.—REVIEWED IN *Murphy v. Chicago & N. W. R. Co.*, 45 Wis. 222.—*Martin v. Stewart*, 38 Am. & Eng. R. Cas. 316, 73 Wis. 553, 41 N. W. Rep. 538.

**214. Effect of negligence of owner's servant.‡**—One whose team is injured

by a collision with a train at a railroad crossing while it is in the charge of his servant, is responsible for the conduct of the servant at the time of the accident; and if he did not exercise due care the owner is chargeable with such want of care, and cannot recover. *Louisville, N. A. & C. R. Co. v. Stommel*, 126 Ind. 35, 25 N. E. Rep. 863.

**215. Effect of drunkenness of person in charge.**—Unless the agents of a company while operating a train are guilty of gross negligence, the company is not liable for a horse killed at a place on the track where it has no right to be, and it appears that the man in charge of the horse was drunk and that the employer had notice of his bibulous propensities. *Cleveland, C., C. & St. L. R. Co. v. Ducharme*, 49 Ill. App. 520.

A company is not liable for killing a horse where the owner has loaned it to a man who got drunk and took the horse along a highway, where it intersected the track, and thence on the track, where the horse became frightened and ran onto a trestle, where it was caught and killed; and the fact that the person who borrowed the horse had voluntarily made himself drunk could not affect the liability of the company. *Welty v. Indianapolis & V. R. Co.*, 105 Ind. 55, 24 Am. & Eng. R. Cas. 371, 4 N. E. Rep. 410.

Horses hitched to a sleigh, and in charge of a driver who has become intoxicated and fallen into a drunken stupor, are not, when wandering about on the prairie, "stock running at large" within the meaning of § 1289 of the Code; and for the killing of such horses by a passing train at a place where it had the right to fence its track but did not, defendant was not liable under said section. *Grove v. Burlington, C. R. & N. R. Co.*, 75 Iowa 163, 39 N. W. Rep. 248.—DISTINGUISHING *Hinman v. Chicago, R. I. & P. R. Co.*, 28 Iowa 491.

**216. What amounts to negligence on part of owner, generally.**—Negligence in managing and restraining domestic animals is the absence of such methods and means of care as would be employed by men of ordinary prudence. *Chicago, St. L. & P. R. Co. v. Fenn*, 3 Ind. App. 250, 29 N. E. Rep. 790.—QUOTING *Dennis v. Louisville, N. A. & C. R. Co.*, 116 Ind. 42.

One who goes off the highway and attempts to avoid an approaching train by crossing the track at a private crossing, can-

\* See ante, 122-139.

† See ante, 140-151.

‡ See ante, 30, 37.

1 D. R. D.—14.

not recover for a horse that is killed by reason of getting his foot fast in a hole in the track, which detained him until struck by the train. *Cornell v. Skaneateles R. Co.*, 40 N. Y. S. R. 1, 61 Hun 618, 15 N. Y. Supp. 581.—REVIEWING Spooner v. Delaware, L. & W. R. Co., 115 N. Y. 22, 23 N. Y. S. Rep. 554.

Where a cow is turned out with a block and chain fastened to her, the owner cannot recover if she be killed on the track by reason of such block and chain preventing her escape. *Guess v. South Carolina R. Co.*, 30 So. Car. 163, 9 S. E. Rep. 18.

Though a company may have been negligent in failing to erect and maintain necessary fences and cattle-guards, yet if a party, with full knowledge that there are no fences or cattle-guards, turns his horse out where he can go on the track, he cannot recover if the horse is killed by a passing train, where there is no negligence on the part of the company in the management of the train. *Trow v. Vermont C. R. Co.*, 24 Vt. 487.

One who, knowing that a severe storm on Saturday had prostrated fences, on Monday evening turned his cattle upon unclosed lands without inquiry as to whether the railroad fences abutting thereon were uninjured, was guilty of such contributory negligence as would defeat his recovery for injuries received by such cattle on the railroad track; and such facts appearing from his own evidence, a nonsuit should have been granted. *Carey v. Chicago, M. & St. P. R. Co.*, 20 Am. & Eng. R. Cas. 469, 61 Wis. 71, 20 N. W. Rep. 648.

**217. Abandonment or wilful exposure.**—An owner who knowingly abandons his animals to destruction by passing trains, or wilfully exposes them upon the track of a railroad company, cannot recover, although the company may not have performed the statutory duty of fencing its track. *Welty v. Indianapolis & V. R. Co.*, 105 Ind. 55, 24 Am. & Eng. R. Cas. 371, 4 N. E. Rep. 410.

Should a person voluntarily place his animal upon the track, it seems he could not recover, but might, perhaps, be regarded as having abandoned his property. *Indianapolis & C. R. Co. v. Townsend*, 10 Ind. 38.—FOLLOWED IN *Jeffersonville R. Co. v. Applegate*, 10 Ind. 49; *Jeffersonville R. Co. v. Dougherty*, 10 Ind. 549; *Indianapolis & C. R. Co. v. Paramore*, 12 Ind. 406; *Hart v.*

*Indianapolis & C. R. Co.*, 12 Ind. 478; *New Albany & S. R. Co. v. McAhren*, 12 Ind. 552; *New Albany & S. R. Co. v. Beeler*, 12 Ind. 560; *Indianapolis & C. R. Co. v. McKinney*, 24 Ind. 283.

Where the owner of animals voluntarily places them on the track, or purposely exposes them to danger, no recovery for their injury can be had. *Missouri Pac. R. Co. v. Roads*, 23 Am. & Eng. R. Cas. 165, 33 Kan. 640, 7 Pac. Rep. 213.

The fact that the plaintiff by a voluntary act exposed a colt to danger from defendant's train, if the act was done for a lawful purpose, and the danger was merely incidental thereto, does not make the act wilful. *Smith v. Kansas City, St. J. & C. B. R. Co.*, 58 Iowa 622, 12 N. W. Rep. 619.

**218. Failure to use ordinary care—Wilful act.**\*—There can be no recovery for a team of horses killed by driving madly against a slowly-moving train, while hitched to a fire-patrol wagon, though the driver claimed that it was so dark he could not see the train, and that the signals displayed indicated that the gates were open. *Chicago Bd. of Underwriters v. Chicago & E. I. R. Co.*, 44 Ill. App. 253.

The owner of a blind horse who turns him out upon the common of a town through which a railroad runs, is guilty of such gross negligence as to prevent a recovery if the horse is killed where the track is not fenced, though it be not on any street or alley. *Knight v. Toledo & W. R. Co.*, 24 Ind. 402.—DISTINGUISHED IN *Louisville, N. A. & C. R. Co. v. Cahill*, 63 Ind. 340. REVIEWED IN *Sinram v. Pittsburgh, Ft. W. & C. R. Co.*, 28 Ind. 244.

Where it appears that plaintiff knew that his animal had gone upon the track, and he had the opportunity and power to prevent the injury to it, but wilfully refused to do so, he cannot recover damages therefor under § 1289, Iowa Code, which provides that railway companies who fail to fence their track against live stock running at large, at points where such right to fence exists, "shall be liable to the owner of such stock injured or killed by reason of the want of such fence for the value of the property or damage caused, unless the same was occasioned by the wilful acts of the owner or his agents." *Moody v. Minneapolis & St. L.*

\* See post, 248.

*R. Co.*, 38 *Am. & Eng. R. Cas.* 319, 77 *Iowa* 29, 41 *N. W. Rep.* 477.

Where the owner of cattle sees them in danger on the track, and can, by reasonable exertion, get them off, if he does not, and they are injured by a passing train, he cannot recover. The owner has no right to rely upon the performance of the duty which the law imposes on the company of giving warning signals. *Milburn v. Kansas City, St. J. & C. B. R. Co.*, 29 *Am. & Eng. R. Cas.* 244, 86 *Mo.* 104.

**210. Interfering with railroad fences.**—Where a company securely fences its track, and the owner of animals, for his own accommodation or through his own negligence, makes a change in such fence, whereby his animals reach such track and are killed by the cars of such company, the latter is not liable therefor. *Koutz v. Toledo, W. & W. R. Co.*, 54 *Ind.* 515.

The owner of cattle who takes down the wires of a railroad fence and turns his cattle into an adjoining close, and replaces the wires by winding them around a post in such a way that cattle can slip them off, cannot recover where they return and pass through the same place to the track and are injured. *Davidson v. Central Iowa R. Co.*, 35 *Am. & Eng. R. Cas.* 158, 75 *Iowa* 22, 39 *N. W. Rep.* 163.

When the company has properly fenced its track and put up gates in the right places at crossings, and an adjoining landowner has so changed the structure of one gate that cattle may push it open, he cannot recover for animals killed or injured by a passing train, it appearing that they had come upon the track through the gate. *Chicago, B. & Q. R. Co. v. Dannel*, 48 *Ill. App.* 251.

**220. Failure to rebuild or repair fences.**\*—Plaintiff turned his colt into a pasture beside a railroad track knowing that there was nothing to prevent the animal from going upon the track, and using no precaution to prevent it from doing so by repairing or rebuilding the railroad fence, which had been destroyed by fire, which, under the statute, he had a right to do, and the animal went upon the track and was killed. *Held*, such contributory negligence as to defeat a recovery. The fact that he had no other pasture was of no importance.

*Martin v. Stewart*, 38 *Am. & Eng. R. Cas.* 316, 73 *Wis.* 553, 41 *N. W. Rep.* 538.

Where cattle break through a fence on the side of a railroad, and the owner repairs it with defective materials, but it is apparently sufficient, and his cattle again break through the same place and are killed, and he knew that the fence was defective, and failed to notify the company—*held*, that he was guilty of negligence and could not recover. *Chicago, B. & Q. R. Co. v. Seirer*, 60 *Ill.* 295.

Under the Ohio act of March 25, 1859 (1. S. & C. 331), where a railroad fence forms the boundary of an inclosed field, it is the duty of the landowner, as well as the railroad company, to maintain the fence in proper order. If the landowner knows that such fence is insufficient, and, omitting to repair it, turns his stock into a field which it incloses, and by reason of such insufficiency the stock is killed upon the track without fault of the company in running its trains, the landowner is guilty of such contributory negligence as will prevent a recovery by him. *Sandusky & C. R. Co. v. Sloan*, 27 *Ohio St.* 341, 11 *Am. Ry. Rep.* 264. —FOLLOWED IN *Dayton & M. R. Co. v. Miami County Infirmary*, 32 *Ohio St.* 566.

Where a fence, constructed by an individual and landowner; serves as a partition fence between a railroad track and the inclosed fields of such individual owner, but not so divided that each owner is charged with maintaining in repair a distinct portion thereof, the railroad company and individual landowner are each under equal obligations to keep and maintain the entire fence in repair until so divided, and if the landowner, knowing the partition fence to be out of repair, turns his stock into a field inclosed by such defective fence, and, by reason of its insufficiency, his stock go upon the railroad track and are killed by a passing train run without negligence, such landowner is chargeable with contributory negligence, and cannot recover for the loss. *Dayton & M. R. Co. v. Miami County Infirmary*, 32 *Ohio St.* 566. —FOLLOWING *Sandusky & C. R. Co. v. Sloan*, 27 *Ohio St.* 341. —DISTINGUISHED IN *Busby v. St. Louis, K. C. & N. R. Co.*, 81 *Mo.* 43.

Where the owner of stock knows that the fastening of a gate between his lands and a railroad track is insecure, and takes no measures to inform the company, nor to render it safe himself, cannot recover if his stock pass through it and are injured on

\* See *ante*, 140-151.

the track. *Chicago & A. R. Co. v. Buck*, 14 Ill. App. 394.

**221. Leaving gate open or bars down.\***—A railroad company that is without fault itself is not liable for injuries to stock that go upon the track through a gate left open by a landowner. *Hook v. Worcester & N. R. Co.*, 58 N. H. 251.

Where gates are allowed at farm crossings for the convenience of an adjoining landowner, he is bound to keep them closed, and if he fails to do so, and his animals pass through them to the railroad and are injured or killed, he cannot recover from the company on the ground that it has neglected to fence its track as required by the statute. In such case, and as to such landowner, the company is not bound to maintain cattle-pits at such crossing. *Bond v. Evansville & T. H. R. Co.*, 23 Am. & Eng. R. Cas. 200, 100 Ind. 301.—FOLLOWED IN Louisville, N. A. & C. R. Co. v. Goodbar, 102 Ind. 596.

Where the owner of land is permitted for his own convenience to maintain drawbars or gates in the fence along the line of a railroad, the company is not liable for damages done to his stock passing onto the track through such bars or gates, by reason of his own neglect or default in maintaining them. *Indianapolis, P. & C. R. Co. v. Shimer*, 17 Ind. 295.—DISTINGUISHED IN *Bartlett v. Dubuque & S. C. R. Co.*, 20 Iowa 188. QUOTED IN *Bond v. Evansville & T. H. R. Co.*, 23 Am. & Eng. R. Cas. 200, 100 Ind. 301.

The tenant of the landowner using the crossing is subject to the same rule. *Indianapolis, P. & C. R. Co. v. Shimer*, 17 Ind. 295.

Where a landowner leaves a gate open between his lands and a railroad track, neither he nor his lessees nor employes can hold a railroad company liable for a horse that passes through the gate and goes upon the track and is injured. *Diamond Brick Co. v. New York C. & H. R. R. Co.*, 58 Hun (N. Y.) 396, 34 N. Y. S. R. 637, 12 N. Y. Supp. 22.

The owner of stock cannot recover from a railroad company where his son leaves a gate open through which they pass onto the track and are injured. *Richardson v. Chicago & N. W. R. Co.*, 56 Wis. 347, 14 N. W. Rep. 176.

**222. Allowing animal to be in dangerous place.**—(1) Generally.—A

company is entitled to the use of its track at highway crossings free from unnecessary obstructions by owners of live stock, and if such owner negligently allows his stock to remain on the track at such crossing, and those in charge of the train give the statutory signals, the company is not liable for the killing, as the loss is due to the owner's own negligence. Besides not being allowed to recover for the loss, the owner may be liable to any persons on the train that may be injured by a collision with his stock. *Chicago, B. & Q. R. Co. v. Cauffman*, 28 Ill. 513.

In the absence of proof of negligence on the part of a company's employes, an owner of live stock cannot recover if he knowingly permits them to go on the track where they are killed. *Connyers v. Sioux City & P. R. Co.*, 78 Iowa 410, 43 N. W. Rep. 267.—DISTINGUISHING *Whitbeck v. Dubuque & P. R. Co.*, 21 Iowa 103; *Evans v. Burlington & M. R. R. Co.*, 21 Iowa 374; *Searles v. Milwaukee & St. P. R. Co.*, 35 Iowa 490. FOLLOWING *Smith v. Chicago, R. I. & P. R. Co.*, 34 Iowa 506.

Where a landowner grants a right of way to a railroad company without any agreement as to fencing it, the company is not liable for cattle killed unless the killing could have been avoided, where the owner permits such cattle to run and graze near such unfenced road. *Louisville & F. R. Co. v. Milton*, 14 B. Mon. (Ky.) 61.—CRITICISING *New York & E. R. Co. v. Skinner*, 19 Pa. St. 298.—CHANGED BY STATUTE IN *Kentucky C. R. Co. v. Lebus*, 14 Bush (Ky.) 518. FOLLOWED IN *Louisville & F. R. Co. v. Ballard*, 2 Metc. (Ky.) 177.

The fact of the time of the accident was important, and, perhaps, conclusive on the question of contributory negligence on the part of the plaintiff's intestate. It was negligence on his part to have his teams on the track at a time when he knew that loaded cars were likely to be sent over it. *Good v. New York, L. E. & W. R. Co.*, 18 N. Y. S. R. 773, 50 Hun 601, 2 N. Y. Supp. 419.

(2) *Illustrations.*—It was negligence on the part of the landowner to confine his animals to an inclosure embracing a portion of the track, where it was crossed by a private lane, with no bars or other appliances to restrain them from loitering on the track, and that where, being so confined, they were injured without carelessness of the persons running the cars, the company

\* See ante, 181.

was not liable. *Indianapolis, P. & C. R. Co. v. Brownburg*, 32 Ind. 199.

Where the owner of stock, in violation of the law, tethers his stock on the public highway, such act bars a recovery against the railway for injuries to such stock, notwithstanding its failure to fence. *Patton v. West End Narrow Gauge R. Co.*, 14 Mo. App. 589.

One driving an unbroken or vicious horse, or one easily frightened by a locomotive, along a public road running side by side with a railroad, does so at his own peril; the right of the company to move its trains on its road is as high as that of the individual to use the public road. *Philadelphia, W. & B. R. Co. v. Stinger*, 78 Pa. St. 219.

Near where the cattle were killed was a small brook over which the company had built a culvert; below the culvert was the plaintiff's pasture in which the cattle were kept, and across the creek in this pasture he had made a fence of long poles. A freshet brought down driftwood, which floated through the culvert and against the fence, and the company aided it through the culvert to prevent its accumulating above to an unsafe amount. At sunset the plaintiff knew of the exposed situation of his fence but would not remove his cattle, and in the night the fence was swept away, the cattle went upon the road, and were killed. *Held*, that the plaintiff could not recover. *Indianapolis & C. R. Co. v. Wright*, 13 Ind. 213.

A farmer turned his stock loose upon the track of a railroad on Sunday, not expecting any trains to pass. Hearing a train approaching, he got upon the track to drive his stock off; and, although the train was in plain sight from the time it was several hundred yards off, he failed to escape in time, and was killed. *Held*, that he had been guilty of such conduct as precluded all right of recovery, the railroad company not being in fault. *Schittenhelm v. Louisville & N. R. Co.*, (Ky.) 19 Am. & Eng. R. Cas. 111.—DISTINGUISHED IN *Bostwick v. Minneapolis & P. R. Co.*, 2 N. Dak. 440.

The charter of a railroad company not obliging them to fence the road against adjoining lands, unless requested so to do by the owners, they agreed with the owner of a certain adjoining piece of land not to fence the road against his land, and a cow placed upon the above-mentioned land strayed onto the track and was killed by the passing of the cars. *Held*, that the owner, having contributed, by his own neglect in permitting

the cow to pass upon the road, to its destruction, was not entitled to damages for its loss, and that the charge of the court, that, "if the cow was killed by the neglect of the defendants to use ordinary care and skill in the common and ordinary use of the lands for railroad purposes, then the defendants would be liable to the owner for damages," was erroneous. *Tower v. Providence & W. R. Co.*, 2 R. I. 404.—REVIEWING *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255.—DISAPPROVED IN *Cranston v. Cincinnati, H. & D. R. Co.*, 1 Handy (Ohio) 193.

**223. Turning cattle into right of way.**—Where one habitually turns his horses into the right of way of a railroad company, through a gate maintained for his accommodation, in order that they may reach a pasture-field adjoining the right of way, between which and the latter there is no fence, he cannot recover their value if killed. *Fl. Wayne, C. & L. R. Co. v. Woodward*, 31 Am. & Eng. R. Cas. 546, 112 Ind. 118, 11 West. Rep. 101, 13 N. E. Rep. 260.—QUOTING *Louisville, N. A. & C. R. Co. v. Goodbar*, 102 Ind. 596.—DISTINGUISHED IN *Heller v. Abbot*, 79 Wis. 409.

**224. Driving cattle upon track.**—If one wantonly or carelessly drives stock upon the track of a railroad he is guilty of contributory negligence, and, if the stock is injured, cannot recover in an action against the company. *Forbes v. Atlantic & N. C. R. Co.*, 76 N. Car. 454, 14 Am. Ry. Rep. 313.

**225. Driving colts along right of way.**—One who drives colts along a railroad track which is fenced cannot recover if they are injured by a passing train without negligence on the part of those in charge of it. *Davidson v. Central Iowa R. Co.*, 35 Am. & Eng. R. Cas. 158, 75 Iowa 22, 39 N. W. Rep. 163.

**226. Failure to look and listen before driving cattle over crossing.**—A person who drives his cattle over a railroad crossing without looking or listening is guilty of negligence; but where the cattle are killed by a train, and it is shown that the company's employes, by the use of ordinary care and diligence, could have avoided the injury after discovering the danger, a recovery cannot be defeated on account of the owner's contributory negligence. *Wooster v. Chicago, M. & St. P. R. Co.*, 35 Am. & Eng. R. Cas. 152, 74 Iowa 593, 38 N. W. Rep. 425.—FOLLOWING *Morris v. Chicago, B. & Q. R. Co.*, 45 Iowa 29.

Plaintiff's wagon was being driven by his son along a street, another man sitting beside him, and in attempting to pass over a railway crossing with which both were familiar a locomotive struck the wagon, by which it and the horses were injured. It appeared that neither of them was looking out for or thinking of the train; and it was not until they were within fifteen yards of the track that the man saw the train, when he sharply told the son to put on the whip, but he said the son appeared confused and did nothing; he then attempted to get the whip and whip the horses across, but it was too late. The son acknowledged having heard what the man said, but said he did not understand him. The weight of evidence went to show that the whistle was sounded and bell rung, and that the train was not going more than six or seven miles an hour. *Held*, that there was such contributory negligence on the driver's part as prevented plaintiff from recovering. *Boggs v. Great Western R. Co.*, 23 U. C. C. P. 573.

**227. Leading frightened horse nearer the engine.**—Where a horse becomes frightened at an engine, the owner is guilty of such contributory negligence as to defeat a recovery, where he leads him still nearer the engine, and the horse becomes unmanageable and is killed. *Louisville & N. R. Co. v. Schmidt*, 8 Am. & Eng. R. Cas. 248, 81 Ind. 264.

**228. Leading horse on track when train is coming.**—Plaintiff working upon a bridge across defendant's railroad track, with knowledge of an approaching train, called to his little boy, eleven years old, to lead his horse across the track. In doing so the horse, through fright, escaped and got upon the track and was killed by the train. The proof failed to show negligence in the company. *Held*, that a verdict against the company for the value of the horse could not be sustained; that plaintiff was guilty of great negligence on his part; that the law did not require a railroad to ring a bell at such a place, it being only a farm crossing. *Toledo, P. & W. R. Co. v. Head*, 62 Ill. 233.

**229. Leaving horse unhitched near the track.**—Where the plaintiff left his horse unguarded and unhitched, and in close proximity to a railroad track, upon which, as he knew, it was morally certain a train would pass within a few feet of where

his horse was standing, with another train standing on the track not more than fifty feet away, ready to pull out, and the thoroughfares in the immediate vicinity blockaded with horses and vehicles, a recovery was denied, although the defendant was guilty of negligence in failing to ring the bell, in failing to place a man on the rear end as it backed up at night, and in failing to place any head or other light at such rear end. *Louisville & N. R. Co. v. Eves*, 1 Ind. App. 224, 27 N. E. Rep. 580.—*QUOTING Deville v. Southern Pac. R. Co.*, 50 Cal. 383.

Plaintiff's servant drove to one of defendant's stations, and, leaving the horse unhitched, went into the station. The horse was frightened by the whistle of an approaching train, ran upon the track, and was killed. *Held*, that there could be no recovery. *Edwards v. Philadelphia & R. R. Co.*, 148 Pa. St. 531, 23 Atl. Rep. 894.

**230. Riding unbridled horse upon the track.**—Sending a boy to ride a horse without a bridle is such negligence as will defeat a recovery where the horse goes upon a railroad track, and, by reason of not having a bridle, the boy is unable to move him in time to avoid a collision with the train. *Wabash, St. L. & P. R. Co. v. Krough*, 13 Ill. App. 431.

**231. Rushing cattle across track in front of approaching train.**—In actions based on negligence there can be no recovery where the plaintiff and defendant stand *in pari delicto*. So *held*, in an action where it appeared that plaintiff, who was driving cattle, was told by a companion that he believed a train was approaching, and replied that he thought not, and that they would "rush" the cattle over the track anyway, and where some of them were killed by a train running without the required signals. *Ohio & M. R. Co. v. Eaves*, 42 Ill. 288.

**232. Stopping team close to track when train is approaching.**—It is the duty of those in charge of a team unaccustomed to trains and easily frightened, to exercise proper care when trains are approaching, and they should not stop the team close to the track; and if they do so the railroad company is under no obligation to provide against their failure to exercise proper care. *Hargis v. St. Louis, A. & T. R. Co.*, 75 Tex. 19, 12 S. W. Rep. 953.



### δ. What Is Not Contributory Negligence.

**233. What does not amount to negligence on part of owner, generally.**—The plaintiff, who sued to recover for cattle killed by defendant's train, having, as he had a right to do, built his pasture-fence and located the gate for his cattle on his own land, the maintaining and use of this fence and gate did not constitute contributory negligence on his part, and the court committed no error in failing to instruct the jury on contributory negligence. *Chattanooga, R. & C. R. Co. v. Palmer*, 89 Ga. 161, 15 S. E. Rep. 34.

A party lawfully crossing a railroad at grade with a drove of cattle is not bound to give a signal to an approaching train. If necessary, it is the duty of the company to employ a person to give signals. *Reeves v. Delaware, L. & W. R. Co.*, 30 Pa. St. 454.

Maintaining a pasture-field through which an unfenced railroad track runs is not such contributory negligence as will prevent the owner of stock killed from recovering from the company. *Harmon v. Columbia & G. R. Co.*, 32 So. Car. 127, 10 S. E. Rep. 877.—QUOTING *Simkins v. Columbia & G. R. Co.*, 20 So. Car. 258.

The owner of horses is not chargeable with an unlawful act or with negligence in allowing them to get upon a railroad track, if it be uninclosed. But he by so doing takes the risk of their loss or injury by unavoidable accident. But if killed by the negligence of the servants of the railroad company in running the train, it is responsible. *Washington v. Baltimore & O. R. Co.*, 10 Am. & Eng. R. Cas. 749, 17 W. Va. 190.—QUOTING *Louisville & N. R. Co. v. Wainwright*, 3 Bush (Ky.) 149; *Louisville & F. R. Co. v. Ballard*, 2 Metc. (Ky.) 177. NOT FOLLOWING *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255, 4 N. Y. 349; *Clarke v. Syracuse & U. R. Co.*, 11 Barb. 112; *Talmage v. Rensselaer & S. R. Co.*, 13 Barb. 493; *Terrey v. New York C. R. Co.*, 22 Barb. 574.—FOLLOWED IN *Johnson v. Baltimore & O. R. Co.*, 25 W. Va. 570; *Layne v. Ohio River R. Co.*, 35 W. Va. 438. QUOTED IN *Riley v. West Virginia C. & P. R. Co.*, 27 W. Va. 145; *Nuzum v. Pittsburgh, C. & St. L. R. Co.*, 30 W. Va. 228.

In such a case the servants of the railroad company are bound to use ordinary precaution to discover that the horses are on the track, as well as to avoid injuring them after they are seen. *Washington v. Baltimore*

*& O. R. Co.*, 10 Am. & Eng. R. Cas. 749, 17 W. Va. 190.

In such a case, if the plaintiff be present and fail to give any signal to the approaching train or to drive his horses off the track, when he could have done so, the company would still be responsible, if the engineer of the train saw the horses on the track in ample time to avoid injuring them, or could have so seen them in such ample time by the use of ordinary care. The plaintiff, under such circumstances, could not reasonably anticipate that the engineer of the company would be guilty of such negligence, and therefore he cannot be considered as contributing to the accident. *Washington v. Baltimore & O. R. Co.*, 10 Am. & Eng. R. Cas. 749, 17 W. Va. 190.

**234. Illustrations.**—Plaintiff's mule, in care of a driver, broke loose at night from where he was camping and went over a stone gap of a railroad into a plantation, where it was run over by the cars and killed. Held, that contributory negligence could not be imputed to plaintiff, either from the fact that the driver was negligent in allowing it to escape, or from the fact that the mule was loose; and that in such case no question as to the sufficiency of the fence of the plantation is raised. *South & N. Ala. R. Co. v. Williams*, 65 Ala. 74.—DISTINGUISHED IN *Alabama G. S. R. Co. v. Powers*, 19 Am. & Eng. R. Cas. 502, 73 Ala. 244.

It is not contributory negligence, defeating a recovery for stock killed, for a sheepherder, after having rounded up his sheep in a field about one quarter of a mile from a railroad track, to leave them there overnight and go home. *McCoy v. Southern Pac. R. Co. (Cal.)*, 26 Pac. Rep. 629.

Where a team was stalled at a railroad crossing, near a curve in the railroad, the driver could not be charged with negligence in trying to extricate the team, instead of going around the curve to stop any train that might be approaching. *Chicago & A. R. Co. v. Hogarth*, 38 Ill. 370.

Where the evidence showed that the plaintiff had taken his horses upon the company's right of way, and allowed them to graze there a short time, but before the train arrived he had taken them upon the public highway, he, with the two horses he was leading, being fifty or sixty feet, and the animal that was killed, which was following, being about thirty feet, west of the crossing when said train approached that frightened



it and afterwards killed it, the fact that he had previously taken said animals upon and over said company's right of way will not prevent his recovery, provided he is otherwise entitled to recover. *Toledo, St. L. & K. C. R. Co. v. Jackson*, 5 Ind. App. 547, 32 N. E. Rep. 793.—QUOTING *Louisville, E. & St. L. R. Co. v. Hart*, 2 Ind. App. 130.

If plaintiff's horse is injured through a defect in a railroad's premises while loading freight on the cars, if the loading might have been done more speedily and without the use of horses if some other means had been adopted, the plaintiff was not at fault if the method made use of by him was reasonably well adapted to the particular work in hand, and was in all respects attended with ordinary care, such care as men of ordinary prudence, sense, and discretion would be expected to use under the same circumstances. *Chicago & I. C. R. Co. v. DeBaum*, 2 Ind. App. 281, 28 N. E. Rep. 447.

Where it appeared that the stock was killed through the negligence of the trainmen on a passing train; that the stock was running at large, and strayed on the track; that the night preceding the injury it had been shut up in the plaintiff's barn, but without his knowledge had gotten out of the barn into the barn-lot, and thence through a gate onto the road, and thus strayed away to the place of injury—held, that the fact that plaintiff had another horse which was in the habit of opening the gate of the barn-lot, and did in fact open the gate at that time, did not amount to such contributory negligence as to defeat the plaintiff's recovery. *Pacific R. Co. v. Brown*, 14 Kan. 469.

Plaintiff turned his mule into a field adjoining a railroad track, which was sufficiently fenced on all sides, but during the night the division fence between that and another field blew down, and the mule passed to the other field, and from it over an insufficient fence onto the railroad track. Held, that the facts would not support a charge of contributory negligence. *Williams v. Missouri Pac. R. Co.*, 74 Mo. 453.

Plaintiff owned a farm bisected by a railroad, which the company fenced, as required by statute. Plaintiff corralled twenty-three head of cattle on an inclosure of about three acres on one side of the track, the company's fence being one side of the inclosure,

having first looked along the railroad fence, which apparently was in good condition; but in the morning a board was found broken and part of the cattle had gone upon the track and been killed or injured. The evidence as to the soundness of the fence was conflicting. Held, not sufficient evidence to show contributory negligence, and a verdict for plaintiff would be upheld. *Union Pac. R. Co. v. Schwenck*, 13 Neb. 478.

**235. Escape of animal without owner's fault.**—The owner of animals killed by a railroad train is not chargeable with contributory negligence where they escape and get upon an unfenced railroad track without his fault. *Cox v. Minneapolis, S. St. M. & A. R. Co.*, 38 Am. & Eng. R. Cas. 287, 41 Minn. 101, 42 N. W. Rep. 924.

**236. Escape of animal from securely-fenced inclosure.**—Negligence cannot be imputed to a person simply from the fact that his beasts have escaped from his well-fenced field onto a railroad track. *Spinner v. New York C. & H. R. R. Co.*, 67 N. Y. 133; affirming 6 Hun 600.—FOLLOWING *Corwin v. New York & E. R. Co.*, 13 N. Y. 42.—QUOTED IN *White v. Utica & B. R. Co.*, 15 Hun (N. Y.) 333.

One who places a horse in an inclosure securely fenced along the line of a railroad is not chargeable with contributory negligence because the horse leaps the fence and escapes, unless it appears the horse was one that ordinary fences would not confine. *Dennis v. Louisville, N. A. & C. R. Co.*, 35 Am. & Eng. R. Cas. 141, 116 Ind. 42, 15 West. Rep. 547, 18 N. E. Rep. 179, 1 L. R. A. 448.—QUOTED IN *Chicago, St. L. & P. R. Co. v. Fenn*, 3 Ind. App. 250.

The owner of stock who resides where the herd law is not in force, and who places his cattle in a field inclosed by a fence reasonably sufficient, is not precluded from recovering for injuries thereon inflicted by a railroad train. *Story v. Chicago, M. & St. P. R. Co.*, 79 Iowa 402, 44 N. W. Rep. 690.

**237. Gates left open by third persons.**—The owner of horses left them in a pasture adjoining a railroad, which was securely fenced, and went to another state, not leaving any person to look after the horses, which went upon the railroad track through a gate which had been recently left open by trespassers, and the horses were negligently injured by a passing train.

\* See ante, 182.

*Held*, that the owner was not guilty of contributory negligence. *Toledo, W. & W. R. Co. v. Milligan*, 52 Ind. 505.

**238. Turning cattle into fields where track is unfenced.**\*—Where a railroad company has failed to fence its track as required by statute, it is not contributory negligence for an adjoining landowner to turn his stock into a field bordering the track which is not fenced. *Wilder v. Maine C. R. Co.*, 65 Me. 332.—REVIEWING *Rogers v. Newburyport R. Co.*, 1 Allen (Mass.) 17; *Gardner v. Smith*, 7 Mich. 410; *McCoy v. California Pac. R. Co.*, 40 Cal. 532; *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223.—APPROVED IN *Cleveland, C. & I. R. Co. v. Scudder*, 13 Am. & Eng. R. Cas. 561, 40 Ohio St. 173. QUOTED IN *Cressey v. Northern R. Co.*, 15 Am. & Eng. R. Cas. 540, 59 N. H. 564, 47 Am. Rep. 227.—*Donovan v. Hannibal & St. J. R. Co.*, 26 Am. & Eng. R. Cas. 588, 89 Mo. 147, 1 S. W. Rep. 232.

It is not contributory negligence to turn stock into a field that the owner knows is not fenced on the side adjoining a railroad track. *McCoy v. California Pac. R. Co.*, 40 Cal. 532.—QUOTED IN *Cressey v. Northern R. Co.*, 15 Am. & Eng. R. Cas. 540, 59 N. H. 564, 47 Am. Rep. 227. REVIEWED IN *Wilder v. Maine C. R. Co.*, 65 Me. 332.

It is not contributory negligence in a plaintiff to put cattle in an inclosure of forty acres through which a railroad runs. The fact that the stock law was in force where the inclosure was situate makes no difference. *Horner v. Williams*, 35 Am. & Eng. R. Cas. 155, 100 N. Car. 230, 5 S. E. Rep. 734.

**239. Turning cattle into fields where railroad fences are defective.**†

—Where a statute makes a railroad company liable for stock killed by reason of failing to fence its track, it is no defense to an action for killing stock that the owner turned his stock out knowing that the fence was down or defective. *Bellefontaine R. Co. v. Reed*, 33 Ind. 476.

It is not conclusive evidence of contributory negligence for one to allow his domestic animals to run in his pasture adjoining a railroad, although he knew that the

dividing fence, which the railroad company was bound to maintain, was defective. *Evans v. St. Paul & S. C. R. Co.*, 30 Minn. 489, 16 N. W. Rep. 271.

Where a cow is sent by the owner to a lot adjoining a railroad track in charge of a boy who permits her to go through an opening temporarily made by the railroad company while making certain improvements, proof that the owner knew that the fence was open will not excuse the company for killing her. *Brady v. Rensselaer & S. R. Co.*, 1 Hun (N. Y.) 378, 3 T. & C. 537.

It is not contributory negligence for the owner of hogs to turn them into a field adjoining a railroad track which he knows the company has not fenced as required by statute. *Cleveland, C. & I. R. Co. v. Scudder*, 13 Am. & Eng. R. Cas. 561, 40 Ohio St. 173.—APPROVING *Rogers v. Newburyport R. Co.*, 1 Allen (Mass.) 16; *Shepard v. Buffalo, N. Y. & E. R.*, 35 N. Y. 641; *Toledo, W. & W. R. Co. v. Cory*, 39 Ind. 218; *Hammond v. Chicago & N. W. R. Co.*, 43 Iowa 168; *McCoy v. California Pac. R. Co.*, 40 Cal. 532; *Wilder v. Maine C. R. Co.*, 65 Me. 332. FOLLOWING *Pittsburgh, C. & St. L. R. Co. v. Smith*, 38 Ohio St. 410.

Under the Vermont statute, Rev. Laws, § 3184, one is not guilty of contributory negligence in turning his cattle into his pasture, although he has knowledge that the division fence of an adjoining landowner is insufficient, and that if his cattle should escape into such owner's field they would be liable to injury; and in an action to recover for injuries to the plaintiff's cattle evidence is not admissible in behalf of the defendant to prove such knowledge. *Eddy v. Kinney*, 60 Vt. 554, 15 Atl. Rep. 198.

#### c. Comparative Negligence.

**240. In Georgia.**—Where neither the railroad company nor the owner of stock is required to fence, but the rights of each on uninclosed lands are the same, if stock be injured on such lands by passing trains the diligence of both the owner and the railroad company is material. *Georgia R. & B. Co. v. Neely*, 56 Ga. 540.

In an action for killing a mule, the contributory negligence of plaintiff, however slight, will count against him in mitigation of damages, but the plaintiff is only bound to exercise ordinary care or reasonable diligence. *Georgia R. & B. Co. v. Neely*, 56 Ga. 540.—APPROVED IN *Western & A. R.*

\* See post, 281.

Contributory negligence in placing cattle in unfenced field, see notes, 15 AM. & ENG. R. CAS. 540; 20 Id. 468.

† See post, 281.

Co. v. Bloomingdale, 74 Ga. 604. DISTINGUISHED IN Georgia R. Co. v. Thomas, 68 Ga. 744.

**241. In Illinois.**—Whether permitting male animals to run at large, which are injured by trains, is contributory negligence, depends, first, upon whether permitting them to run at large was a proximate or only a remote cause of the injury; and if it was a proximate cause, then, secondly, whether such negligence of the owner was slight and that of the company gross. *Rockford, R. I. & St. L. R. Co. v. Irish*, 72 Ill. 404.

It appearing from the evidence that the colt was on the railroad track when a train of several cars approached, and the engine-driver whistled for putting on brakes, which was not done, and that if the brakes had been applied, in obedience to the signal, the train could have been controlled so as to prevent the accident, and no explanation was made why the brakes were not applied—held, that, even if the plaintiff was negligent in permitting the colt to run at large, his negligence was slight and that of the defendant gross, and that plaintiff was entitled to recover. *Toledo, W. & W. R. Co. v. McGinnis*, 71 Ill. 346.—DISTINGUISHING *Rockford, R. I. & St. L. R. Co. v. Linn*, 67 Ill. 109.

**242. In Wisconsin.**—An owner of live stock who is guilty of negligence in permitting them to go upon a railroad track cannot recover from the company damages for an injury thereto, on proof showing slight negligence on the part of the company. *Galpin v. Chicago & N. W. R. Co.*, 19 Wis. 604.

## 2. Animals Running at Large.\*

### a. When Owner May Recover.

**243. Rule where animal is lawfully running at large—Alabama.**—One living on the line of a railroad that runs through his pasture is guilty of no negligence in allowing his stock to run upon his own pastures or upon the commons. He is not required in Alabama to fence against

a railroad. *Birmingham Mineral R. Co. v. Harris*, 98 Ala. 326, 13 So. Rep. 317.—QUOTING *Mobile & O. R. Co. v. Williams*, 53 Ala. 595.

Apart from the influence of any special statute, the law in Alabama is, that it is not such contributory negligence for the owner of stock to suffer them to run at large as to prevent him from recovering damages for injuries negligently done to them by persons or corporations owning or controlling railroads. *Alabama G. S. R. Co. v. McAlpine*, 15 Am. & Eng. R. Cas. 544, 71 Ala. 545.—DISTINGUISHED IN *Alabama G. S. R. Co. v. Powers*, 19 Am. & Eng. R. Cas. 502, 73 Ala. 244.—*Alabama G. S. R. Co. v. Jones*, 15 Am. & Eng. R. Cas. 549, 71 Ala. 487.

**244. — California.**—In California the owner is not guilty of negligence in allowing his horse to run at large. *Waters v. Moss*, 12 Cal. 535.

Permitting animals to run at large near a railroad is not such contributory negligence as to prevent a recovery from the company which failed to use ordinary precautions and reasonable care and diligence to avoid injuring them. *Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351.

**245. — Florida.**—A company is liable for injuring or killing cattle or other live stock upon its track by its trains whenever such killing or injury is the result of negligence upon the part of the agents operating the train. The fact that the owner of the live stock permits them to run at large does not constitute contributory negligence. *Savannah, F. & W. R. Co. v. Geiger*, 29 Am. & Eng. R. Cas. 274, 21 Fla. 669, 58 Am. Rep. 697.

**246. — Illinois.**—Owners of stock killed by a train are not chargeable with contributory negligence because the stock are running at large at the time. Individuals may permit their stock to run on the commons and highways of the country, and in doing so they are guilty of no wrong. *Chicago, B. & Q. R. Co. v. Cauffman*, 38 Ill. 424.—DISTINGUISHED IN *Rockford, R. I. & St. L. R. Co. v. Linn*, 67 Ill. 109.

It being lawful for animals to run at large upon the commons, the owner of a cow, who lives in the country, and turns her out upon the commons, whence she strays upon a railroad, at a public crossing, and is killed, will not be guilty of negligence. *Rockford, R. I. & St. L. R. Co. v. Rafferty*, 73 Ill. 58.

\* See ante, 53-60, 152-159, 187-206; post, 288, 337, 411.

Contributory negligence in allowing animals to run at large, see notes, 13 AM. & ENG. R. CAS. 578, 584; 15 Id. 557; 20 Id. 485; 22 Id. 625.

Allowing stock to run loose in vicinity of unfenced track, see 42 AM. & ENG. R. CAS. 578 abstr.

The owner of a horse killed by a railroad train has not been guilty of negligence in allowing the animal to run at large through the streets of a village through which an unfenced railroad track ran, he having the legal right to the use of the street in common with the railroad. *Chicago & A. R. Co. v. Engle*, 84 Ill. 397.

**247. — Indiana.**—Where an order of the board of county commissioners authorizes an animal to run at large, the owner is not prevented from recovering for a negligent injury to the animal at a public railroad crossing by the mere fact that he permitted it to run at large, such fact not being imputed to him as a contributory fault. *Chicago, St. L. & P. R. Co. v. Nash*, 1 Ind. App. 298, 27 N. E. Rep. 564.

**248. — Iowa.**—(1) *Generally.*—The owner of stock who is guilty of no contributory negligence further than permitting it to run at large may recover from a railroad company who negligently kills it. *Searles v. Milwaukee & St. P. R. Co.*, 35 Iowa 490, 5 Am. Ry. Rep. 524.—DISTINGUISHED IN *Connyers v. Sioux City & P. R. Co.*, 78 Iowa 410, 43 N. W. Rep. 267. REVIEWED IN *Moses v. Southern Pac. R. Co.*, 42 Am. & Eng. R. Cas. 555, 18 Oreg. 385.

In Iowa, permitting cattle to run at large is not negligence on the part of the owner; neither is he a trespasser if the cattle go upon an unfenced railroad track. *Alger v. Mississippi & M. R. Co.*, 10 Iowa 268.—APPROVING *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172; *Stadwell v. Rich*, 14 Conn. 293; *Barnum v. Van Dusen*, 16 Conn. 200; *Beaufort v. Danner*, 1 Strobb. (So. Car.) 176; *Seeley v. Peters*, 10 Ill. 130. FOLLOWING *Wagner v. Bissell*, 3 Iowa 396; *Heath v. Coltenback*, 5 Iowa 490.—DISTINGUISHED IN *Pearson v. Milwaukee & St. P. R. Co.*, 45 Iowa 497. FOLLOWED IN *Evans v. Burlington & M. R. R. Co.*, 21 Iowa 374.

Permitting stock to run at large in the vicinity of a railroad crossing which is known to be dangerous is not such contributory negligence as will prevent a recovery if they are negligently killed by the company. *Kuhn v. Chicago, R. I. & P. R. Co.*, 42 Iowa 420.—DISTINGUISHED IN *Van Horn v. Burlington, C. R. & N. R. Co.*, 7 Am. & Eng. R. Cas. 591, 59 Iowa 33. FOLLOWED IN *Miller v. Chicago & N. W. R. Co.*, 59 Iowa 707.

The owner of cattle allowing them to run at large on the public highway is not

guilty of contributory negligence when such running at large is not prohibited by municipal ordinance. *Whitbeck v. Dubuque & P. R. Co.*, 21 Iowa 103.—DISTINGUISHED IN *Connyers v. Sioux City & P. R. Co.*, 78 Iowa 410, 43 N. W. Rep. 267.

(2) *Under § 1289 of the Code.*—Allowing swine to run on one's own land in close proximity to an unfenced railroad track is not that "wilful act of the owner" which, under § 1289 of the Code, exonerates the railroad company from liability in case they go on the track and are killed. *Lee v. Minneapolis & St. L. R. Co.*, 20 Am. & Eng. R. Cas. 476, 66 Iowa 131, 23 N. W. Rep. 299.

The mere negligence of the owner of a team injured while running at large will not defeat his recovery. The statute provides that the company shall be liable unless the damage was caused by the wilful act of the owner or his agent. *Inman v. Chicago, M. & St. P. R. Co.*, 60 Iowa 459, 15 N. W. Rep. 286.

An instruction that "if plaintiff knowingly allowed his horse to be upon and to frequent the depot and station grounds of defendant, where it was not required to fence, and where there was danger of the horse being struck by the trains of defendant, he is guilty of contributory negligence, and cannot recover in this action," i.e., for double damages, under Iowa Code, § 1289—held, properly refused. *Miller v. Chicago & N. W. R. Co.*, 59 Iowa 707, 13 N. W. Rep. 859.—DISTINGUISHING *Van Horn v. Burlington, C. R. & N. R. Co.*, 59 Iowa 33. FOLLOWING *Kuhn v. Chicago, R. I. & P. R. Co.*, 42 Iowa 420.

**249. — Kansas.**—In counties where no order has been made by the board of county commissioners regulating or prohibiting the running at large of animals, individuals may permit their stock to run on public highways, and in so doing they are not necessarily guilty of negligence. *Missouri Pac. R. Co. v. Wilson*, 11 Am. & Eng. R. Cas. 447, 28 Kan. 537.—DISTINGUISHING *Union Pac. R. Co. v. Rollins*, 5 Kan. 167.

**250. — Mississippi.**—An owner of domestic animals in Mississippi has the right to pasture them on the commons of incorporated towns, in the absence of local regulations to the contrary, and such conduct, though dangerous and reprehensible, does not diminish his right to compensation from

\* See ante, 217, 218.

those who injure them. *Chicago, St. L. & N. O. R. Co. v. Jones*, 11 *Am. & Eng. R. Cas.* 450, 59 *Miss.* 465.

But in so doing he takes the risk of their loss or injury by unavoidable accident, such as going upon a railroad track. *Ratford v. Mississippi C. R. Co.*, 43 *Miss.* 233; *Memphis & C. R. Co. v. Blakeney*, 43 *Miss.* 218.

Persons in Mississippi living near railroads have the same right as those living at a greater distance to turn their cattle upon the range, but in doing so they assume the increased danger of accidents that cannot be avoided. *New Orleans, J. & G. N. R. Co. v. Field*, 46 *Miss.* 573, 2 *Am. Ry. Rep.* 439.

**251. — Missouri.**—It is not negligence in Missouri to permit stock to run at large near a railroad. *Nolon v. Chicago & A. R. Co.*, 23 *Mo. App.* 353.

By the law of Missouri the owner of animals is not bound to confine his stock within his own inclosures, and he is guilty of no negligence in not confining them. *Hannibal & St. J. R. Co. v. Kenney*, 41 *Mo.* 271.

It is no defence to an action under § 38 of Missouri act for killing stock, that the plaintiff allowed his animals to run at large upon the highway near the railroad. *Turner v. Kansas City, St. J. & C. B. R. Co.*, 19 *Am. & Eng. R. Cas.* 506, 78 *Mo.* 578.—QUOTED IN *Apitz v. Missouri Pac. R. Co.*, 17 *Mo. App.* 419.

For the owner has the lawful right to turn out his horse upon the uninclosed lands adjoining the railroad. *Tarwater v. Hannibal & St. J. R. Co.*, 42 *Mo.* 193.

Railroad companies may be liable in such a case for unavoidable accidents or simple misadventure, but the owner of cattle would not be guilty of negligence unless he wilfully drives cattle upon a railroad track. *Tarwater v. Hannibal & St. J. R. Co.*, 42 *Mo.* 193.

Although an owner is not bound to fence in his stock he may be guilty of such wilfulness or negligence in relation to his animals as to render himself liable to a railroad company for damages caused by their being upon the track. *Hannibal & St. J. R. Co. v. Kenney*, 41 *Mo.* 271.—REFERRING TO *Gorman v. Pacific R. Co.*, 26 *Mo.* 441; *Clark v. Hannibal & St. J. R. Co.*, 36 *Mo.* 202.

An owner of stock may allow it to run at large, notwithstanding that he knows that salt has been left exposed near the railroad track, and such knowledge will, therefore,

not affect his right to recover for the loss of the stock in consequence of the negligence of the railway company. *Burger v. St. Louis, K. & N. W. R. Co.*, 52 *Mo. App.* 119.

Where the evidence showed that plaintiff lived in the village where defendant's station was, and where salt was on the track, and that he turned his horse out about a half-hour before it was killed, knowing that the salt was upon the track and was attracting stock, this was not contributory negligence in plaintiff. It was his legal right to turn his horse outside an inclosure, and he ought not to be forced to lose the benefit of the commons because defendant fails of its duty. *Brown v. Hannibal & St. J. R. Co.*, 27 *Mo. App.* 394.

**252. — Montana.**—The fact that the owner of a ranch in Montana turns his horses out to graze on the public domain in the vicinity of his ranch does not make him guilty of contributory negligence, so as to prevent recovery for the value of the horses killed by a passing train. *McMaster v. Montana Union R. Co.*, 56 *Am. & Eng. R. Cas.* 195, 12 *Mont.* 163.

**253. — North Carolina.**—When plaintiff permitted his steer to leave home and wander upon defendant's track, he was not guilty of contributory negligence under the rule as applied in North Carolina. *Bethea v. Raleigh & A. R. Co.*, 106 *N. Car.* 279, 10 *S. E. Rep.* 1045.

**254. — Ohio.**—In Ohio the owner of cattle, horses, hogs, and other live stock is not compelled to keep them on his own land or within inclosures. Allowing them to run at large on uninclosed lands is not contributory negligence. *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 *Ohio St.* 172.—APPROVED IN *Isbell v. New York & N. H. R. Co.*, 27 *Conn.* 393; *Alger v. Mississippi & M. R. Co.*, 10 *Iowa* 268; *Gorman v. Pacific R. Co.*, 26 *Mo.* 441. EXPLAINED IN *Scott v. Third Ave. R. Co.*, 36 *N. Y. S. R.* 838, 59 *Hun* 456, 13 *N. Y. Supp.* 344. QUOTED IN *Cincinnati, H. & D. R. Co. v. Kassen*, 49 *Ohio St.* 230. REVIEWED IN *Hicks v. Pacific R. Co.*, 64 *Mo.* 430; *Cressey v. Northern R. Co.*, 15 *Am. & Eng. R. Cas.* 540, 59 *N. H.* 564, 47 *Am. Rep.* 227; *Pendleton St. R. Co. v. Stallmann*, 22 *Ohio St.* 1.

The mere fact that plaintiffs' cattle strayed, without right, on the track of the railroad of the defendants, neither establishes that character of negligence which precludes a claim for injury done to them,

nor justifies a want of proper care to save and preserve them from destruction on the part of the defendants. Whether the negligence of the plaintiffs has contributed to the injury in such manner as to preclude their recovery, and whether the defendants have used proper care, are questions depending on the facts and circumstances of the case. *Cranston v. Cincinnati, H. & D. R. Co.*, 1 *Handy (Ohio)* 193.—DISAPPROVING *Munger v. Tonawanda R. Co.*, 4 N. Y. 349; *New York & E. R. Co. v. Skinner*, 19 Pa. St. 302; *Tower v. Providence & W. R. Co.*, 2 R. I. 404.

**255. — Oregon.**—In those jurisdictions in which the common-law rule as to the duty of the owner of cattle to keep them within his own inclosure is not in force—held, that a plaintiff in allowing his stock to run at large commits no unlawful act, nor is he guilty of an omission of ordinary care; and if such stock stray upon an uninclosed railroad track and are injured or killed whether they are rightfully there or not, he is not guilty of contributory negligence, but the company is liable unless it or its agents exercised ordinary care or skill in the management of its train to prevent their injury or destruction. *Moses v. Southern Pac. R. Co.*, 42 *Am. & Eng. R. Cas.* 555, 18 *Oreg.* 385, 23 *Pac. Rep.* 498.—QUOTING *Blaine v. Chesapeake & O. R. Co.*, 9 W. Va. 253.

Stock running at large are animals that roam and feed at will, and are not under the immediate direction and control of any one; and in such case, if they wander upon the track of a railroad and are killed, the owner, in allowing them to run at large, is not guilty of contributory negligence and precluded from a recovery. *Keeney v. Oregon R. & N. Co.*, 42 *Am. & Eng. R. Cas.* 619, 19 *Oreg.* 291, 24 *Pac. Rep.* 233.

The act of 1887, §§ 4044-4049, Oregon Code, respecting cattleowner's right to recover for stock killed upon unfenced railroad track by a moving train, does not relieve the owner from the duty of keeping his stock within reasonable confines. He owes a duty to the public, which requires him to use reasonable efforts to prevent them from going where they will imperil the safety and security of persons and property; and while he is allowed to depasture his horses and cattle upon "the common, unfenced range" without being chargeable with contributory negligence in case they are killed

or injured as mentioned, yet he is not permitted to turn them out to roam wherever their instincts incline them. *Hindman v. Oregon R. & N. Co.*, 38 *Am. & Eng. R. Cas.* 310, 17 *Oreg.* 614, 22 *Pac. Rep.* 116.

**256. — South Carolina.**—An owner who permits his horse to roam at large over uninclosed land is not guilty of such negligence as will embarrass his recovery should the horse be killed by the negligence of another. *Murray v. South Carolina R. Co.*, 10 *Rich. (So. Car.)* 227.

Testimony that the cow was turned out into the street to graze on the commons near the railroad track, that she was found lying in the ditch near the track with two legs broken, and that the land on both sides of the track at that point belonged to the defendant, is sufficient evidence to entitle the plaintiff to have his case submitted to the jury, and does not show contributory negligence on the part of plaintiff. *Roue v. Greenville & C. R. Co.*, 7 *So. Car.* 167.

**257. — Tennessee.**—Tennessee statutes recognize the running out of stock on the commons as lawful, and the fact that the owner of an animal allowed it to be out of his inclosure cannot be relied on either to defeat the action or in mitigation of damages. *Memphis & C. R. Co. v. Smith*, 9 *Heisk. (Tenn.)* 860, 20 *Am. Ry. Rep.* 60.

**258. — Texas.**—Under the law of Texas it is not contributory negligence for an owner to permit his cattle to run at large within the corporate limits of the city where there is an ordinance which expressly authorizes it. *Texas & P. R. Co. v. Cockrell*, 2 *Tex. App. (Civ. Cas.)* 629.

**259. — Washington Territory.**—The law of Washington Territory does not require cattle to be fenced in, or herded, and it is not negligence in the owner to permit them to go upon a railway track, even though he knew it to be unfenced. *Timms v. Northern Pac. R. Co.*, 3 *Wash. T.* 299, 13 *Pac. Rep.* 415.—DISTINGUISHED IN *Dacres v. Oregon R. & N. Co.*, 1 *Wash.* 525.

**260. Animals unlawfully at large without fault of owner.**—The case of a person whose stock escape from him and stray upon a railroad against his will, is to be distinguished from cases where owners voluntarily turn their cattle out to range where it is probable that they will go upon the track. *Chicago & N. W. R. Co. v. Goss*, 17 *Wis.* 428.—QUOTED IN *McCandless v. Chicago & N. W. R. Co.*, 45 *Wis.* 365.



No contributory negligence is chargeable to the owner in letting the stock run at large when it breaks out of its pasture without his fault. *Toledo, P. & W. R. Co. v. Johnston*, 74 Ill. 83.

To charge the owner of stock killed by a railroad on its unfenced track with contributory negligence in allowing it to run at large contrary to law, it must appear he did so under such circumstances that the natural and probable consequence of doing so was that the stock would go upon the railroad and be injured. *Cairo & St. L. R. Co. v. Woosley*, 85 Ill. 370.

It is not sufficient, to charge a plaintiff with contributory negligence in a suit against a railroad for injury to stock, to show that the owner permitted the stock to run at large in violation of law, but it must appear that he did so under such circumstances that the natural and probable consequence of so doing was that the stock would go upon the track and be injured. *Ewing v. Chicago & A. R. Co.*, 72 Ill. 25.—*QUOTING Chicago & N. W. R. Co. v. Harris*, 54 Ill. 528; *St. Louis, A. & T. H. R. Co. v. Todd*, 36 Ill. 409.

Leaving mules unfastened in a stable with the stable-door open for about twenty minutes during a heavy rain, whereby one of them escaped and was killed by a moving train, does not constitute such negligence on the part of the person so leaving them as to preclude recovery on the ground that he violated a municipal ordinance against permitting any mules to run at large. *Doran v. Chicago, M. & St. P. R. Co.*, 73 Iowa 115, 34 N. W. Rep. 619.

Where plaintiff, in a county where the herd law was in force, turned his horses into an inclosure upon his farm fenced with a hedge-fence, and they escaped therefrom without his knowledge and strayed upon the defendant's track, where they were killed by a passing train—*held*, that he could not be considered guilty of contributory negligence, in the absence of proof that the fence was not reasonably sufficient. *Moriarty v. Central Iowa R. Co.*, 20 Am. & Eng. R. Cas. 438, 64 Iowa 696, 21 N. W. Rep. 143.

The company is not released from its duty to exercise ordinary or reasonable care towards animals required to be kept in inclosures which may have strayed upon its track, unless such animals are at large by the owner's sufferance. *Pearson v. Mil-*

*waukee & St. P. R. Co.*, 45 Iowa 497.—*DISTINGUISHING Alger v. Mississippi & M. R. Co.*, 10 Iowa 268. *FOLLOWING Buckley v. New York & N. H. R. Co.*, 27 Conn. 479.

Where a colt breaks into the highway from the pasture in which it is being kept, without the knowledge of the owner or negligence on his part, and gets upon a railroad track, where it is killed, the owner cannot be said to have allowed or permitted or suffered it to run at large. *Parker v. Lake Shore & M. S. R. Co.*, 93 Mich. 607, 53 N. W. Rep. 834.—*DISTINGUISHING Robinson v. Flint & P. M. R. Co.*, 79 Mich. 323. *FOLLOWING Great Western R. Co. v. Morthland*, 30 Ill. 451.

The owner of animals running at large is not guilty of a breach of any duty imposed upon him by the Ohio act of April 13, 1865 (S. & S. 7), if they be at large without the omission on his part of reasonable care. *Marietta & C. R. Co. v. Brown*, 24 Ohio St. 48.—*DISTINGUISHING Pittsburgh, Ft. W. & C. R. Co. v. Methven*, 21 Ohio St. 586.

Where cattle running at large, without the fault of the owner, enter the inclosed field of another person, through which a railroad passes, and thence go upon the track of the road by reason of the want of fences which it was the duty of the railroad company to have constructed, so as to separate the railroad from the adjacent lands, such owner is not guilty, under the act of April 7, 1865 (S. & S. 373), of contributing, by his own wrong, to an injury done by a passing train to the cattle while upon the railroad. *Marietta & C. R. Co. v. Brown*, 24 Ohio St. 48, 6 Am. Ry. Rep. 428.—*FOLLOWED IN Pittsburgh, C. & St. L. R. Co. v. Allen*, 19 Am. & Eng. R. Cas. 657, 40 Ohio St. 206.

#### b. When Owner May Not Recover.

**261. Generally.**—Where cattle escape from the owner's field over his fence and go upon a track, where they are injured by a train running at its usual rate of speed, the owner cannot recover for the injury, though there be evidence from which it might be inferred that the engineer could possibly have avoided the injury. *Price v. New Jersey R. & T. Co.*, 32 N. J. L. 19.

The horse of the plaintiff escaped from his stable at night and fell into a cut in the public highway through which the railroad track of the defendant passed. *Held*, that it was the duty of the plaintiff so to secure his horse that it could not stray into the



public streets, and that if it escaped, and any accident occurred to it in consequence thereof, the plaintiff must suffer the consequences. *Mentges v. New York & H. R. Co.*, 1 *Hill* (N. Y.) 425.—FOLLOWING *Halloran v. New York & H. R. Co.*, 2 E. D. Smith 257. REVIEWING *Munger v. Tona-wanda R. Co.*, 4 N. Y. 349.

Where the owner of stock lives near a railroad track and knows the danger to which his cattle will be exposed if permitted to go at large, it is his duty to exercise the same degree of care to prevent his cattle being exposed to danger as the railroad company is required to exercise in preventing injuries if they go upon the track; and while it may be negligence of a railroad company not to fence its track, the owner of stock is guilty of the same degree of negligence where he knowingly permits his stock to run upon a highway where there is nothing to prevent their going upon the railroad track. *Trow v. Vermont C. R. Co.*, 24 *Vt.* 487.

**262. Permitting cattle to go at large unattended.**—If the owner of an animal carelessly and rashly permit it to roam at large, unattended, in the vicinity of a railroad where the company cannot be required to fence in its track, and it is there negligently injured by such company, he cannot recover, for he is chargeable with contributory negligence, although an order of the board of county commissioners then in force allowed such an animal to run at large. In such an instance he is chargeable with actual fault. *Chicago, St. L. & P. R. Co. v. Nash*, 1 *Ind. App.* 298, 27 *N. E. Rep.* 564. *Hanna v. Terre Haute & I. R. Co.*, 119 *Ind.* 316, 21 *N. E. Rep.* 903.

In turning his cattle at large in the public highway near a railroad crossing, without a keeper, the owner is guilty of contributory negligence. *Robinson v. Flint & P. M. R. Co.*, 45 *Am. & Eng. R. Cas.* 496, 79 *Mich.* 323, 44 *N. W. Rep.* 779.—DISTINGUISHING *Louisville & F. R. Co. v. Ballard*, 2 *Metc.* (Ky.) 177.—DISTINGUISHED IN *Parker v. Lake Shore & M. S. R. Co.*, 93 *Mich.* 607. FOLLOWED IN *Niemann v. Michigan C. R. Co.*, 80 *Mich.* 197.

The owner of cattle is guilty of contributory negligence in turning them loose in a public highway near a railroad crossing without a keeper, the road being properly fenced, where the cattle enter upon the grounds of the company at a place where it

was not required to fence. *Niemann v. Michigan C. R. Co.*, 80 *Mich.* 197, 44 *N. W. Rep.* 1049.—FOLLOWING *Robinson v. Flint & P. M. R. Co.*, 79 *Mich.* 323.

Voluntarily turning cattle, unattended by a servant, upon a highway, from which they can go upon a railroad track, is such negligence as will prevent the owner from recovering for injuries to them. *Fitch v. Buffalo, N. Y. & P. R. Co.*, 13 *Hun* (N. Y.) 668.—APPLYING *Corwin v. New York & E. R. Co.*, 13 *N. Y.* 42.

Plaintiff's premises, in a city, were so nearly surrounded by railroads, running within a few feet of them, that his cow, if suffered to be at large, would be likely to get upon some one of said roads. She was accustomed to go for water to a canal on one side of his premises, and might go to a river on the other side, but to reach either must cross a railroad. Late in the fall, when grass was scarce, and there was none growing in the immediate vicinity of plaintiff's barn, his cow, after being housed until late in the day, was turned into the street without any one to look after her; and not long after, being near but not upon the track of defendant's road, a few rods from plaintiff's premises and near the river, feeding on grass growing on defendant's embankment, she started on the approach of a train, and, after running a short distance, was struck upon the track and fatally injured. In an action for the damages, the above facts appearing from plaintiff's evidence—held, as matter of law, that plaintiff was guilty of gross contributory negligence, and could not recover in the absence of malice or wilfulness on defendant's part. *McCandless v. Chicago & N. W. R. Co.*, 45 *Wis.* 365, 19 *Am. Ry. Rep.* 374.—QUOTING *Curry v. Chicago & N. W. R. Co.*, 43 *Wis.* 665; *Chicago & N. W. R. Co. v. Goss*, 17 *Wis.* 428.—DISTINGUISHED IN *Heller v. Abbot*, 79 *Wis.* 409.

**263. Rule where animals are unlawfully running at large—Alabama.**—The Alabama act of February 28, 1881, making it unlawful for stock to run at large in certain designated portions of the state, and making the owner liable for all damages committed by them on the lands of others, and making him liable for a misdemeanor if he knowingly permits his stock to run at large, does not change the rule as to contributory negligence where he sues to recover from a railroad company for injuries thereto. *Alabama, G. S. R. Co. v. Mc-*

*Alpine*, 15 *Am. & Eng. R. Cas.* 544, 71 *Ala.* 545.

**264.—Colorado.**—Although the statute makes companies liable in damages to the owners of domestic animals killed or injured by their trains, yet where such animals are, at the time of the accident, running at large, contrary to the provisions of another section of the statute, and the injury thereto results without wilful or gross negligence on part of the railroad company, it is not liable in damages. *Denver & R. G. R. Co. v. Stewart*, 1 *Colo. App.* 227, 28 *Pac. Rep.* 658.

**265.—Illinois.**—A company has a right to the use of its track free from obstructions caused by animals going thereon, and animals which are permitted to stray on the track are there at the risk of their owner. *Central M. T. R. Co. v. Rockafellow*, 17 *Ill.* 541.—DISTINGUISHED IN *Toledo, W. & W. R. Co. v. Fergusson*, 42 *Ill.* 449. OVER-ruled IN *Illinois C. R. Co. v. Middlesworth*, 46 *Ill.* 494.

The owner of a horse, who voluntarily permits it to run at large contrary to law, cannot recover of a company for killing the animal by one of its trains, upon the ground that such company has failed to fence its track at the place where the animal is killed. In such a case, however, the railway company will not be relieved from its duty to observe all reasonable precautions to prevent injury to the property of plaintiff. *Peoria, P. & J. R. Co. v. Champ*, 75 *Ill.* 577.—DISTINGUISHED IN *Chicago & A. R. Co. v. Kellam*, 92 *Ill.* 245. QUOTED IN *Chicago & N. W. R. Co. v. Taylor*, 8 *Ill. App.* 108; *Cleveland, C., C. & St. L. R. Co. v. Ahrens*, 42 *Ill. App.* 434.

**266.—Indiana.**—One who voluntarily permits his cattle to run at large near a railroad where it is not required to be fenced is guilty of contributory negligence, if the cattle stray upon the track and are killed by the negligent management of the train, and he cannot recover. *Wabash, St. L. & P. R. Co. v. Nice*, 23 *Am. & Eng. R. Cas.* 168, 99 *Ind.* 152. *Cincinnati, H. & D. R. Co. v. Street*, 50 *Ind.* 225.

However, the rule is otherwise where the cattle are wilfully killed. *Jeffersonville, M. & I. R. Co. v. Underhill*, 48 *Ind.* 389. *Jeffersonville, M. & I. R. Co. v. Adams*, 43 *Ind.* 402.—EXPLAINING *Jeffersonville, M. & I. R. Co. v. Underhill*, 40 *Ind.* 229. FOLLOWING *Indianapolis, C. & L. R. Co. v.*

*Harter*, 38 *Ind.* 557.—*Ft. Wayne, C. & L. R. Co. v. O'Keefe*, 4 *Ind. App.* 249, 30 *N. E. Rep.* 916. *Chicago, St. L. & P. R. Co. v. Nash*, 1 *Ind. App.* 298, 27 *N. E. Rep.* 564.

At common law the owner of animals is obliged to keep them on his own grounds, and is a wrongdoer if he suffers them to stray upon the grounds of others, which, as a rule, is the law of Indiana. So, where there is no order of the county commissioners determining what animals may run at large, as prescribed by statute, and the owner of live stock knowingly permits them to run at large in the immediate vicinity of a railroad where fencing is not required, he is guilty of negligence, and cannot recover for an injury thereto without proof of wantonness in the management of the train. *Indianapolis, C. & L. R. Co. v. Harter*, 38 *Ind.* 557.—FOLLOWED IN *Jeffersonville, M. & I. R. Co. v. Adams*, 43 *Ind.* 402. REVIEWED IN *Jeffersonville, M. & I. R. Co. v. Huber*, 42 *Ind.* 173.—*Cincinnati, W. & M. R. Co. v. Hiltzshauer*, 99 *Ind.* 486. *Ft. Wayne, C. & L. R. Co. v. O'Keefe*, 4 *Ind. App.* 249, 30 *N. E. Rep.* 916. *Chicago, St. L. & P. R. Co. v. Nash*, 1 *Ind. App.* 298, 27 *N. E. Rep.* 564.

Where there is no evidence from which it can be inferred that there was an order of the board of commissioners allowing cattle to run at large, the court may, as a matter of law, conclusively infer contributory negligence, and there can be no recovery by their owner for their killing by a railroad train. *Lyons v. Terre Haute & I. R. Co.*, 101 *Ind.* 419.

**267.—Iowa.**—Where the owner of horses allows them to run at large, in violation of a city ordinance, and they stray upon a railroad track, they are trespassers, and the owner cannot recover for injuries to them by a passing train unless there be proof of recklessness and wantonness in the management of the train. *Vanhorn v. Burlington, C. R. & N. R. Co.*, 63 *Iowa* 67, 18 *N. W. Rep.* 679.

Where a person in a city allows his horses to run at large at night, and to lie and sleep on a railroad track, his conduct is a circumstance tending to show contributory negligence, where they are injured by a passing train, unless he had a legal right to allow them to run at large; and it is therefore error to exclude an ordinance which is offered to show that he had not such right. *Van Horn v. Burlington C. R. & N. R. Co.*, 7

*Am. & Eng. R. Cas.* 591, 59 *Iowa* 33, 12 *N. W. Rep.* 752.—FOLLOWING *Halloran v. New York & H. R. Co.*, 2 *E. D. Smith* (N. Y.) 257; *Bowman v. Troy & B. R. Co.*, 37 *Barb.* (N. Y.) 516.—DISTINGUISHING *Kuhn v. Chicago, R. I. & P. R. Co.*, 42 *Iowa* 420.—FOLLOWED IN *Miller v. Chicago & N. W. R. Co.*, 59 *Iowa* 707.

**268. — Kansas.**—The owner of live stock who permits them to run at large, in violation of the Kansas night-herd law of 1868, cannot recover if they stray upon an unfenced railroad track and are injured, though it is the duty of the company to have it fenced, under the act of 1874, ch. 94. *Central Branch R. Co. v. Lea*, 20 *Kan.* 353.—LIMITING *Hopkins v. Kansas Pac. R. Co.*, 18 *Kan.* 462.—DISTINGUISHED IN *Sherman v. Anderson*, 27 *Kan.* 333, 41 *Am. Rep.* 414; *Atchison, T. & S. F. R. Co. v. Riggs*, 15 *Am. & Eng. R. Cas.* 531, 31 *Kan.* 622.—NOT FOLLOWED IN *Missouri Pac. R. Co. v. Johnston*, 35 *Kan.* 58.

The conduct of the owner of a hog, permitting it to run at large in violation of Kansas Comp. Laws 1879, ch. 105, § 46, is such contributory negligence as will defeat a recovery where it is negligently killed by a train. *Kansas City, Ft. S. & G. R. Co. v. McHenry*, 24 *Kan.* 501.

Plaintiff turned his mule at night on lands that were surrounded by a lawful fence, within the meaning of the Kansas night-herd law, but through which a railroad track ran which was unfenced on either side, and the mule was injured during the night by a passing train. *Held*, that the negligence of the company in failing to fence was offset or equalled by that of the plaintiff in turning his animal out under such circumstances, and though the animal was confined, within the meaning of the night-herd law, still he could not recover for the killing. *Kansas Pac. R. Co. v. Landis*, 24 *Kan.* 406.—DISTINGUISHED IN *Krebs v. Minneapolis & St. L. R. Co.*, 20 *Am. & Eng. R. Cas.* 478, 64 *Iowa* 670; *Atchison, T. & S. F. R. Co. v. Riggs*, 15 *Am. & Eng. R. Cas.* 531, 31 *Kan.* 622; *Gooding v. Atchison, T. & S. F. R. Co.*, 20 *Am. & Eng. R. Cas.* 466, 32 *Kan.* 150. FOLLOWED IN *St. Louis & S. F. R. Co. v. Mossman*, 30 *Kan.* 336. QUOTED IN *Burlington & M. R. R. Co. v. Brinkman*, 11 *Am. & Eng. R. Cas.* 438, 14 *Neb.* 70.

**269. — Maryland.**—At common law the company is not responsible for injuries to cattle or stock straying upon its road

1 *D. R. D.*—15.

through the neglect of their owners, and this rule of law is not changed by the Maryland act of 1838, ch. 244, and the act of 1846, ch. 346. *Baltimore & O. R. Co. v. Lamborn*, 12 *Md.* 257.—FOLLOWING *Baltimore & S. R. Co. v. Woodruff*, 4 *Md.* 242.—APPLIED IN *Keech v. Baltimore & W. R. Co.*, 17 *Md.* 32. APPROVED IN *State v. Baltimore & O. R. Co.*, 24 *Md.* 84. DISTINGUISHED IN *Baltimore & O. R. Co. v. Mulligan*, 45 *Md.* 486.

**270. — Minnesota.**—In the absence of action by the town, under supervision 6, § 15, ch. 10, Gen. St. of Minnesota, the common-law rule whereby every man is bound to keep his cattle on his land is in force; so, where plaintiff allowed his cow to run at large and she strayed on a railroad track, she was there by his fault. *Locke v. First Div. St. P. & P. R. Co.*, 15 *Minn.* 350, *Gill*, 283.—DISTINGUISHED IN *Watier v. Chicago, St. P., M. & O. R. Co.*, 13 *Am. & Eng. R. Cas.* 582, 31 *Minn.* 91.

It is *prima facie* contributory negligence for one to voluntarily allow a valuable horse to run at large in the public streets, contrary to law, in the immediate vicinity of unfenced railroad tracks. *Moser v. St. Paul & D. R. Co.*, 42 *Minn.* 480, 44 *N. W. Rep.* 530.

But it is not negligence *per se* to turn a cow loose upon the streets unattended, where there is a city ordinance allowing cattle to run at large during certain hours of the day. *Frita v. First Div. St. P. & P. R. Co.*, 22 *Minn.* 404, 19 *Am. Ry. Rep.* 404.

**271. — New Jersey.**—Where an owner of stock is required to keep them on his own land at his peril, he cannot recover for an injury to them while running at large, against a railroad engineer who was shown to be a careful man and running his engine at the time of the injury at a lawful rate of speed, and where there is no evidence to show wilful killing. *Vandegrift v. Rediker*, 22 *N. J. L.* 185.—DISTINGUISHED IN *Bostwick v. Minneapolis & P. R. Co.*, 2 *N. Dak.* 440.

**272. — New York.**—It is contributory negligence for the owner of a cow to permit her to run at large upon a highway in the vicinity of a railroad crossing, and if she be killed by a passing train the owner cannot recover. *Clark v. Syracuse & U. R. Co.*, 11 *Barb.* (N. Y.) 112.—NOT FOLLOWED IN *Washington v. Baltimore & O. R. Co.*, 17 *W. Va.* 190.

A person who voluntarily suffers his horse

to go at large upon the public streets and stray upon a railroad cannot recover for injuries to the horse happening through the negligence of the railroad company, the negligence of both parties in such case having contributed to the injury. *Halloran v. New York & H. R. Co.*, 2 E. D. Smith (N. Y.) 257.—FOLLOWING *Marsh v. New York & E. R. Co.*, 14 Barb. (N. Y.) 364.—FOLLOWED IN *Van Horn v. Burlington, C. R. & N. R. Co.*, 7 Am. & Eng. R. Cas. 591, 59 Iowa 33; *Bowman v. Troy & B. R. Co.*, 37 Barb. (N. Y.) 516; *Mentges v. New York & H. R. Co.*, 1 Hilt. (N. Y.) 425.

The law charges the owner of cattle with a wrongful or negligent act if the beasts stray from his inclosure and go upon lands appropriated by a railroad corporation, although his inclosure is kept well fenced, and he is guilty of no actual carelessness in suffering them to escape. *Munger v. Tonawanda R. Co.*, 4 N. Y. 349.—APPLIED IN *Hance v. Cayuga & S. R. Co.*, 26 N. Y. 428. DISAPPROVED IN *Cranston v. Cincinnati, H. & D. R. Co.*, 1 Handy (Ohio) 193. DISTINGUISHED IN *Alabama G. S. R. Co. v. Powers*, 19 Am. & Eng. R. Cas. 502, 73 Ala. 244. FOLLOWED IN *Price v. New Jersey R. & T. Co.*, 31 N. J. L. 229. REVIEWED IN *Mentges v. New York & H. R. Co.*, 1 Hilt. (N. Y.) 425; *Moses v. Southern Pac. R. Co.*, 42 Am. & Eng. R. Cas. 555, 18 Oreg. 385.

The owner of a cow who permits her to go at large, and unattended, on a street of a city on which railroad tracks are laid, is guilty of such carelessness as to defeat a recovery for an injury thereto by a passing train, if it is not the result of gross negligence in the management of the train. *Bowman v. Troy & B. R. Co.*, 37 Barb. (N. Y.) 516.—DISTINGUISHING *Corwin v. New York & E. R. Co.*, 13 N. Y. Rep. 42. FOLLOWING *Halloran v. New York & H. R. Co.*, 2 E. D. Smith (N. Y.) 257. REVIEWING *Tonawanda R. Co. v. Munger*, 5 Den. 255; affirmed in 4 N. Y. 349.—DISTINGUISHED IN *Brady v. Rensselaer & S. R. Co.*, 1 Hun (N. Y.) 378, 3 T. & C. 537. FOLLOWED IN *Van Horn v. Burlington C. R. & N. R. Co.*, 7 Am. & Eng. R. Cas. 591, 59 Iowa 33. REVIEWED IN *Moses v. Southern Pac. R. Co.*, 42 Am. & Eng. R. Cas. 555, 18 Oreg. 385.

It is gross negligence for a man to suffer his cattle to go at large on the highways in the immediate vicinity of a railroad. *Marsh v. New York & E. R. Co.*, 14 Barb. (N. Y.)

364.—DISAPPROVED IN *Corwin v. New York & E. R. Co.*, 13 N. Y. 42.

Where the owner of a cow wrongfully permits her to go upon a highway, a company is not liable for failing to remove snow from a cattle-guard, whereby the cow passes upon the track and is injured.\* *Hance v. Cayuga & S. R. Co.*, 26 N. Y. 428.—APPLYING *Munger v. Tonawanda R. Co.*, 4 N. Y. 349. FOLLOWING *Corwin v. New York & E. R. Co.*, 13 N. Y. 42.—CRITICISED IN *Bostwick v. Minneapolis & P. R. Co.*, 2 N. Dak. 440. DISTINGUISHED IN *Brown v. Milwaukee & P. du C. R. Co.*, 21 Wis. 39.

**273. — North Carolina.**—If the owner of cattle permit them to stray off and get upon the track of a railroad and they are killed or hurt, the company is not liable unless the train was being carelessly run, or by the exercise of proper care after the animals were discovered the injury could have been avoided or prevented. *Doggett v. Richmond & D. R. Co.*, 81 N. Car. 459.—QUOTED IN *Winston v. Raleigh & G. R. Co.*, 19 Am. & Eng. R. Cas. 516, 90 N. Car. 66.

**274. — Ohio.**—When the owner suffers his stock to run at large, contrary to the statutes of the state, he cannot recover if they stray upon a railroad track and are killed, although they may have done so by reason of the track not being fenced as required by law, for the reason that in such case both parties are regarded as wrongdoers, and neither can recover for injury resulting from the unlawful act of the other. *Baltimore & O. R. Co. v. Wood*, 45 Am. & Eng. R. Cas. 464, 47 Ohio St. 431, 24 N. E. Rep. 1077.—FOLLOWING *Pittsburgh, Ft. W. & C. R. Co. v. Methven*, 21 Ohio St. 586.

Where an action is brought against a company for injuring stock after the adoption of the Ohio act of April 13, 1865, being an act to restrain certain domestic animals from running at large, and it is charged that the damage resulted from a failure on the part of the company to fence its track as required by the act of March 25, 1859, an answer sets up a good defence which avers that plaintiff did not live on the line of the road, nor was the animal grazing on an adjacent field; that plaintiff, knowingly, unlawfully, and wilfully permitted his animal to go at large upon the uninclosed lands and highways bordering the railroad track,

\* See ante, 121, 160.

whereby she went upon the track and was fatally injured. *Pittsburgh, Ft. W. & C. R. Co. v. Melhuus*, 21 *Ohio St.* 586.—RECONCILING *Corwin v. New York & Erie R. Co.*, 13 *N. Y.* 42.—DISTINGUISHED IN *Krebs v. Minneapolis & St. L. R. Co.*, 20 *Am. & Eng. R. Cas.* 478, 64 *Iowa* 670; *Marietta & C. R. Co. v. Stephenson*, 24 *Ohio St.* 48. FOLLOWED IN *Baltimore & O. R. Co. v. Wood*, 47 *Ohio St.* 431. REVIEWED AND DISTINGUISHED IN *Burlington & M. R. R. Co. v. Brinkman*, 11 *Am. & Eng. R. Cas.* 438, 14 *Neb.* 70.

**275. — Pennsylvania.**—Neglect on the part of a plaintiff in allowing his animal to run at large will prevent a recovery where it is killed on the track, and it is error to instruct the jury that plaintiff may recover notwithstanding such neglect. *Horsv. Philadelphia & T. R. Co.*, 1 *Phila.* 28.

Where companies are not required to fence, cattle owners who permit their cattle to go at large cannot recover against the company or its servants where the same are killed or injured; but such owners may be liable for the damages done by them to the company or its passengers. *New York & E. R. Co. v. Skinner*, 19 *Pa. St.* 298.—APPLIED IN *North Pa. R. Co. v. Rehman*, 49 *Pa. St.* 101. DISAPPROVED IN *Cranston v. Cincinnati, H. & D. R. Co.*, 1 *Handy (Ohio)* 193. DISTINGUISHED IN *Rehman v. Railroad Co.*, 5 *Phila. (Pa.)* 450. EXPLAINED IN *Sullivan v. Philadelphia & R. R. Co.*, 30 *Pa. St.* 234.

**276. — Canada.**—Where the animals get upon the railway track in consequence of being allowed to run upon the highway near a crossing, in violation of the statute, and are killed at the point of intersection, the owner can maintain no action for their loss. *McGee v. Great Western R. Co.*, 23 *U. C. Q. B.* 293.—FOLLOWING AND QUOTING *Thompson v. Grand Trunk R. Co.*, 18 *U. C. Q. B.* 92.

Where there was evidence to show that the horse escaped from the plaintiff's field into the street within half a mile of the railway, and thence upon the track—held, that if so the plaintiff was precluded from recovering by 20 *Vic. ch. 12*, § 16, forbidding cattle to run at large, though the horse was not killed at the very point of intersection. *Ferris v. Grand Trunk R. Co.*, 16 *U. C. Q. B.* 474.—FOLLOWED IN *Cooley v. Grand Trunk R. Co.*, 18 *U. C. Q. B.* 96.

Plaintiff's son, a boy of fourteen, was driving four of the plaintiff's horses along the highway about dusk in the evening, intending to put them in a field, the gate of which opened into the road about sixty yards from the railway crossing. While he was opening the gate, the horses, being loose, passed onto the track, where three of them were killed by the train, which was passing at its usual time. Held, that the plaintiff was prevented by 20 *Vic. ch. 12*, § 16, from sustaining any action, for his horses were not "in charge of" the boy, within the meaning of that section; and, independently of that statute, he was guilty of culpable negligence in sending his horses, as he did, in charge of a boy, without a bridle or any means of control, after dark, and at a time when it was known that the train might be expected. The neglect of the company to blow the whistle or ring the bell in approaching the crossing could not affect the right of action. *Thompson v. Grand Trunk R. Co.*, 18 *U. C. Q. B.* 92.—FOLLOWED AND QUOTED IN *McGee v. Great Western R. Co.*, 23 *U. C. Q. B.* 293. REVIEWED IN *Markhan v. Great Western R. Co.*, 25 *U. C. Q. B.* 572.

Plaintiff sent three of his horses to a watering-place on the highway with his servant, who merely drove them before him, not having any further means of control by bridle, halter, or otherwise. They passed the watering-place and got onto the railway over the cattle-guard, which was filled up with snow, and one of them was killed by the train some distance from the point of intersection. The jury found that the plaintiff was guilty of no negligence, and that, had the cattle-guard been kept clear of snow the horses could not have got upon the track. Held, that the plaintiff nevertheless could not recover, for his horses were not "in charge of" any person within the meaning of 20 *Vic. ch. 12*, § 16, when they got upon the railway. *Cooley v. Grand Trunk R. Co.*, 18 *U. C. Q. B.* 96.—FOLLOWING *Simpson v. Great Western R. Co.*, 17 *U. C. Q. B.* 57; *Ferris v. Grand Trunk R. Co.*, 16 *U. C. Q. B.* 474.—DISTINGUISHED IN *Hillyard v. Grand Trunk R. Co.*, 8 *Ont.* 583.

### 3. Proximate Cause.\*

**277. Generally.**—In stock-killing cases, to establish contributory negligence,

\* See also *ante*, 34-36, 65, 186, 188, 194; *post*, 344, 356, 454.

there must be some act or omission of the plaintiff proximately affecting the question of the exposure of the animal to danger or contributing to the accident. *Watier v. Chicago, St. P., M. & O. R. Co.*, 13 *Am. & Eng. R. Cas.* 582, 31 *Minn.* 91, 16 *N. W. Rep.* 537.

Contributory negligence, debarring the plaintiff's right of recovery, exists only where the negligence of plaintiff contributed proximately to the injury sued for; it does not exist where the injury sued for and that resulting from the fault of the plaintiff are disconnected. *Pinnell v. St. Louis, A. & T. R. Co.*, 49 *Mo. App.* 170.

The negligence of the owner of cattle in permitting them to stray upon a railroad track will not prevent a recovery for their negligent killing, where it appears that the negligence of the owner is not the proximate cause of the killing. *Needham v. San Francisco & S. J. R. Co.*, 37 *Cal.* 409.—QUOTING *Isbell v. New York & N. H. R. Co.*, 27 *Conn.* 393.—APPROVED IN *Flynn v. San Francisco & S. J. R. Co.*, 40 *Cal.* 14. EXPLAINED IN *Toomey v. Southern Pac. R. Co.*, 86 *Cal.* 374. FOLLOWED IN *Kline v. Central Pac. R. Co.*, 37 *Cal.* 400. QUOTED IN *Meeks v. Southern Pac. R. Co.*, 8 *Am. & Eng. R. Cas.* 314, 56 *Cal.* 513, 38 *Am. Rep.* 67; *Bostwick v. Minneapolis & P. R. Co.*, 2 *N. Dak.* 440.

The fact that horses run at large where they might trespass upon a railroad track and right of way, contrary to the California act of March 7, 1878, requiring all cattle to be confined by their owners, is not contributory negligence constituting a defense, where they are killed by the railroad company, unless it appears that such running at large was the proximate cause of the killing. *Orcutt v. Pacific Coast R. Co.*, 85 *Cal.* 291, 24 *Pac. Rep.* 661.

A company cannot avoid liability for stock killed that go from an adjoining field to the track after the railroad fence has been burned, and before the company has rebuilt, by showing that the owner trespassed upon the track in driving the stock to the field, where it does not appear that such trespass was directly connected with the killing. *Sika v. Chicago & N. W. R. Co.*, 21 *Wis.* 370.

**278. Illustrations of what is proximate cause.**—Where a company obtains a right of way, with a provision in the deed that it shall maintain a proper fence on each

side of its track, its failure to do so, and the negligent killing of live stock which go upon the track at such unfenced place, will not make it liable, where the owner of the stock was guilty of contributory negligence in not taking proper care of them, which negligence was the proximate cause of the injury. *Joliet & N. I. R. Co. v. Jones*, 20 *Ill.* 221.

Where a horse escapes from the owner and runs between six and seven hundred feet, and enters a railroad track where there are no fences, and runs on the track between five and six hundred feet before it is injured, if the jury find that the injury was the proximate, probable, and natural result of the owner's negligence in permitting it to escape, there can be no recovery. *Amstein v. Gardner*, 16 *Am. & Eng. R. Cas.* 585, 134 *Mass.* 4.—REVIEWING *Marble v. Worcester*, 4 *Gray (Mass.)* 395.

Stock in charge of a herder and subject to his control are not stock running at large, as the places whither they wander and feed or lie down to rest are selected by him and are subject to his direction and control; and if he voluntarily drives and leaves them uncared for in a place of danger along a railroad track where injury is likely to happen to them as a probable consequence, and they are killed, his act will be regarded as the proximate cause of the injury, and will preclude the owner from recovery. *Keeney v. Oregon R. & N. Co.*, 42 *Am. & Eng. R. Cas.* 619, 19 *Oreg.* 291, 24 *Pac. Rep.* 233.

**279. Illustrations of what is not proximate cause.**—As a rule, where there is negligence both of the owner of cattle, in permitting them to run at large, and of the trainmen, in killing them, the negligence of the latter will be regarded as the proximate cause of the killing, and that of the owner as a remote cause, and therefore allowing him to recover. *Cleveland, C. & C. R. Co. v. Elliott*, 4 *Ohio St.* 474.

The principle is that a railway company is liable in damages for injuries to stock through its negligence, where the plaintiff contributed to the injury no further than permitting his stock to run at large. Such negligence, if it may be called negligence, is not the proximate cause of the injury, and, in the sense of the law, does not constitute contributory negligence. *Moses v. Southern Pac. R. Co.*, 42 *Am. & Eng. R. Cas.* 555, 18 *Oreg.* 385, 23 *Pac. Rep.* 498. *Alabama G. S. R. Co. v. McAlpine*, 15 *Am. & Eng. R.*



*Cas.* 544, 71 *Ala.* 545.—FOLLOWING Cairo & St. L. R. Co. v. Woosley, 85 Ill. 370; Ewing v. Chicago & A. R. Co., 72 Ill. 25.

The plaintiff's horse, for the killing of which by defendant's train of cars the action is brought, having escaped from the car in which he was being transported, ran several miles along a public road, until it intersected the railroad track, and up the railroad track for nearly a mile, when it was overtaken by another train of cars, run over, and killed; the fact that it escaped from the car through the negligence of the plaintiff himself, who had charge of the car containing his horses, is not the proximate cause of the injury, and does not constitute such contributory negligence as will defeat a recovery. *Louisville & N. R. Co. v. Kelsey*, 42 *Am. & Eng. R. Cas.* 584, 89 *Ala.* 287, 7 *So. Rep.* 648.

The owner of a mare and colt saw them feeding in a lane leading to a railroad track, but about half a mile therefrom, but made no effort to turn them back, though their heads were turned toward the railroad. *Held*, that he had a right to assume that the statutory signals would be given to frighten the horses back on the approach of a train, and his failure to turn them back when seeing them cannot be regarded as the proximate cause of their killing. *Orcutt v. Pacific Coast R. Co.*, 85 *Cal.* 291, 24 *Pac. Rep.* 661.

In an action for killing plaintiff's cattle, it appears that plaintiff had driven them over a private road upon the right of way to a highway crossing. While the cattle were being herded on the highway, about sixty-four yards from the railroad, they became frightened by the approaching train, and ran through an unfenced and unclosed tract of land upon the railroad track, where they were killed and injured by the train. *Held*, that the fact that the animals had been previously driven over the private road would not defeat plaintiff's right to recover. *Louisville, E. & St. L. R. Co. v. Hart*, 2 *Ind. App.* 130, 28 *N. E. Rep.* 218.

Plaintiff's ox escaped from his field to the company's right of way, over a defective fence that the company was bound to maintain, and, after wandering about, passed from unclosed lands of plaintiff to an adjoining tract, and from it to the track, and was killed. By a special contract with the owner the company was not bound to fence where the killing occurred. *Held*, that the defect in the fence where the ox escaped

from the owner's field was the cause of the accident, and that it was not contributory negligence in plaintiff to fail to securely fence between his lands, where he did not allow his cattle to pasture, and the track on which the ox was killed. *Gilman v. European & N. A. R. Co.*, 60 *Me.* 235.—DISTINGUISHING *Eames v. Salem & L. R. Co.*, 98 *Mass.* 561.

If the plaintiff has, by his own negligence or misconduct, contributed directly and immediately to the production of the injury complained of, he is regarded as the author of his misfortune, and he is as much precluded from recovering damages therefor since the statute as before. But if he merely allows his stock to escape from his inclosure, and to stray at large unattended, and thus get upon the railroad of the company, and there be injured,—while the entry of the stock upon the road may be an act of negligence as well as trespass on the part of the plaintiff in thus allowing his stock to stray at large unattended,—such negligence is not of that direct and proximate character as to be so contributory to the production of the injury as to preclude the plaintiff the right to recover, if the accident could have been avoided by the use of reasonable and proper care on the part of the defendant or its agents, under the circumstances of the case. *Western Md., R. Co. v. Carter*, 13 *Am. & Eng. R. Cas.* 573, 59 *Md.* 306.—APPLIED IN *Central R. Co. v. Smith*, 74 *Md.* 212.

#### 4. Liability Notwithstanding Owner's Negligence.\*

**280. Generally.**—Where cattle at large, without the fault of the owner, go upon the track and are killed through the negligence of the company, the owner is not shut out from the right to damages by the fact that the cattle were trespassers on the railroad, for the owner must be guilty of actual negligence, not a mere technical wrong. *Isbell v. New York & N. H. R. Co.*, 27 *Conn.* 393.—APPROVING *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 *Ohio St.*, 172.—APPROVED IN *Grant v. Baltimore & P. R. Co.*, 2 *MacArth.* (D. C.) 277. QUOTED IN *Meeks v. Southern Pac. R. Co.*, 8 *Am. & Eng. R. Cas.* 314, 56 *Cal.* 513, 38 *Am. Rep.* 67; *Fritts v. New York & N. E. R. Co.*, 62

\* Liability of company for negligence notwithstanding contributory negligence of plaintiff, see note, 22 *AM. & ENG. R. CAS.* 539.



Conn. 503; *Bostwick v. Minneapolis & P. R. Co.*, 2 N. Dak. 440.

Under the Indiana act of 1853 (p. 113), providing compensation to owners of animals killed or injured by the cars, the owner might be passively a wrongdoer, by suffering his animal to run at large, and yet recover. *New Albany & S. R. Co. v. Maiden*, 12 Ind. 10.—QUOTED IN *Chicago, St. L. & P. R. Co. v. Fenn*, 3 Ind. App. 250.

**281. Where company has failed to fence as required by statute.\***—(1) *Illinois*.—The fact that stock are running at large in violation of the statute does not relieve companies, under the Illinois statutes, from liability for an injury to them resulting from a neglect to fence their road; and no other negligence need be shown. *Cairo & St. L. R. Co. v. Murray*, 82 Ill. 76. *Ohio & M. R. Co. v. Fowler*, 85 Ill. 21. *Ewing v. Chicago & A. R. Co.*, 72 Ill. 25.—FOLLOWED IN *Alabama G. S. R. Co. v. McAlpine*, 15 Am. & Eng. R. Cas. 544, 71 Ala. 545.

Permitting stock to run at large in violation of the statute will not prevent a recovery where they are killed upon an unfenced track which the law requires to be fenced, where the killing is the result of a lack of reasonable care on the part of those in charge of the train. *Louisville, E. & St. L. R. Co. v. Dulaney*, 43 Ill. App. 297.

(2) *Indiana*.—Where the suit is founded on the Indiana statute, and the liability of the company is based solely on a failure to fence the track, the question of contributory negligence does not arise; and if cattle are killed or injured at a point on the railway where the company could lawfully fence the track, and it was not fenced, the company is liable. *Toledo, W. & W. R. Co. v. Cory*, 39 Ind. 218.—FOLLOWING *Toledo, W. & W. R. Co. v. Weaver*, 34 Ind. 298.—FOLLOWED IN *Louisville, N. A. & C. R. Co. v. Wilkerson*, 83 Ind. 153.—*Indianapolis, P. & C. R. Co. v. Wolf*, 47 Ind. 250. *Terre Haute & I. R. Co. v. Schaefer*, 5 Ind. App. 86, 31 N. E. Rep. 557. *Chicago & E. R. Co. v. Brannegan*, 5 Ind. App. 540, 32 N. E. Rep. 790.

And this is true though the plaintiff is not an adjoining proprietor and has been guilty of negligence in permitting the animal to stray upon the railroad. *Indianapolis & C. R. Co. v. McKinney*, 24 Ind. 283.—FOLLOWING *Indianapolis & C. R. Co. v. Townsend*, 10 Ind. 38.

Contributory negligence is no defense to an action, under the statute, against a railroad company for killing stock at a point on its road not securely fenced. *Louisville, N. A. & C. R. Co. v. Whitesell*, 68 Ind. 297. *Louisville, N. A. & C. R. Co. v. Cahill*, 63 Ind. 340.—APPROVING *Toledo, W. & W. R. Co. v. Cory*, 39 Ind. 218; *Toledo, W. & W. R. Co. v. Cory*, 37 Ind. 172; *Jeffersonville, M. & I. R. Co. v. Ross*, 37 Ind. 545; *Toledo, W. & W. R. Co. v. Weaver*, 34 Ind. 298; *Jeffersonville, M. & I. R. Co. v. O'Connor*, 37 Ind. 95; *Cleveland, C., C. & I. R. Co. v. Crossley*, 36 Ind. 370; *Bellefontaine R. Co. v. Reed*, 33 Ind. 476; *Indianapolis & C. R. Co. v. Parker*, 29 Ind. 471.

In such cases neither contributory negligence on the part of the owner nor the fact that the animal was a trespasser will constitute a defense. Such statutory liability is in the nature of a police penalty, and was designed to promote the public safety. *Chicago, St. L. & P. R. Co. v. Fenn*, 3 Ind. App. 250, 29 N. E. Rep. 790.—QUOTING *New Albany & S. R. Co. v. Maiden*, 12 Ind. 10.

Where the streets and alleys of a town end at a railroad track and terminate at a high bank, which cannot be used for loading or unloading cars, it is the duty of the railroad company to fence, and it is liable for injury to cattle when it does not do so, without regard to the negligence of the owner of the animals. *Toledo, W. & W. R. Co. v. Cary*, 37 Ind. 172, 5 Am. Ry. Rep. 557.

If a horse be killed at a crossing where the company is not required to fence, contributory negligence on the part of the owner will defeat a recovery; but if the killing be at a place where the company was bound to fence and had not securely fenced, then contributory negligence will not defeat a recovery. *Baltimore, O. & C. R. Co. v. Everts*, 112 Ind. 533, 14 N. E. Rep. 369, 11 West. Rep. 875.

(3) *Massachusetts—Michigan—Minnesota*.—A company which is bound by statute to erect and maintain a sufficient fence is liable in damages if a horse, feeding in an adjacent pasture, escapes through a defect in the fence and is run over and killed by the cars, without proof of any care on the part of the owner to prevent such an escape; and evidence of notice to the owner that his horse had escaped two or three times before, and been upon the track, is immaterial. *Rogers v. Newburyport R. Co.*, 1 Allen

\* See ante, 236, 239.

(Mass.) 16.—APPROVED in *Cleveland, C., C. & I. R. Co. v. Scudder*, 13 Am. & Eng. R. Cas. 561, 40 Ohio St. 173. REVIEWED IN *Wilder v. Maine C. R. Co.*, 65 Me. 332; *Pittsburgh, C. & St. L. R. Co. v. Smith*, 13 Am. & Eng. R. Cas. 579, 38 Ohio St. 410.

The statutory liability of a company for injuries to cattle resulting from its neglect to put up and maintain side-fencing is not affected by the contributory negligence of the owner of the cattle. Act 198 of 1873. *Grand Rapids & I. R. Co. v. Cameron*, 45 Mich. 451, 8 N. W. Rep. 99.—FOLLOWING *Flint & P. M. R. Co. v. Lull*, 28 Mich. 510.

Merely permitting cattle to run at large in violation of a special law prohibiting it in a certain town is not such contributory negligence as prevents recovery by the owner where they have been killed by straying onto the track of a railroad company through the latter's failure to fence. *Watier v. Chicago, M. & St. P. R. Co.*, 13 Am. & Eng. R. Cas. 582, 31 Minn. 91, 16 N. W. Rep. 537.—DISTINGUISHING *Locke v. First Div. St. P. & P. R. Co.*, 15 Minn. 283; *Witherell v. Milwaukee & St. P. R. Co.*, 24 Minn. 410. FOLLOWING *Gillam v. Sioux City & St. P. R. Co.*, 26 Minn. 268.

(4) *Missouri—New Hampshire—New York*.—Allowing stock to run at large in violation of the Missouri act of 1883 is not a defence to an action against a railroad company for killing them at a point where its track was not fenced, as required by the statute. *Boyle v. Missouri Pac. R. Co.*, 21 Mo. App. 416.—REVIEWING *Stanley v. Missouri Pac. R. Co.*, 84 Mo. 625; *Bowman v. Chicago & A. R. Co.*, 85 Mo. 533; *Spence v. Chicago & N. W. R. Co.*, 25 Iowa 139; *Fritz v. Milwaukee & St. P. R. Co.*, 34 Iowa 337.

The fact that plaintiff's animals escaped from a pasture in which they were confined, situated about a mile and a half from the point where they went upon defendant's road, and were killed, cannot avail as a defence unless it is further shown that they passed through intervening lawful fences to reach defendant's road. *Emmerson v. St. Louis & H. R. Co.*, 35 Mo. App. 621.—REVIEWING *Berry v. St. Louis, S. & L. R. Co.*, 65 Mo. 172; *Peddicord v. Missouri Pac. R. Co.*, 85 Mo. 160.

The neglect of a company to fence its road will make it liable for injury to animals upon its track although the owner of such animals was aware of that neglect when he turned them out to graze on his own adjoin-

ing land. *Cressey v. Northern R. Co.*, 15 Am. & Eng. R. Cas. 540, 59 N. H. 564, 47 Am. Rep. 227.—QUOTING *Flint & P. M. R. Co. v. Lull*, 28 Mich. 510; *McCoy v. California Pac. R. Co.*, 40 Cal. 532; *Wilder v. Maine C. R. Co.*, 65 Me. 332, 20 Am. Rep. 698; *Cook v. Champlain Transp. Co.*, 1 Den. (N. Y.) 91. REVIEWING *Kerwhacker v. Cleveland, C. & C. R. Co.*, 3 Ohio St. 172.

Where a company neglects to maintain fences and cattle-guards along its line, as required by statute, and cattle get upon the track and are injured, the corporation is liable, although the owner is not an adjoining proprietor, and it does not appear how or when the cattle came upon the track. The mere negligence of the owner in permitting his cattle to stray upon the land of another adjoining the railway, or to run at large in the highway which crosses the track, is not a defense to the corporation. *Rhodes v. Utica, I. & E. R. Co.*, 5 Hun (N. Y.) 344.—FOLLOWING *Corwin v. New York & E. R. Co.*, 13 N. Y. 42; *Bradley v. Buffalo, N. Y. & E. R. Co.*, 34 N. Y. 427.—*Sheaf v. Utica & B. R. Co.*, 2 T. & C. (N. Y.) 388.

A cow owned by the plaintiff was left in charge of a boy, who drove her from plaintiff's stable to an open lot adjoining defendant's track, near a crossing, in the vicinity of which some of the fences were temporarily and necessarily down for the purpose of repairing the roadway of defendant. The boy having left the cow for a short time she strayed upon the track and was killed by a passing train. Held, that the defendant was liable. *Brady v. Rensselaer & S. R. Co.*, 1 Hun (N. Y.) 378, 3 T. & C. 537.—DISTINGUISHING *Bowman v. Troy & B. R. Co.*, 37 Barb. (N. Y.) 516.

The negligence of the owner of a horse in permitting him to run at large on a highway and to trespass upon a neighbor's premises is not a defense to an action against a railway company for killing him, where it appears that the horse went through an opening in a fence onto the right of way, which it was the duty of the company to keep closed. *Munch v. New York C. R. Co.*, 29 Barb. (N. Y.) 647.

**282. Where company could have prevented the accident.**—Although the owner of stock knowingly permits it to run at large in violation of statute, he may recover for an injury to it by a railway train, if such injury was due to the negligence of the employees of the railway company in

running the train; and the railway company is thus liable, whether such negligence was gross or wanton, or consisted only of the want of ordinary or reasonable care. *Windsor v. Hannibal & St. J. R. Co.*, 45 Mo. App. 123.—FOLLOWING *Dunckman v. Wabash, St. L. & P. R. Co.*, 95 Mo. 232.

Plaintiff's mule was killed by defendant's train. *Held*, that even if the plaintiff was guilty of contributory negligence in turning the mule out of his inclosure, he is entitled to recover damages if defendant could have prevented the accident. But the plaintiff had the right to turn out the mule, and his act could in no sense be considered as contributory negligence. *Farmer v. Wilming-ton & W. R. Co.*, 20 Am. & Eng. R. Cas. 481, 88 N. Car. 564.—DISTINGUISHED IN *Emry v. Raleigh & G. R. Co.*, 109 N. Car. 589.

**283. — by the use of ordinary care.**—A company is liable for injury to animals which, by the use of ordinary care on its part, might have been prevented, even though the owner of the animals is in some degree negligent. *Central R. & B. Co. v. Davis*, 19 Ga. 437.—APPLYING *Macon & W. R. Co. v. Davis*, 18 Ga. 679.—DISTINGUISHED IN *Macon & W. R. Co. v. Baber*, 42 Ga. 300.

Although one may not be altogether free from negligence in permitting his stock to go at large in the immediate vicinity of a railroad, yet, in doing so, he assumes only the risk of an accident which might not be avoided by ordinary care and watchfulness of the agents and employes of the railroad company. *Little Rock & Ft. S. R. Co. v. Finley*, 37 Ark. 562, 11 Am. & Eng. R. Cas. 469. *Rockford, R. I. & St. L. R. Co. v. Irish*, 72 Ill. 404.—FOLLOWING *Illinois C. R. Co. v. Middleworth*, 46 Ill. 495; *Illinois C. R. Co. v. Baker*, 47 Ill. 295; *Toledo, P. & W. R. Co. v. Ingraham*, 58 Ill. 120. *Toledo, P. & W. R. Co. v. Ingraham*, 58 Ill. 120, 10 Am. Ry. Rep. 393.—FOLLOWED IN *Rockford, R. I. & St. L. R. Co. v. Irish*, 72 Ill. 404.

Where stock running at large go upon the railroad track and are killed by a passing train at a point where the railroad company is not required to fence its road, the company is held to the exercise of reasonable care, and is liable for ordinary negligence. The mere fact that the plaintiff in this case permitted his cow to run at large does not constitute such negligence as will defeat a recovery. *Prickett v. Atchison, T. & S. F.*

*R. Co.*, 23 Am. & Eng. R. Cas. 232, 33 Kan. 748, 7 Pac. Rep. 611.

If an engineer or person conducting a train sees cattle on the track, and can by ordinary care, caution, and diligence avoid injury to them, he is bound to do so; and if he fails the railroad company is liable, no matter if the owner of the stock was negligent in allowing his cattle to get on the track. *Chicago, M. & St. P. R. Co. v. Phillips*, 14 Ill. App. 265.

In an action under article 77 of the Maryland Code, to recover damages for killing the plaintiff's colts, the plaintiff is entitled to recover, though guilty of negligence in allowing the colts to be on the railroad track, if the proof show that the killing could have been avoided by the observance of proper care and caution on the part of the defendant's agents. *Northern C. R. Co. v. Ward*, 63 Md. 362.

If the plaintiff were guilty of negligence, or even of positive wrong, in allowing his cattle or horses to run in the highway, from whence, through the want of a fence which it was the duty of the railroad corporation to maintain, they strayed upon the railroad track, the corporation is yet bound to the exercise of reasonable care and diligence in the use of its road and the management of the engine and train; and if for want of that care the injury arose, they are liable. *Trow v. Vermont C. R. Co.*, 24 Vt. 487.

Where cattle have wrongfully got upon a railroad through the negligence of the owner, the company are still obliged to use ordinary care and caution to avoid a collision; and in this case, where horses had escaped upon the track through a gate at a farm crossing which the owner had left open, but although they were seen by the engineer the speed was not slackened and no precaution was taken except sounding the whistle, the company were held liable. *Campbell v. Great Western R. Co.*, 15 U. C. Q. B. 498.—QUOTING *Butterfield v. Forester*, 11 East. 60.—DISTINGUISHED IN *Hurd v. Grand Trunk R. Co.*, 15 Ont. App. 58.

**284. Where company is guilty of wilful or gross negligence.\***—(1) *Generally.*—The fact that the owner of an animal knowingly permitted it to run at large is not such contributory negligence as will defeat an action by him against a railroad

\* See also *ante*, 37-50, 60, 187, 200, 217, 218.

company for wilfully killing it. *Detroit, E. R. & I. R. Co. v. Barton*, 61 Ind. 293.

But it is a question whether a company is liable, under § 6, ch. 169, of the Iowa laws of 1862, for killing a bull unlawfully running at large, even in case of gross negligence. *McCool v. Galena & C. U. R. Co.*, 17 Iowa 461.

The owner of live stock permitting them to knowingly go upon lands of a railroad company over which tracks are laid cannot recover for injuries by passing trains, unless such injuries result from the most wanton and gross negligence. *Union Pac. P. Co. v. Rollins*, 5 Kan. 167.—QUOTING *New World v. King*, 16 How. (U. S.) 469; *Galena & C. U. R. Co. v. Jacobs*, 20 Ill. 478.—DISTINGUISHED IN *Missouri Pac. R. Co. v. Wilson*, 28 Kan. 637; *Atchison, T. & S. F. R. Co. v. Davis*, 15 Am. & Eng. R. Cas. 521, 31 Kan. 645.—*Williams v. Northern Pac. R. Co.*, 11 Am. & Eng. R. Cas. 421, 3 Dak. 168, 14 N. W. Rep. 97. *Illinois C. R. Co. v. Phelps*, 29 Ill. 447.—APPLIED IN *Louisville & N. R. Co. v. Shelton*, 43 Ill. App. 220. FOLLOWED IN *Illinois C. R. Co. v. Goodwin*, 30 Ill. 117.—*Illinois C. R. Co. v. Goodwin*, 30 Ill. 117.—FOLLOWING *Illinois C. R. Co. v. Phelps*, 29 Ill. 447.—DISTINGUISHED IN *Great Western R. Co. v. Geddis*, 33 Ill. 304; *Toledo, W. & W. R. Co. v. Furgusson*, 42 Ill. 449; *St. Louis, J. & C. R. Co. v. Terhune*, 50 Ill. 151; *Illinois C. R. Co. v. Phillips*, 55 Ill. 194.—See also *Windsor v. Hannibal & St. J. R. Co.*, 45 Mo. App. 123.—DISTINGUISHING *Fritz v. Milwaukee & St. P. R. Co.*, 34 Iowa 337; *Spence v. Chicago & N. W. R. Co.*, 25 Iowa 139. REVIEWING *Bowman v. Chicago & A. R. Co.*, 85 Mo. 533; *Schwarz v. Hannibal & St. J. R. Co.*, 58 Mo. 207; *Owens v. Hannibal & St. J. R. Co.*, 58 Mo. 386.—*Cleveland, C. & St. L. R. Co. v. Ducharme*, 49 Ill. App. 520. *International & G. N. R. Co. v. Cocke*, 23 Am. & Eng. R. Cas. 226, 64 Tex. 151. *Fisher v. Farmers' L. & T. Co.*, 21 Wis. 73.

(2) *Illustrations*.—The Georgia act of 1847, which provides that railroads shall be liable in law for injuries done to property in running their cars and locomotives—held, to be only declaratory of the common-law rule of liability in such cases. They are bound to ordinary care and diligence, and liable for gross neglect. In such cases the plaintiff cannot recover if the injury complained of is with his consent or caused by his negligence. If both plaintiff and de-

fendant are in default, the plaintiff cannot recover unless the injury was intentional on the part of the defendant, or unless it was impossible with ordinary care and diligence for the plaintiff to avoid the consequences of defendant's neglect. Individuals are in like manner liable to corporations for injuries done to their property by the negligent use of their own. *Macon & W. R. Co. v. Davis*, 13 Ga. 68.—FOLLOWED IN *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 657.

Where throughout a whole country stock customarily run at large, the owner of a horse which is killed by a train is not in *pari delicto* with the company, because his horse is upon the track of the company, so as to relieve it from liability for the negligence of the engineer of the train. *Macon & W. R. Co. v. Lester*, 30 Ga. 911.

A company is liable for animals killed where it appears that the engineer, upon seeing them, blew the whistle and then wilfully ran over them, though the train might have been stopped in time to have avoided a collision; and such liability is not affected by the fact that the owner of the stock had wrongfully appropriated the company's fence as one side of an inclosure for the stock, and they had gone upon the track by breaking down the fence. *Illinois C. R. Co. v. Middlesworth*, 46 Ill. 494.—OVER-RULING *Central Military Tract R. Co. v. Rockafellow*, 17 Ill. 541; *Great Western R. Co. v. Thompson*, 17 Ill. 131; *Illinois C. R. Co. v. Reedy*, 17 Ill. 580; *Chicago & M. R. Co. v. Patchin*, 16 Ill. 198.—DISAPPROVED IN *Illinois C. R. Co. v. Noble*, 142 Ill. 578. FOLLOWED IN *Rockford, R. I. & St. L. R. Co. v. Irish*, 72 Ill. 404.

##### 5. Burden of Proof.\*

**285. When on the company.**—In a suit by an owner of stock suffered to go at large contrary to law against a railroad to recover damages for killing the same in consequence of its track being unfenced, where it does not otherwise appear the burden of showing contributory negligence on the part of the owner is upon company. *Cairo & St. L. R. Co. v. Woostley*, 85 Ill. 370.

Under Iowa act of 1862, ch. 169, railroad companies are liable absolutely for killing stock at all points where they have a right to fence their tracks but fail to do so,

\* See post, 495-523.

unless the injury be the result of the wilful act of the owner; and the burden of proof to show such wilful act rests upon the defendant. *Stewart v. Burlington & M. R. Co.*, 32 Iowa 561, 10 Am. Ry. Rep. 1.—FOLLOWING *Spence v. Chicago & N. W. R. Co.*, 25 Iowa 139; *Corwin v. New York & E. R. Co.*, 13 N. Y. 42—FOLLOWED IN *Fritz v. Milwaukee & St. P. R. Co.*, 34 Iowa 337.

**286. When on the owner to show absence of negligence on his part.**—

Where plaintiff's horse was injured in consequence of a defective crossing, in order to recover he must not only show negligence of the company, but also that the driver of the horse was exercising ordinary care and vigilance at the time the injury occurred. *Bergert v. Davenport City R. Co.*, 34 Iowa 571.

To support trespass for an injury done by a railroad company in the exercise of its lawful rights, it must appear that no neglect or want of care on the part of the plaintiff co-operated in producing the injury. *Waldron v. Portland, S. & P. R. Co.*, 35 Me. 422.—FOLLOWED IN *Eames v. Boston & W. R. Co.*, 14 Allen (Mass.) 151.

Plaintiff must show the exercise of ordinary care on his part, and the omission of some duty or the commission of some wrong on the part of the defendant by which the injury was produced. *Waldron v. Portland, S. & P. R. Co.*, 35 Me. 422.—QUOTING *Bradley v. Boston & M. R. Co.*, 2 Cush. (Mass.) 539.

A company which is not bound to erect and maintain a fence is not liable in damages if a cow, feeding in an adjacent pasture, escapes through a defect in the fence and is run over and killed by the cars, without proof of due care on the part of the owner to prevent such an escape. *Stearns v. Old Colony & F. R. R. Co.*, 1 Allen (Mass.) 493.

**6. Question of Law or Fact.\***

**287. When question of law for the court.**—

Plaintiff lived in a city on premises nearly surrounded by railroad tracks. In order for his cow to reach water on either side she must cross a track. She was turned out unattended at a season when pasture was scarce, and soon afterward was grazing on the defendant's right of way, near where she usually went for water, and upon the approach of a train ran onto

the track and was killed. *Held*, that there was such evidence of contributory negligence as to warrant a nonsuit. *McCandless v. Chicago & N. W. R. Co.*, 45 Wis. 365.—QUOTING *Curry v. Chicago & N. W. R. Co.*, 43 Wis. 665; *Chicago & N. W. R. Co. v. Goss*, 17 Wis. 428.—See also *Lyons v. Terre Haute & I. R. Co.*, 101 Ind. 419.

In a suit against a railroad for killing a cow, in a county where the law provided that stock should not run at large, requests to charge that if the plaintiff permitted her cow to run at large, and it was killed by the defendant's cars, the former would be guilty of negligence and could not recover, were properly refused. It was not for the court to single out any one of a number of facts and tell the jury that it constituted such negligence as would deprive the plaintiff of her right to recover. *Central R. Co. v. Hamilton*, 23 Am. & Eng. R. Cas. 207, 71 Ga. 461.

Permitting stock to run at large cannot be said, as a matter of law, to be such contributory negligence on the part of the owner as will defeat a recovery if they go upon a railroad track and are killed. It is a question of fact, depending upon all the circumstances of the case, whether merely permitting them to run at large is negligence or not; and if so, whether it contributed to the injury. *Cincinnati, L. F. & C. R. Co. v. Ducharme*, 4 Ill. App. 178.

Where a person permits his jack, about one year old, to run upon his own premises, which are inclosed with a fence, but through which a railroad, not inclosed with a fence, is constructed and operated, and the jack is unattended by any one, and passes from the plaintiff's premises onto the unfenced railroad track, and is there killed by the railroad company in the operation of its railroad—*held*, that the plaintiff is not, as a matter of law, guilty of contributory negligence; and this, whether the herd law of 1872 is in operation in the county where the animal is killed or not. *Atchison, T. & S. F. R. Co. v. Gabbert*, 22 Am. & Eng. R. Cas. 621, 34 Kan. 132, 8 Pac. Rep. 218.—QUOTING *Atchison, T. & S. F. R. Co. v. Riggs*, 31 Kan. 622.

The fact that a horse was frightened and not under the control of any one at a time when it was struck by a railroad train on a highway crossing is not conclusive, as matter of law, of such a want of care on the part of its owner as to defeat an action

\* See post, 532-554.

brought by him against the railroad corporation to recover for the injury caused by its negligence. *Southworth v. Old Colony & N. R. Co.*, 105 Mass. 342, 2 Am. Ry. Rep. 436.

Evidence that a servant, whom traders employed to deliver goods, upon stopping with his horse and wagon to deliver a parcel at a house from fifty to a hundred rods from a railroad crossing, left the horse unfastened for four or five minutes while he was in the house, knowing that it was not afraid of cars, and having used it for three or four months without ever hitching it or knowing it to start, is not conclusive, as matter of law, of a want of due care on his part; but the question is for the jury. *Southworth v. Old Colony & N. R. Co.*, 105 Mass. 342.

**288. When question of fact for the jury.**—(1) *Generally.*—The contributory negligence of a boy in riding a horse, supposed to be gentle, to within seventy-five feet of a track, where he became frightened and jumped over an insufficient fence and was killed, is for the jury. *Hynes v. San Francisco & N. P. R. Co.*, 20 Am. & Eng. R. Cas. 486, 65 Cal. 316, 4 Pac. Rep. 28.

In a suit to recover for killing plaintiff's cow, whether there was contributory negligence on the part of plaintiff, and if so, to what extent, and whether the negligence of the company probably caused or contributed to the injury, are questions of fact to be determined by the evidence. *Illinois C. R. Co. v. Gillis*, 68 Ill. 317.

Whether or not the owner of a blind horse was guilty of negligence in turning out the horse to graze where he might be exposed to danger from passing railroad trains, was properly admitted to the jury. *Hammond v. Sioux City & P. R. Co.*, 49 Iowa 450.

Plaintiff's cow was killed by a "wild" train at a highway crossing. Plaintiff lived near the crossing and knew the time when trains passed, but more than an hour before a train would be due the cow was turned onto the highway, with the intention soon to drive her to a pasture beyond the track, but she was soon afterward killed. *Held*, that the question of plaintiff's contributory negligence was for the jury. *Courson v. Chicago, M. & St. P. R. Co.*, 71 Iowa 28, 32 N. W. Rep. 8.

In an action for injury to horses which go upon the track over an alleged insufficient cattle-guard, while the jury might not infer the insufficiency of the cattle-guard from

the fact that the horses passed over it by stepping between or upon the cross-ties, and further from the fact that cattle-guards somewhat differently constructed were in use, yet they might properly consider such facts, in connection with others, in determining the question of its sufficiency. *Timins v. Chicago, R. I. & P. R. Co.*, 31 Am. & Eng. R. Cas. 541, 72 Iowa 94, 33 N. W. Rep. 379. —*REVIEWING* *Krebs v. Minneapolis & St. L. R. Co.*, 64 Iowa 670; *McKinley v. Chicago, R. I. & P. R. Co.*, 47 Iowa 76.

Where cattle escape from the owner's barnyard to a track through a gate that the company is bound to maintain, and it appears that it had been down or insufficient for some time, the negligence of both the company and the owner is for the jury. *Estes v. Atlantic & St. L. R. Co.*, 63 Me. 308.

In actions for negligence in failing to erect or maintain fences under the statute, contributory negligence on the part of plaintiff is a defence; but whether merely permitting stock to run in a pasture after notice that it had several times passed through the railroad fence adjoining, which was defective and insufficient, and went onto the track and was killed, is such contributory negligence or not, is for the jury. *Johnson v. Chicago, M. & St. P. R. Co.*, 29 Minn. 425, 13 N. W. Rep. 673.

Whether, in exercising his right to use his land, the landowner has been guilty of negligence, contributing to an injury to his cattle, is ordinarily a question of fact for the jury, to be determined with reference to all the circumstances of the case, and to the duty of the company as above indicated. Merely suffering his cattle to graze upon his land, or to go to a spring thereon, in broad daylight, is not such negligence on the part of the landowner in law, notwithstanding the company's road is unfenced, and notwithstanding there is another railroad within a few hundred feet. *Schubert v. Minneapolis & St. L. R. Co.*, 27 Minn. 360, 7 N. W. Rep. 366.

Whether a person was in the lawful use of a highway as a "traveller," and whether he was in the exercise of due care at the time of an injury to his horse, are questions for the jury. *Sleeper v. Worcester & N. R. Co.*, 53 N. H. 520.

Plaintiff, living about three-fourths of a mile from defendant's track, which he knew to be unfenced, permitted his cow to pasture



in summer (presumably with other cattle) on a large tract of unclosed grass-land, extending from the neighborhood of his residence to the track, and she passed upon the track from said land, and was injured. *Held*, that upon these facts the question of contributory negligence, being open to doubt and debate, was for the jury. *Curry v. Chicago & N. W. R. Co.*, 43 Wis. 665.—REVIEWING *Blair v. Milwaukee & P. du C. R. Co.*, 20 Wis. 254.

In an action for the value of plaintiff's horse, which escaped upon defendant's railway track from an adjoining field, and was killed by a train in consequence, as was alleged, of a defect in defendant's fence at that place—*held*, that if it had appeared that the horse was breachy and accustomed to jump or break lawful fences, and that plaintiff, knowing these facts, had turned him loose in the field adjoining the track, the jury might have found upon this evidence that plaintiff was guilty of contributory negligence, though the court could not so hold as matter of law. *Jones v. Sheboygan & F. du L. R. Co.*, 42 Wis. 306, 15 Am. Ry. Rep. 229.

Where a landowner leaves open a gate at a private crossing, and some of his horses escape onto the track and are killed, it is a question for the jury whether he was guilty of contributory negligence. *Ellis v. London & S. W. R. Co.*, 2 H. & N. 424, 3 Jur. N. S. 1008, 26 L. J. Exch. 349.

A horse that escapes from plaintiff's servant onto a highway, and thence by a railroad gate onto the track, is not a trespasser, but the question as to whether the servant was negligent in allowing the horse to escape is for the jury. *Towne v. Nashua & L. R. Co.*, 124 Mass. 101.

(2) *Animals running at large.*—In Dakota it is lawful to allow cattle to run at large, but it is the duty of the owner to exercise reasonable care to prevent their going on a railroad track; but the question as to whether such care has been exercised in a given case is for the jury. *Williams v. Northern Pac. R. Co.*, 11 Am. & Eng. R. Cas. 421, 3 Dak. 168, 14 N. W. Rep. 97.

In a suit in Illinois against a railroad for stock killed in consequence of its neglect to fence its road, where it appears such stock were permitted to run at large in violation of law, the question whether the owner has been guilty of contributory negligence in permitting them to run at large is one of fact, to be determined by the jury.

*Cairo & St. L. R. Co. v. Woosley*, 85 Ill. 370.  
—FOLLOWED IN *Alabama G. S. R. Co. v. McAlpine*, 15 Am. & Eng. R. Cas. 544, 71 Ala. 545.—*Rockford, R. I. & St. L. R. Co. v. Irish*, 72 Ill. 404. *Ewing v. Chicago & A. R. Co.*, 72 Ill. 25.

## V. PROCEDURE.

### 1. Jurisdiction\*—Process.

**289. Jurisdiction, generally.**†—The Indiana act of 1853, relating to the liability of companies which fail to fence their road according to law, by reason of which injury occurs to stock, does not apply to actions in courts of common pleas or in circuit courts. *Evansville & C. R. Co. v. Ross*, 12 Ind. 446. *Indianapolis, P. & C. R. Co. v. Fisher*, 15 Ind. 203. *Jeffersonville R. Co. v. Martin*, 10 Ind. 416. *Toledo, W. & W. R. Co. v. Hibbert*, 14 Ind. 509.

But the act of 1859, amending the act of 1853, extends the rule established by the former act to actions brought either in the courts of common pleas or in circuit courts. *Evansville & C. R. Co. v. Ross*, 12 Ind. 446.

**290. —as dependent upon county lines.**—The word "may," as used in the Arkansas act of February 3, 1875, § 4, providing that the owner of stock killed "may sue the company running such train \* \* \* in any court having jurisdiction in the county where the killing or wounding occurred—*held*, to mean "must," and therefore restricting the right of action to the county where the killing occurred. *Little Rock & Ft. S. R. Co. v. Clifton*, 38 Ark. 205.

Where an action for killing stock is based upon the failure of the company to fence, it must be brought in the county where the killing occurred; but when it is based upon alleged negligence, it may be brought in any county through which the railroad runs. If such action be based on both these grounds, the supreme court, in the absence of evidence of the venue, will presume that a general finding or verdict was based upon the paragraph alleging negligence. *Terre Haute & I. R. Co. v. Pierce*, 19 Am. & Eng. R. Cas. 581, 95 Ind. 496.

**291. —as dependent upon parish lines.**—The company may be sued for damages for the killing of a mule in any parish

\* See *post*, 605-609.

† Suit must be brought in a court having jurisdiction over place of accident, see note, 19 Am. & Eng. R. Cas. 500.



in which the act was done. *State ex rel. v. Judge*, 33 La. Ann. 954.

**292. — as dependent upon state lines.**—A recovery may be had in the courts of Iowa for an animal killed by a railroad in Illinois, the statutes in each state giving a remedy being similar. *Boyce v. Wabash R. Co.*, 23 Am. & Eng. R. Cas. 172, 63 Iowa 70, 50 Am. Rep. 730, 18 N. W. Rep. 673.—**DISTINGUISHING** *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Hyde v. Wabash, St. L. & P. R. Co.*, 61 Iowa 441; *Woodard v. Michigan S. & N. I. R. Co.*, 10 Ohio St. 121; *Richardson v. New York C. R. Co.*, 98 Mass. 85; *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 Kan. 46.

In an action for the killing of plaintiff's cow by defendant's train, the complaint recited a statute of Iowa, and the facts necessary under it, for the recovery of double damages in such cases, and prayed judgment for such double damages. *Held*, that it must be treated as an action under that statute, and that, no such action being known to the law of this state, it cannot be maintained here. *Bettys v. Milwaukee & St. P. R. Co.*, 37 Wis. 323.—**FOLLOWING** *Anderson v. Milwaukee & St. P. R. Co.*, 37 Wis. 321.—**DISTINGUISHED IN** *Burns v. Grand Rapids & I. R. Co.*, 113 Ind. 169, 12 West. Rep. 688, 15 N. E. Rep. 230; *Herrick v. Minneapolis & St. L. R. Co.*, 31 Minn. 11, 47 Am. Rep. 771.

It is not material to a recovery whether the "local habitation" of the company was or is within or without the state, or was or is a creature of the laws of the state of the forum or some other state. *Pittsburgh, C. & St. L. R. Co. v. Hunt*, 71 Ind. 229.

At common law the owner of a dog may maintain an action against one who wrongfully kills or injures it; therefore the owner of a dog may maintain a common-law action in Texas against a railroad company for killing his dog in another state, where the service of process can be legally had in Texas. *St. Louis, A. & T. R. Co. v. Holden*, 3 Tex. App. (Civ. Cas.) 391.\*

**293. — as dependent upon amount.**—Under the Indiana laws of 1863, "to provide compensation to the owners of animals killed," etc. (Acts 1863, p. 25), all animals killed at any one time constitute a separate and indivisible cause of action, and two of these causes cannot be united to aggre-

gate an amount sufficient to give jurisdiction to the circuit court. *Indianapolis & C. R. Co. v. Kercheval*, 24 Ind. 139.—**FOLLOWED IN** Louisville, N. A. & C. R. Co. v. Quade, 101 Ind. 364.—*Toledo, B. & L. R. Co. v. Tilton*, 27 Ind. 71.—**FOLLOWED IN** Louisville, N. A. & C. R. v. Quade, 101 Ind. 364.

All animals killed on the track of a railroad company at any one time constitute a separate and indivisible cause of action; and where their value exceeds \$50, the circuit court or common pleas has original jurisdiction, but not otherwise. *Indianapolis & C. R. Co. v. Elliott*, 20 Ind. 430.—**FOLLOWED IN** Louisville, N. A. & C. R. Co. v. Quade, 101 Ind. 364.

Two or more causes of action cannot be united in the same suit for the purpose of giving the circuit or common pleas court jurisdiction, which is wanting when the value of the animal or animals killed, or the injury done, at the same time does not exceed \$50. *Jeffersonville, M. & I. R. Co. v. Brevoort*, 30 Ind. 324.

Under 1 Indiana Rev. St. 1876, p. 752, § 2, jurisdiction is given to the circuit courts or courts of common pleas in actions against railroad companies for killing stock "in all cases when the value of any animal or animals so killed or the injury done should exceed \$50," and below that amount the jurisdiction is given to justices of the peace. So where an action is commenced in court, if the jury find that the value of the stock killed is less than \$50, the court should at once dismiss the suit, though the complaint alleges that such value exceeds that amount. *Louisville, N. A. & C. R. Co. v. Johnson*, 67 Ind. 546.—**REVIEWING** *Indianapolis & C. R. Co. v. Elliott*, 20 Ind. 430; *Indianapolis & C. R. Co. v. Kercheval*, 24 Ind. 139; *Toledo, B. & L. R. Co. v. Tilton*, 27 Ind. 71; *Jeffersonville, M. & I. R. Co. v. Brevoort*, 30 Ind. 324.—**EXPLAINED IN** *Denver, W. & P. R. Co. v. Church*, 14 Am. & Eng. R. Cas. 320, 7 Colo. 143.

Complaint in the circuit court, in two paragraphs, for stock killed at different times: the first paragraph was for a horse worth \$200, and the second for a cow worth \$50. *Held*, that as to the second paragraph of the complaint the circuit court had no jurisdiction, as the value of the cow did not exceed \$50. *Indianapolis & C. R. Co. v. Kercheval*, 24 Ind. 139.

\* See ante, 82-84.

In an action for double damages for injury to stock, the jurisdiction as to the amount will be governed by the sum claimed as single damages, and not by the amount after the damages are doubled. *Williams v. Hannibal & St. J. R. Co.*, 80 Mo. 597.

**204. Action, whether local or transitory.**—An action for killing stock by reason of the company failing to erect and maintain sufficient fences along its track is transitory in its nature, whether it be brought under the statute or at common law. *Illinois C. R. Co. v. Swearingen*, 33 Ill. 289. *Detroit, E. R. & I. R. Co. v. Barton*, 61 Ind. 293.

An action against a railroad company, based on its common-law liability for negligently killing or injuring animals, is a transitory action, and may be brought in any county through which the railroad passes. *Toledo, W. & W. R. Co. v. Milligan*, 52 Ind. 505.

Under Indiana Rev. St. 1881, § 4026, the right of action against a railroad company for stock injured or killed is local, and the plaintiff must allege, as a jurisdictional fact, that the animals were killed or injured in the county where he brings suit; but where the complaint contains a description of the land where the railroad was located and the animals were injured, and avers that the land so described was in the county where the suit was brought, the complaint is sufficient on demurrer. *Louisville, N. A. & C. R. Co. v. Davis*, 83 Ind. 89.

**205. Jurisdiction of particular courts.\***—Under the provision of the act of congress of July 4, 1884, which confers upon the United States circuit court for the western district of Arkansas jurisdiction "over all controversies arising between said Southern Kansas R. Co. and the nations and tribes through whose territory the said railroad shall be constructed," the circuit court has jurisdiction of an action to recover damages for the killing of cattle by the negligence of the company's servants in operating its railroad. *Briscoe v. Southern Kansas R. Co.*, 40 Am. & Eng. R. Cas. 599, 40 Fed. Rep. 273.

The Southern Kansas R. Co. being authorized to construct its railroad through the Indian Territory by act of congress, such claim for damages is a suit arising

under a law of the United States. *Briscoe v. Southern Kansas R. Co.*, 40 Am. & Eng. R. Cas. 599, 40 Fed. Rep. 273.

**206. Process.\***—In an action against a company for injuries to stock, the summons and complaint may be served on a "depot-agent" without the affidavit required in other actions against corporations, when the service is on any other person than the "president, or other head thereof, secretary, cashier, or managing agent." *East Tenn., V. & G. R. Co. v. Bayliss*, 19 Am. & Eng. R. Cas. 480, 74 Ala. 150.

Under the provisions of the Georgia Code, §§ 3049, 3369, 3406, an action against a railroad company for killing stock cannot be instituted in a superior court by serving written notice on the company and filing the same in the clerk's office, without other pleadings. *Hodges v. Atlantic & G. R. Co.*, 51 Ga. 244.—DISTINGUISHING *Jones v. Central R. & B. Co.*, 18 Ga. 247.

Where in an action brought, under the provisions of § 2988 of the Georgia Code, for stock killed, the notice required was served personally by the plaintiff, who attached his affidavit of such service thereto. *Held*, that such affidavit was sufficient evidence of such service, and not being traversed, it was not necessary to produce the witness on the stand to prove the same. *Macon & W. R. Co. v. Baber*, 42 Ga. 300.

In trespass for killing a cow the summons was returned, "served by leaving copy at Enon Station office;" defendants not having appeared, service held insufficient, not having been made upon an officer or agent of the company. *Ohio & P. R. Co. v. Brittain*, 1 Pittsb. (Pa.) 271.

*Semble*, that in an action against a railroad company for killing cattle, the ten days' service of summons is not sufficient notice under the act of March 4, 1853. *New Albany & S. R. Co. v. Welsh*, 9 Ind. 479.

## 2. Right of Action — Form of Action — Demand.

**207. Right of action, generally.†**—The remedy provided by Dakota Code for an appraisal of stock killed or injured is merely cumulative, and a compliance therewith is not necessary to enable the party to sue in court. *Volkman v. Chicago, St. P., M. & O. R. Co.*, 35 Am. &

\* See post, § 610.

† When owner of stock killed on track cannot recover, see note, 1 L. R. A. 450.

\* See ante, § 289; post, § 605-609.

*Eng. R. Cas.* 204, 5 *Dak.* 69, 37 *N. W. Rep.* 731.

The appraisement of value of live stock injured by moving trains on unfenced railroad tracks, provided by acts 1891, ch. 101, is not made a condition precedent to railroad company's liability. The owner of the live stock may, at his option, proceed by appraisement and suit, or by suit without appraisement. If he proceeds without appraisement, he cannot recover his attorney fees, but only the actual damage sustained. *Cincinnati, N. O. & T. P. R. Co. v. Russell*, 92 *Tenn.* 108, 20 *S. W. Rep.* 784.

The Maryland acts of 1838, ch. 244, and 1846, ch. 346, give a right of action to the owner of stock killed or injured on a railway only when such stock are on the railway without any fault on the part of the plaintiff. *Baltimore & O. R. Co. v. Lamborn*, 12 *Md.* 257.

**298. — for acts of servants.\*—** An action of trespass does not lie against a railroad company for injury to animals run over by its cars or engines, unless the act was done by the company's direction or assent; and the conductor, engineer, or other subordinate agent who has charge of the train at the time is not, for this purpose, the representative of the corporation. *Selma, R. & D. R. Co. v. Webb*, 49 *Ala.* 240.

A railroad company is not liable to the owner of stock killed by an engineer who was in charge of a construction engine, by running the engine when he is not on duty, and for business not connected with the railroad company and against its orders. *N. Y., T. & M. R. Co. v. Sutherland*, 3 *Tex. App. (Civ. Cas.)* 177.

**299. — under § 43 Wagn. (Mo.) Statutes.**—Under § 43 of the Missouri railroad act (Wagn. Stat. 310-11), no recovery can be had for injuries resulting from the negligent management of the locomotive or train. For that purpose suit must be brought under § 5 of the damage act. *Crutchfield v. St. Louis, K. C. & N. R. Co.*, 64 *Mo.* 255.—REVIEWING *Cary v. St. Louis, K. C. & N. R. Co.*, 60 *Mo.* 209.—*Edwards v. Hannibal & St. J. R. Co.*, 66 *Mo.* 567.—FOLLOWING *Cary v. St. Louis, K. C. & N. R. Co.*, 60 *Mo.* 209; *Crutchfield v. St. Louis, K. C. & N. R. Co.*, 60 *Mo.* 209.

An action cannot be brought under the 43d section of the corporation law, and a

recovery be had under the 5th section of the damage act. *Edwards v. Hannibal & St. J. R. Co.*, 66 *Mo.* 567.—FOLLOWED IN *Cousins v. Hannibal & St. J. R. Co.*, 66 *Mo.* 572; *Elliott v. Hannibal & St. J. R. Co.*, 66 *Mo.* 683.

An action for damages for killing stock cannot be brought under both the 43d section of the Missouri railroad law, Wagn. St. 317, and the 5th section of the damage act, Wagn. St. 520. Such action must be brought under only one of them, and should be tried under the one which applies to the facts of the case as made by the petition and evidence; and instructions which leave it uncertain under which act they are to proceed in estimating damages, tend to confuse and mislead the jury, and are improper. *Wood v. St. Louis, K. C. & N. R. Co.*, 58 *Mo.* 109.—DISTINGUISHED IN *Lincoln v. St. Louis, I. M. & S. R. Co.*, 75 *Mo.* 27; *Carpenter v. St. Louis, I. M. & S. R. Co.*, 20 *Mo. App.* 644. FOLLOWED IN *Rhea v. St. Louis & S. F. R. Co.*, 84 *Mo.* 345.

No action can be maintained, under the 43d section of the Missouri railroad law (Wagn. St. 310), for animals killed within the limits of a town or city; in such cases, where fences have not been but might lawfully be erected, the action should be brought under section 5 of the damage act (Wagn. St. 520), which dispenses with the proof of negligence; or the action should be brought at common law. *Elliott v. Hannibal & St. J. R. Co.*, 66 *Mo.* 683.—FOLLOWING *Edwards v. Hannibal & St. J. R. Co.*, 66 *Mo.*, 567.—FOLLOWED IN *Cousins v. Hannibal & St. J. R. Co.*, 66 *Mo.* 572.

**300. — under § 809, Rev. St. of Missouri.**—When the action is founded on § 809, Rev. St. of Missouri, there can be no recovery under Rev. St. § 2124. *Rhea v. St. Louis & S. F. R. Co.*, 84 *Mo.* 345.—FOLLOWING *Cary v. St. Louis, K. C. & N. R. Co.*, 60 *Mo.* 209; *Wood v. St. Louis, K. C. & N. R. Co.*, 58 *Mo.* 109.

Under § 809, Rev. St. of Missouri, there can be no recovery for injuries to stock resulting from the negligent management of trains. *Rhea v. St. Louis & S. F. R. Co.*, 84 *Mo.* 345.—FOLLOWING *Cary v. St. Louis, K. C. & N. R. Co.*, 60 *Mo.* 209; *Crutchfield v. St. Louis, K. C. & N. R. Co.*, 64 *Mo.* 255.

**301. Election between statutory and common-law actions.**—Where

\* See ante, 30, 37.

stock are killed by a railroad which has neglected to fence its track in the time prescribed, the owner of such stock may elect, according to the facts of the case, to base his action upon the statute of 1855, or upon the common-law grounds of negligence. *Rockford, R. I. & St. L. R. Co. v. Phillips*, 66 Ill. 548.

The owner of stock killed by a railroad company may have his common-law action against the company for negligence, although there is a statute making railroad companies liable for killing stock, without regard to the question of negligence, provided the owner complies with the method of procedure laid down. *Denver & R. G. R. Co. v. Henderson*, 31 Am. & Eng. R. Cas. 559, 10 Colo. 1, 13 Pac. Rep. 910. See also *Denver & R. G. R. Co. v. Henderson*, 10 Colo. 4, 13 Pac. Rep. 912.—RECONCILING *Atchison, T. & S. F. R. Co. v. Lujan*, 6 Colo. 338.—FOLLOWED IN *Colorado C. R. Co. v. Caldwell*, 11 Colo. 545, 19 Pac. Rep. 542. QUOTED IN *Denver & R. G. R. Co. v. Outcalt*, 2 Colo. App. 395. REVIEWED IN *Wadsworth v. Union Pac. R. Co.*, 18 Colo. 600.—*Colorado C. R. Co. v. Caldwell*, 11 Colo. 545, 19 Pac. Rep. 542.—FOLLOWING *Denver & R. G. R. Co. v. Henderson*, 10 Colo. 4, 13 Pac. Rep. 912.

The Missouri statute for the recovery of single damages against railroad companies for the killing of stock (Rev. St. 1889, § 4428) does not provide for an exclusive remedy, but is cumulative, and does not displace the common law in the situation to which it applies. *Hill v. Missouri Pac. R. Co.*, 49 Mo. App. 520.—QUOTING *Calvert v. Hannibal & St. J. R. Co.*, 34 Mo. 243; *Iba v. Hannibal & St. J. R. Co.*, 45 Mo. 469.

**302. Form of action—Case not trespass.**—A railway company is not liable in trespass for injury to animals run over by a train in charge of its agent. The proper form of action is on the case. *Sharrod v. London & N. W. R. Co.*, 6 Railw. Cas. 239, 7 D. & L. 213, 14 Jur. 23, 20 L. J. Exch. 185, 4 Exch. 580. *Price v. New Jersey R. & T. Co.*, 31 N. J. L. 229.

**303. Splitting actions where more than one animal is killed.**—The killing or injuring of a number of cattle at the same time by railroad cars constitutes but one cause of action, but when they are killed or injured at different times each injury constitutes a separate cause of action.

*Pucket v. St. Louis, I. M. & S. R. Co.*, 25 Mo. App. 650. *Binicker v. Hannibal & St. J. R. Co.*, 83 Mo. 660. *Indianapolis & C. R. Co. v. Elliott*, 20 Ind. 430.

Where animals are killed by railroad trains at different times the causes of action are separate, and if one cause of action is for an amount under \$50 the action must be before a justice of the peace. *Louisville, N. A. & C. R. Co. v. Quade*, 101 Ind. 364.—FOLLOWING *Indianapolis & C. R. Co. v. Elliott*, 20 Ind. 430; *Indianapolis & C. R. Co. v. Kercheval*, 24 Ind. 139; *Toledo, B. & L. R. Co. v. Tilton*, 27 Ind. 71; *Jeffersonville, M. & I. R. Co. v. Brevoort*, 30 Ind. 324.—Compare *Bricker v. Missouri Pac. R. Co.*, 83 Mo. 391.

A claim for stock killed after suit is commenced cannot be united with a claim for stock killed before suit was commenced. *Toledo, P. & W. R. Co. v. Arnold*, 49 Ill. 178.

And in such case, where there is no positive proof that the defendant operated the railway which, it is claimed, committed the injury, but such fact is inferentially shown by the fact that the defendant was incorporated by the name it bears at a session of the legislature next previous to the injury complained of,—under such circumstances the inference is that such injury was done by the defendant's road, there being no proof that any other road was operated in that portion of the county where the damage was done. *Toledo, P. & W. R. Co. v. Arnold*, 49 Ill. 178.

Where two cattle standing but a few feet apart are killed by a passing train there is but one cause of action, and where the value of the two together exceeds \$50 the common pleas court has jurisdiction. *Lafayette & I. R. Co. v. Ehman*, 30 Ind. 83.

**304. Merger of cause of action in judgment.**—A cause of action upon which a judgment is rendered becomes merged in the judgment and cannot be the basis of a new action so long as the judgment is in force. Where, therefore, upon appeal from a judgment of a justice of the peace in an action against a railroad for killing stock, plaintiff dismissed his suit in the circuit court, that did not save another action begun by him before the dismissal on the same cause of action. *Cooksey v. Kansas City, St. J. & C. B. R. Co.*, 74 Mo. 477.—DISTINGUISHED IN *Wilson v. St. Louis, I. M. & S. R. Co.*, 87 Mo. 431.

**305. Action over against engineer.**

—A failure on the part of an engineer to ring a bell or sound a whistle, as required by law, will render him liable over to the company for any damages that it has been subjected to by reason of such failure. *Chicago & R. I. R. Co. v. Hutchins*, 34 Ill. 108.

**306. — over against adjoining landowner.**—Where a company sues an abutting landowner for removing a fence along the track which it was bound to maintain, there can be no recovery of money which the company has paid to a third person for stock that went upon the track by reason of the removal of such fence and were killed, where it does not appear that such killing was the direct consequence of the removal of the fence, nor that the company was free from negligence. *Louisville & N. R. Co. v. Guthrie*, 10 Lea (Tenn.) 432.—Compare *Warren v. Keokuk & D. M. R. Co.*, 41 Iowa 484.

Where defendant wrongfully removed a gate, whereby the horse of a third person strayed upon plaintiff's track and was injured, and plaintiff was obliged to pay because of its negligence in not replacing the gate—*held*, that plaintiff could recover the amount so paid. *Chicago & N. W. Co. v. Dunn*, 59 Iowa 619, 13 N. W. Rep. 722.

**307. Necessity of demand or notice of claim.**—Under Alabama Code, § 1701, it is necessary to present a claim against a company for killing stock to an agent of the company, or to bring suit, within sixty days; and when the case is tried by the court without a jury, and the statute is set up as a defence, and the amount claimed is less than \$20, it is error to render judgment for plaintiff without proof that such demand was made, or that the suit was commenced as provided by statute. *South & N. Ala. R. Co. v. Reid*, 66 Ala. 250.

The original affidavit of loss must be served on a railway company to render it liable for stock killed upon its track, the delivery of a copy of such affidavit not fulfilling the requirement of the statute. *Cole v. Chicago & N. W. R. Co.*, 38 Iowa 311.—DISTINGUISHED IN *Brentner v. Chicago, M. & St. P. R. Co.*, 7 Am. & Eng. R. Cas. 574, 58 Iowa 625.

To sustain an action, under Kansas Laws 1874, ch. 94, against a railroad company for the killing of stock, proof must be made of  
1 D. R. D.—16.

a demand in accordance with the provisions of § 2. *Kansas Pac. R. Co. v. Ball*, 19 Kan. 535.—FOLLOWED IN *Kansas City, Ft. S. & G. R. Co. v. Frazier*, 23 Kan. 698.

**308. Proof and sufficiency of demand or notice.**—(1) *Alabama.*—Section 1701 of the Alabama Code of 1876 was superseded by the later enactment, now embodied in § 1711 of that Code, as to the time within which the claim for damages for injuries done to stock by a railroad company should be presented; but that section still stands as a regulation as to the manner in which the claim must be preferred. Hence, the claim must still be in writing, and must be presented to one of the officers or employes named in that section. *Alabama G. S. R. Co. v. Killian*, 69 Ala. 277.

Suit brought in less than six months is of itself sufficient presentment of claim. *South & N. Ala. R. Co. v. Bees*, 82 Ala. 340, 2 So. Rep. 752.

In an action to recover damages for injuries to stock (Alabama Code, § 1711), it being proved that plaintiff's claim was presented, within six months after the injury, to an agent of the company, who promised to forward it to the proper officer or department, and afterward told plaintiff that he had forwarded it, and that he would pay it on his return trip; and the evidence showing, also, that other similar claims had been presented to said agent and had been paid by him, and that he held himself out as the agent to whom such claims could properly be presented; this is sufficient evidence of due presentation to authorize the submission of the question to the jury, although the defendant's evidence tended to show that said agent had no authority to receive the presentation of claims, but was only authorized to adjust and pay claims referred to him by the higher officers of the company. *Alabama G. S. R. Co. v. Roebuck*, 23 Am. & Eng. R. Cas. 176, 76 Ala. 277.

Proof that an agent, appointed for the purpose of investigating and paying such claims, inquired after plaintiff to settle his claim within sixty days after it accrued, and offered to pay his attorney half the amount claimed, will authorize a jury to infer due presentment. *South & N. Ala. R. Co. v. Brown*, 53 Ala. 651, 13 Am. Ry. Rep. 166.

(2) *Arkansas.*—Under Mansfield's Arkansas Digest, § 5538, providing that when any stock are killed by a railroad train the railroad company must post at the station—

house nearest to the killing a description of the animal killed and the time and place of killing, or forfeit double damages for such killing, the posting of such notice at such station-house in any public place where it could be seen is a sufficient compliance with the statute. *St. Louis, I. M. & S. R. Co. v. Wright*, 57 Ark. 327.

Proof that no advertisement of the killing of an animal was posted at the nearest station-house, either at the place where such notices were usually placed or in front of the building, will, in the absence of evidence that there were other places suitable for such posting, justify a finding of the jury that no notice was posted. *St. Louis, I. M. & S. R. Co. v. Wright*, 57 Ark. 327.

(3) *Iowa*.—Where stock were killed by the "Central Iowa Railway Company," a notice served upon the "Iowa Central Railway Company" is a sufficient compliance with Iowa Code, § 1289, requiring notice to be served on the company killing stock in order to recover double damages. *Martin v. Central Iowa R. Co.*, 59 Iowa 411, 13 N. W. Rep. 424.

The affidavit served for the purpose of entitling claimant to double damages for stock killed by a railroad train need not specially designate the place where the injury was done. The jurat to such affidavit may be amended within such reasonable time as not to cause essential injury to the other party, and the notice of claim and the accompanying affidavit may be served by the plaintiff or any other person. *Mundhenk v. Central Iowa R. Co.*, 11 Am. & Eng. R. Cas. 463, 57 Iowa 718, 11 N. W. Rep. 656.—FOLLOWING *Mackie v. Central R. Co.*, 54 Iowa 540.

Proof that a notice and affidavit of the killing of stock served on a railroad company were similar to others introduced in evidence is sufficient. *Keyser v. Kansas City, St. J. & C. B. R. Co.*, 56 Iowa 440, 9 N. W. Rep. 338.—REVIEWING *McNaught v. Chicago & N. W. R. Co.*, 30 Iowa 336.

It is not essential that the notice and affidavits required to be served upon the railroad company, where damages are claimed for stock killed, should contain anything more than a statement of the claim and the fact of the injury. *Mackie v. Central R. Co.*, 54 Iowa 540, 6 N. W. Rep. 723.

\* Notice of injury to stock and tender by company of amount of claim under Iowa statute, see 49 Am. & Eng. R. Cas. 585, *abstr.*

A notice to a railroad company of stock killed which contains a statement of the loss complained of, and is sworn to, is a sufficient compliance with the laws of 9th Gen. Assembly of Iowa, ch. 169, § 6, and it is not necessary that the notice and affidavit be on separate papers. *Mendell v. Chicago & N. W. R. Co.*, 20 Iowa 9.—REVIEWED IN *Manwell v. Burlington, C. R. & N. R. Co.*, 45 Am. & Eng. R. Cas. 501, 80 Iowa 662.

Service of such notice may be made by delivering to the defendant either the original or a copy. *Mendell v. Chicago & N. W. R. Co.*, 20 Iowa 9.

(4) *Kansas*.—In an action under par. 1252 of the Kansas General Statutes of 1889, for injuries to stock, where there was evidence tending to show that there were both a verbal and a written demand, but the trial court rejected the copy of the notice of the written demand upon the ground that it was not the best evidence, and the jury found that there were both a written and a verbal demand—*held*, that the finding that there was a written demand was immaterial, and that a new trial should not be granted for that reason. *Missouri Pac. R. Co. v. Gill*, 49 Kan. 441, 30 Pac. Rep. 414.

Where the owner of a steer, killed by a company in the operation of its trains, makes out a bill in writing, stating an account in favor of himself and against the company, for the value of the animal killed, giving the date of the accident, and presents said bill to the company within thirty days from the date of the accident—*held*, that the making and delivery of said bill is a sufficient demand upon the company for the value thereof. *Fl. Scott, W. & W. R. Co. v. Holman*, 45 Kan. 167, 25 Pac. Rep. 585.

In an action under the railroad stock law of 1874, to recover for the value of a heifer killed by the railway company in the operation of its road, it was shown that the plaintiff made a demand upon the railway company for the value of the heifer, which demand was sufficient and proper in every respect, except that the plaintiff placed the value of the heifer at \$50, when in fact she was worth only \$30. *Held*, that such demand is not void so as to prevent the plaintiff from maintaining an action against the railway company under said railway stock law for the real value of the heifer. *Missouri Pac. R. Co. v. Abney*, 30 Kan. 41, 1 Pac. Rep. 385.

**309. Upon whom demand may be made.**—An owner of stock can maintain an



action, under the Kansas act of 1874 (Gen. St. of 1889, par. 121-1256), against a railroad company for injuring his stock, only after a demand for payment for such injury has been made upon some ticket agent, station agent, or other agent of the railroad company having authority to collect or settle claims for such injuries. *St. Louis & S. F. R. Co. v. Kinman*, 49 Kan. 627, 31 Pac. Rep. 126.

A demand under the Kansas act of 1874 is sufficient if made upon one who is the "stock and claim adjuster, and authorized to settle for stock killed." *Union Trust Co. v. Kendall*, 20 Kan. 515, 20 Am. Ry. Rep. 294.—FOLLOWED IN *Kansas City, Ft. S. & G. R. Co. v. Frazier*, 23 Kan. 698.

Under the special Kansas statute of 1874, imposing liability on railroad companies for stock killed, a demand made upon the general superintendent of a railway company is a sufficient demand upon the company. *Central Branch R. Co. v. Ingram*, 20 Kan. 66.—FOLLOWED IN *Union Trust Co. v. Kendall*, 20 Kan. 515; *Kansas City, Ft. S. & G. R. Co. v. Frazier*, 23 Kan. 698.

### 310. To whom notice may be given.

—A return of service on a notice for a claim for stock killed by a railroad company, which recites that service was made upon the station agent of the road at a certain place, is sufficient. *Welsh v. Chicago, B. & Q. R. Co.*, 53 Iowa 632, 6 N. W. Rep. 13, 21 Am. Ry. Rep. 181.—FOLLOWED IN *Schlenker v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 625, 61 Iowa 235.

In the absence of all proof to the contrary, it will be presumed that a station agent of a railroad company is employed in the management of such business of the corporation as usually devolves upon such agents, and service in due manner and form upon him of a notice and affidavit of killing stock is sufficient to bind the company. *Smith v. Chicago, M. & St. P. R. Co.*, 13 Am. & Eng. R. Cas. 534, 60 Iowa 512, 15 N. W. Rep. 303.

**311. — or claim presented.**—The provision of Alabama Code 1876, § 1701, providing that a claim against a railroad company for stock killed shall be presented to the "president, treasurer, superintendent, or some depot agent" of the company, is not sufficiently complied with by giving notice to a section boss. *Alabama G. S. R. Co. v. Killian*, 69 Ala. 277.

But presentment of such claim to an

agent specially appointed by the company for the purpose of reporting such claims is a sufficient compliance with the statute. *South & N. Ala. R. Co. v. Brown*, 53 Ala. 651, 13 Am. Ry. Rep. 166.—FOLLOWED IN *South & N. Ala. R. Co. v. Hagood*, 53 Ala. 647.

Proof that the auditor of the company had frequently acted as depot agent and received and paid claims for stock killed, there being no proof that there was any depot agent at the place where the claim was presented, shows a sufficient compliance with the Revised Code, requiring claims for stock killed to be presented in writing in sixty days to the president, treasurer, superintendent, or some depot agent of the corporation. *Mobile & O. R. Co. v. Malone*, 46 Ala. 391.

**312. Notice and affidavit in claims for double damages.**—The statutory notice required to be given by the owner of stock killed on a railroad, in order to recover double damages therefor (Code, § 1976), may be duly served by the delivery of a copy thereof instead of the original, as the statute does not prescribe the mode of service. *Van Slyke v. Chicago, St. P. & K. C. R. Co.*, 80 Iowa 620, 45 N. W. Rep. 396.

But under the Iowa act 1862, ch. 169, providing for a recovery of double damages for stock killed on a railroad track, a provision requiring notice of the killing to be accompanied by an affidavit of the injury is not complied with by serving a copy of the affidavit. *McNaught v. Chicago & N. W. R. Co.*, 30 Iowa 336.—DISTINGUISHED IN *Brentner v. Chicago, M. & St. P. R. Co.*, 7 Am. & Eng. R. Cas. 574, 58 Iowa 625. REVIEWED IN *Keyser v. Kansas City, St. J. & C. B. R. Co.*, 56 Iowa 440.

Proof of the service of notice and affidavit of loss, to entitle plaintiff to double damages for injury to animals, may be made by copies shown to be correct, without notice to defendant to produce the originals. *Smith v. Kansas City, St. J. & C. B. R. Co.*, 58 Iowa 622, 12 N. W. Rep. 619.—FOLLOWING *Brentner v. Chicago, M. & St. P. R. Co.*, 58 Iowa 625.

Upon the trial of an action against a railroad company to recover double the value of a horse killed by a train, the value not having been paid after notice and proof of the injury by affidavit, the statement in the return of the constable who served the affidavit upon the agent of the railroad company, that such service was made by giving



a copy of the affidavit to the agent, may be corrected by the constable's evidence showing that he served the original affidavit. *Liston v. Central Iowa R. Co.*, 26 *Am. & Eng. R. Cas.* 593, 70 *Iowa* 714, 29 *N. W. Rep.* 445.

On a trial to recover for injury to stock killed by a train, a copy of the notice and affidavit served on the company under the statute is admissible when accompanied by the oath of the person who made the service, to prove it. *McLenon v. Kansas City, St. J. & C. B. R. Co.*, 69 *Iowa* 320, 28 *N. W. Rep.* 619.

The notice and affidavit of the killing of stock by a railroad company, required by § 1289 of the Code of Iowa, in order to recover double damages, may be served by simply delivering them to the proper officer or agent of the company without reading them. *Brentner v. Chicago, M. & St. P. R. Co.*, 19 *Am. & Eng. R. Cas.* 448, 68 *Iowa* 530, 23 *N. W. Rep.* 245, 27 *N. W. Rep.* 605.

Proof of the service of the notice and affidavit of loss required by statute to be served upon the defendant, to entitle the plaintiff to double damages for injury to cattle, may be made by copies or duplicate originals, without serving notice upon the defendant to produce the originals. *Brentner v. Chicago, M. & St. P. R. Co.*, 7 *Am. & Eng. R. Cas.* 574, 58 *Iowa* 625, 12 *N. W. Rep.* 615.—DISTINGUISHING *McNaught v. Chicago & N. W. R. Co.*, 30 *Iowa* 336; *Cole v. Chicago & N. W. R. Co.*, 38 *Iowa* 311; *Campbell v. Chicago, R. I. & P. R. Co.*, 35 *Iowa* 334.—FOLLOWED IN *Smith v. Kansas City, St. J. & C. B. R. Co.*, 58 *Iowa* 622.

Under Iowa act 1862, ch. 469, authorizing a recovery of double damages for stock killed or injured by a company, the affidavit of injury provided for by the act may be made either by the claimant or by any other person cognizant of the facts. *Henderson v. St. Louis, K. C. & N. R. Co.*, 36 *Iowa* 387.

In proceedings under Iowa act 1862, ch. 169, providing for the recovery of double damages for stock killed by railroad companies, the original affidavit required to be made under the act must accompany the written notice of killing which is required to be served on the company. A copy of the affidavit does not meet the requirements of the law. *Campbell v. Chicago, R. I. & P. R. Co.*, 35 *Iowa* 334.—DISTINGUISHED IN *Brent-*

*ner v. Chicago, M. & St. P. R. Co.*, 7 *Am. & Eng. R. Cas.* 574, 58 *Iowa* 625.

Where a railroad is being operated by a receiver, the service of notice, in due form, of a claim for damages for an injury to stock upon the receiver and a station agent in the county where the stock were injured, is sufficient to entitle the claimant to recover from the receiver, under section 1289 of the Code Iowa, double damages for such injury, if payment is not made within thirty days after the service of such notice. *Brockert v. Central Iowa R. Co.*, 82 *Iowa* 369, 47 *N. W. Rep.* 1026.

### 3. Parties.

**313. Who may sue, generally.**—One who has a special ownership in an animal killed by a railway train is empowered by the statute to recover its full value. *St. Louis, I. M. & S. R. Co. v. Taylor*, 57 *Ark.* 136.

Before a party can recover against a railroad for injury to property, he must show that he is either the absolute or qualified owner of it. *Ohio & M. R. Co. v. Jones*, 27 *Ill.* 41.

In an action for injuries to animals, it is necessary to show that plaintiff was the owner or had possession of the property. *Ohio & M. R. Co. v. Saxton*, 27 *Ill.* 426.

A man must be the owner of property before he can recover for injury it has sustained; and, where several persons sue, if any portion of the property belongs to other persons than the plaintiffs, or if any portion of it belongs to any one of them individually, they cannot recover for it. When several sue for injury to property belonging to them jointly, they can recover only for such property as they prove so belonged to them. *St. Louis, A. & T. H. R. Co. v. Linder*, 39 *Ill.* 433.

One having sheep in his possession, under an arrangement by which he is accountable for them or for any injury thereto, is the owner thereof within the meaning of the Indiana statute providing that the owners of stock killed may sue therefor. *New York, C. & St. L. R. Co. v. Auer*, 24 *Am. & Eng. R. Cas.* 383, 106 *Ind.* 219, 55 *Am. Rep.* 734, 6 *N. E. Rep.* 330.

In an action for damages for the killing of a cow, evidence that the cow was given to the plaintiff by a third person, coupled with a request that at a future time the plaintiff give another cow to the plaintiff's son, is sufficient evidence of ownership to support

a judgment. *Wood v. St. Louis, I. M. & S. R. Co.*, 20 Mo. App. 601.

In a suit against a railroad for double damages for injuries to cattle, brought under the statute (Wagn. Missouri St. 310, § 43), the party injured is the proper plaintiff. *Fickle v. St. Louis, K. C. & N. R. Co.*, 54 Mo. 219, 12 Am. Ry. Rep. 376.—FOLLOWING *Hudson v. St. Louis, K. C. & N. R. Co.*, 53 Mo. 525.

Plaintiff, owning land adjacent to the railway, permitted one D., a servant of the company living within their fences, to cultivate a small piece free of rent. D. made a gate in the railway fence to give him access to this land, and the plaintiff's horses passed through it to the railway track and were killed. Held, that the plaintiff was sufficiently in possession of the close from which the horses escaped to entitle him to recover. *Henderson v. Grand Trunk R. Co.*, 20 U. C. Q. B. 602.

**314. Bailee.**—Under Mansf. Arkansas Dig. § 5540, providing that actions for damages may be maintained by any person who has either a special or an absolute property in stock killed or injured by a railroad, one who has a horse hired under an agreement to return it in good condition may maintain an action against a railroad for killing it. *St. Louis, I. M. & S. R. Co. v. Biggs*, 50 Ark. 169, 6 S. W. Rep. 724.—QUOTING *Heydon & Smith's case*, 13 Coke 489; *White v. Webb*, 15 Conn. 302; *Barker v. Dement*, 9 Gill (Md.) 7; note to *Armory v. Delamarie*, 1 Smith's Leading Cases 701. REVIEWING *Poole v. Symonds*, 1 N. H. 289; *Lyle v. Barker*, 5 Binn. (Pa.) 457.

**315. Person who takes up an estray.**—One in possession of a cow, taken up as an estray, may recover of a railroad where the cow is killed through the negligence of the company. *Peoria, P. & J. R. Co. v. McIntire*, 39 Ill. 298.—DISTINGUISHED IN *Chicago & N. W. R. Co. v. Shultz*, 55 Ill. 214.

A party had taken up a colt as an estray, and after he had been in possession about eight months it was killed by a train by reason of the negligence of the company. The party so taking up the estray, in attempting to comply with the law, failed to post the animal in the proper manner, yet he could recover against the company for the injury, and such recovery would be a bar to any subsequent action against the company by the true owner for the same injury. *Chicago & N. W. R. Co. v. Shultz*, 55 Ill. 421.—DISTINGUISHING *Peoria, P. &*

*I. R. Co. v. McIntire*, 39 Ill. 298.—DISTINGUISHED IN *Toledo, P. & W. R. Co. v. Johnston*, 74 Ill. 83.

**316. Licensee of a lessee.**—A licensee who has acquired from the lessees of land the right to pasture his sheep thereon occupies no more favorable position to recover from a railroad company for the loss of sheep which strayed upon the track through an opening in the fence, made by the lessees for their own convenience, than that occupied by the lessees, who could not recover if the stock lost had been their own. *McCoy v. Southern Pac. R. Co.*, 56 Am. & Eng. R. Cas. 132, 94 Cal. 568, 29 Pac. Rep. 1110.

**317. Vendor.**—A cow was agreed to be sold for thirty dollars, but the price had not been paid nor the cow delivered, and the cow was killed by railroad. Another cow was delivered to the purchaser, and the vendor sued for the value of cow killed. Held, the suit might well lie. The title to the cow was still in the vendor. *Railroad Co. v. Ford*, 11 Heisk. (Tenn.) 388.

**318. Inhabitant of the Chickasaw nation.**—Under the act of Congress of July 4, 1884, granting a right of way through the Indian Territory to the Southern Kansas Railway Company, and providing that the United States circuit and district courts for the northern district of Texas, western district of Arkansas, and district of Kansas shall have concurrent jurisdiction over all controversies arising between said railroad company and the Indian tribes through whose territory the road passes, without reference to the citizenship of the parties or the amount involved, confers jurisdiction upon such courts of a suit by an inhabitant of the Chickasaw nation to recover for stock killed by the cars of said company. *Southern Kansas R. Co. v. Briscoe*, 144 U. S. 133, 12 Sup. Ct. Rep. 538; affirming 40 Fed. Rep. 273.

**319. Assignee of cause of action.**—The assignee of a cause of action against a company for killing cattle may sue in his own name. *East. Tenn., G. & V. R. Co. v. Henderson*, 1 Lea (Tenn.) 1.

And this rule holds good in Indiana, notwithstanding a statute provides that, in actions for killing animals, the owner must make complaint and may sue. *Louisville, N. A. & C. R. Co. v. Goodbar*, 13 Am. & Eng. R. Cas. 599, 88 Ind. 213.

And under the Iowa Code, § 1289, if the

claim is not paid within thirty days after notice to company by assignee, he may sue for and recover, in his own name, double damages, just as the assignor might have done. *Everett v. Central Iowa R. Co.*, 31 *Am. & Eng. R. Cas.* 550, 73 *Iowa* 442, 35 *N. W. Rep.* 609.

Where cattle were run over and killed by the cars of a railroad company, and the owner of the stock assigned the right to sue the company for the damage sustained, the assignment conveyed the right to sue, the tort being not to the person but to the estate. *Galveston, H. & S. A. R. Co. v. Freeman*, 57 *Tex.* 156.—APPROVING BUTLER *v. New York & E. R. Co.*, 22 *Barb.* (N. Y.) 110. QUOTING *Hodgman v. Western R. Co.*, 7 *How. Pr.* (N. Y.) 493.

**320. Action need not be in name of state, under § 43 of Mo. railroad act.**—Suit against a railroad company to recover double damages for injuries to stock need not be brought in the name of the state, under § 42 of the railroad statute (*Wagn. St.* 310), but may be instituted under § 43 thereof, in the name of the owner. Double damages, although looked upon as punitive, may be also treated as compensatory. *Seaton v. Chicago, R. I. & P. R. Co.*, 55 *Mo.* 416.—FOLLOWED IN *Mis-souri River, Ft. S. & G. R. Co. v. Shirley*, 20 *Kan.* 660; *Saunders v. St. Louis, K. C. & N. R. Co.*, 57 *Mo.* 117; *Sparr v. St. Louis, K. C. & N. R. Co.*, 57 *Mo.* 152. REVIEWED IN *Barnett v. Atlantic & P. R. Co.*, 68 *Mo.* 56.—*Sparr v. St. Louis, K. C. & N. R. Co.*, 57 *Mo.* 152.

**321. Not in the name of one for the use of another.**—An action of damages for killing animals on its track, being *ex delicto*, should not be brought in the name of one for the use of another. And in an action so brought a recovery against the defendant will not be disturbed for want of proof that the user had an interest in the suit. His connection with the case will be disregarded in passing upon the correctness of the verdict. *Kansas City, M. & B. R. Co. v. Cantrell*, 70 *Miss.* 329, 12 *So. Rep.* 344.

**322. Who cannot sue.**—A husband cannot recover anything for the killing of an animal belonging to his wife worth \$150, although it may have been procured in exchange for a similar animal belonging to her, with the addition of \$25 paid by him in cash out of his own means. *Central R. &*

*B. Co. v. Bryant*, 89 *Ga.* 457, 15 *S. E. Rep.* 537.

The tenant of the landowner who is bound by contract to maintain the fence, or a person whose animals trespass upon the land, is in no better position to maintain an action than the proprietor. *Indianapolis, P. & C. R. Co. v. Petty*, 25 *Ind.* 413.

A father cannot recover damages from a railroad company for killing stock owned by his son, although the latter is a minor. *Morris v. St. Louis, K. C. & N. R. Co.*, 58 *Mo.* 78, 9 *Am. Ry. Rep.* 96.

**323. Who may be sued, generally.**—A railroad company that holds itself out to the public as the operator of a railroad is liable for damages resulting to third persons by reason of a negligent management and operation of said road. *Jacksonville, T. & K. W. R. Co. v. Garrison*, 30 *Fla.* 557, 11 *So. Rep.* 929.

**324. Engineer and fireman.**—The engineer who conducts a train of cars upon a railroad, and a fireman who is hired by him and has charge of the brake under his direction, are both servants of the railroad company, and they and the company are all responsible, either jointly or severally, for an injury resulting from negligence in conducting the train. *Suydam v. Moore*, 8 *Barb.* (N. Y.) 358.—REVIEWED IN *St. Johnsbury & L. C. R. Co. v. Hunt*, 59 *Vt.* 294.

**325. State.**—The only purpose of Alabama Rev. Code, § 2534, was to afford to persons who had claims against the state the mode of ascertaining whether or not they were well founded, and if they were, what sum of money or other thing was due to them; and said section does not operate to make the state liable for stock killed by a railroad while being operated by a state receiver. *State v. Hill*, 54 *Ala.* 67.

#### 4. Pleadings.

##### a. Declaration—Complaint—Petition.\*

**326. Generally.**—Under the liberal construction placed on the Alabama statute requiring brevity in pleadings (Code, § 2664), a general averment of negligence on the part of defendant's servants, and consequent injury to plaintiff's horse, may be sufficient in a complaint claiming damages, without a statement of the particular facts; but, if the particular facts are stated, they must show that the injuries were the natural conse-

\* See *post*, 615.

quence thereof, or the damages not too remote. *Stanton v. Louisville & N. R. Co.*, 91 Ala. 382, 8 So. Rep. 798.—APPLYING South & N. Ala. R. Co. v. Thompson, 62 Ala. 494; Western R. Co. v. Lazarus, 88 Ala. 453.

A declaration alleging that defendant, by reckless negligence in running its trains, etc., in the month of October, 1889, did kill five head of cattle, the property of petitioner, of the said value of \$129, etc., and which said defendant refuses to pay, notwithstanding often asked to do so by petitioner, was held good on demurrer. *Chattanooga, R. & C. R. Co. v. Palmer*, 89 Ga. 161, 15 S. E. Rep. 34.

A plaintiff to recover double damages for killing stock is required, somewhat strictly, to allege and prove all the facts prescribed by the statute, yet if such facts appear by express averment, or by necessary implication from such express averment, the petition will be held sufficient. *Lainiger v. Kansas City, St. J. & C. B. R. Co.*, 41 Mo. App. 165.

A complaint in the following words and form, to wit, "The Toledo and Wabash Railway Co., to Emanuel F. Lurch, Dr., 1861, November. To one cow killed by your locomotive, within Clinton township, Cass county, Indiana, \$50," fails to state a cause of action. *Toledo & W. R. Co. v. Lurch*, 23 Ind. 10.

The second count of a declaration averred defendant's possession of their railway, and of the engines thereon, and charged that they so carelessly managed the same that the said engine ran against the plaintiff's mare, and threw the said mare unto and upon the said railway, and injured her so that she died—held, bad on demurrer: 1st, because no value was stated for the mare; 2d, because the count implied that the mare was trespassing on the railway. *Connors v. Great Western R. Co.*, 13 U. C. Q. B. 401.

**327. Interpretation, generally.**—To determine whether a petition states a statutory or common-law cause of action for the killing of stock by a railway company, it is necessary to consider whether, in order to recover under the petition, the plaintiff must prove the kind of negligence named in the statute, that is, the failure on the part of the railway company to erect and maintain a lawful fence, or whether he can succeed by proving what would be negligence at common law. *Hill v. Missouri Pac. R. Co.*, 49 Mo. App. 520.

Where plaintiff's petition in suit against a

railroad company for injuries to stock alleges the duty of defendant to erect and maintain fences, the breach of that duty, and the prayer for double damages; and direct reference is made in the body of the petition to § 43 of the railroad law, the pleading will be treated as brought under that section, although containing the further averment that the injury was negligently done. *Crutchfield v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 255, 17 Am. Ry. Rep. 250.—FOLLOWED IN *Rhea v. St. Louis & S. F. R. Co.*, 84 Mo. 345.

In the Indian Territory, a complaint alleging simply that defendant, while operating its railway through plaintiff's pasture, negligently killed his stock, and that the stock were killed solely through defendant's inexcusable neglect, is sufficient to withstand a general demurrer, since, under Mansf. Dig. Ark. § 5065 (in force in the territory), a complaint will be treated as alleging every fact which can be implied from its averments by the most liberal intendment. *Gulf, C. & S. F. R. Co. v. Washington*, 49 Fed. Rep. 347, 4 U. S. App. 121, 1 C. C. A. 286.—APPLIED IN *Gulf, C. & S. F. R. Co. v. Ellidge*, 49 Fed. Rep. 356, 4 U. S. App. 136, 1 C. C. A. 295.

**328. Interpretation of particular words and phrases.**—The word "reckless," as employed in the complaint in an action against a railroad company to recover damages for "the negligent, careless, and reckless killing" of live stock, implies no more than a want of that degree of care required by law of the defendant's employes. *Louisville & N. R. Co. v. Barker*, 96 Ala. 435, 11 So. Rep. 453.

A complaint which charges that the defendant "wilfully and willingly killed" the plaintiff's animal is sufficient to show an intentional killing. *Chicago, St. L. & P. R. Co. v. Nash*, 1 Ind. App. 298, 27 N. E. Rep. 564.—QUOTING *Lewis v. Great Western R. Co.*, 3 Q. B. D. 195; *Pittsburgh, C. & St. L. R. Co. v. Stuart*, 71 Ind. 500; *Carter v. Louisville, N. A. & C. R. Co.*, 98 Ind. 552; *Palmer v. Chicago, St. L. & P. R. Co.*, 112 Ind. 250; *Cincinnati & M. R. Co. v. Eaton*, 53 Ind. 307.

In an action for killing live stock, an averment that the horses went upon the railroad "by reason of the company's failure to maintain sufficient fences and cattle-guards" must be held to be the practical equivalent of an allegation that they went upon the railroad at a point "where it was not securely fenced." *Wabash R. Co. v. Ferris*

(*Ind. App.*), 32 *N. E. Rep.* 112. *Evansville & T. H. R. Co. v. Tipton*, 101 *Ind.* 197.

Where there was an allegation that the "right of way" was not securely fenced, it was considered equivalent to an allegation that the "road" was not securely fenced. *Louisville, N. A. & C. R. Co. v. Hixon*, 101 *Ind.* 337.

An allegation that a railroad was not securely fenced will be held to mean that it was not inclosed with a good and lawful fence. *Missouri Pac. R. Co. v. Morrow*, 31 *Am. & Eng. R. Cas.* 520, 36 *Kan.* 495, 13 *Pac. Rep.* 789.

Where a complaint in an action for killing a horse was in two paragraphs, and in the first it was charged that the agents and servants of the railway company "wilfully and willingly" killed the horse by striking and running upon it with the locomotive and train of cars, and the second paragraph charged that the defendant company, by carelessness, negligence of its servants and employés, ran its locomotive and train of cars on plaintiff's animal and killed it at a highway crossing, that he was without fault, etc.—an objection that the first paragraph is not sufficient because it did not aver that the animal was wrongfully or unlawfully killed is not well taken. The word "wilfully," when employed to characterize the purpose for which an act was done or omitted, signifies that it was done or omitted, not voluntarily, but without any justifiable excuse, and with the evil design to do or omit the act. *Chicago, St. L. & P. R. Co. v. Nash* (*Ind.*), 24 *N. E. Rep.* 884.

The words "or by any other person at its special instance and request," as occurring in the complaint, which alleges that the track was not fenced by the company "or by any other person at its special instance and request" at the point where the animal entered, do not imply that the track was fenced by some other person not at the special instance and request of the company. So held, on a motion in arrest of judgment. *Ft. Wayne, M. & C. R. Co. v. Mussetter*, 48 *Ind.* 286.

The declaration averred that on a day named defendant was operating a railroad through a certain county; but did not charge directly the day, or place of killing, but "at the time and place aforesaid." Held, on demurrer, that the time and place must be understood to be that named for the operation of the train, and that the averment

was sufficient. *St. Louis, J. & C. R. Co. v. Kilpatrick*, 61 *Ill.* 457, 12 *Am. Ry. Rep.* 438.

**329. Allegations laying the venue.**—The declaration need not be more specific in its allegation as to locality than to state the county in which the killing occurred. *Jacksonville, T. & K. W. R. Co. v. Wellman*, 26 *Fla.* 344, 7 *So. Rep.* 845.

Where, in an action of trespass on the case against a company for killing stock, the first count in the declaration alleges the act complained of to have been committed "at the circuit aforesaid," and that the defendant "was, then and there, a corporation, operating and doing business, under and by virtue of the laws of the State of Illinois, and was, then and there, possessed of a certain railroad track, over and upon which the said defendant was, then and there, running divers locomotive engines and railroad cars,"—although not accurate in form, the words "then and there" obviously refer to the time and place previously mentioned, which appear in the caption; no other time and place having preceded the phrase "at the circuit aforesaid," in the averment, the venue is laid with sufficient accuracy. So, where the second and subsequent counts in the declaration allege the act complained of to have been committed "at the circuit aforesaid," and that the defendant "was then and there running certain other locomotive engines and railroad cars," whereby certain other described stock were killed, and the plaintiff thereby sustained great damage, the venue in these subsequent counts in the declaration was laid with sufficient accuracy. *St. Louis, J. & C. R. Co. v. Thomas*, 47 *Ill.* 116.

In an action under the Indiana statute, against a company, to recover damages for killing or injuring stock, the plaintiff must allege in his complaint, and prove on the trial, as a jurisdictional fact, that the injury complained of occurred within the county wherein such action is commenced. *Evansville & C. R. Co. v. Epperson*, 59 *Ind.* 438.

If such averment is omitted, the objection to the complaint may be raised by answer or by demurrer assigning want of jurisdiction, but not by demurrer assigning failure to state facts sufficient. If the question of jurisdiction is not so raised, it is not waived, but the objection may be raised by motion in arrest of judgment. The failure to prove such fact is not a ground for a

motion in arrest of judgment. *Toledo, W. & W. R. Co. v. Milligan*, 52 Ind. 505.

But it is not necessary that the proof be made by direct or positive testimony; it will be sufficient if facts are proved from which it can be reasonably inferred. *Louisville, N. A. & C. R. Co. v. Kious*, 82 Ind. 357.

In an action prosecuted under the Kansas stock law of 1874, the bill of particulars must state or show that the stock were injured or killed in the county in which the suit was commenced. *St. Louis & S. F. R. Co. v. Byron*, 24 Kan. 350. *Hadley v. Central Branch U. P. R. Co.*, 22 Kan. 359. *Kansas City, Ft. S. & G. R. Co. v. Burge*, 40 Am. & Eng. R. Cas. 181, 40 Kan. 734, 19 Pac. Rep. 791. *Wichita & C. R. Co. v. Gibbs*, 47 Kan. 274, 27 Pac. Rep. 991.

In an action for damages arising out of its neglect to fence its railroad where it crossed the plaintiff's land, the want of venue in the declaration—held, cured by the statute (Comp. L. 1871, § 6051), where the injury complained of was located territorially upon land in the county where the suit was brought. Trial by the court stands in the same equity in this regard as trial by jury. *Grand Rapids & I. R. Co. v. Southwick*, 30 Mich. 444.

The venue was sufficiently laid in the following cases:

Where the complaint in an action under the statute showed the killing to have occurred in the county where the action is brought. *Detroit, E. R. & I. R. Co. v. Barton*, 61 Ind. 293.

Where the complaint in action under statute alleged that the killing had occurred in the county where the action was brought, and that, at the point where the stock entered upon the defendant's railroad and were killed, such road was not "securely fenced." *Detroit, E. R. & I. R. Co. v. Blodgett*, 61 Ind. 315.

Where the complaint in an action under the statute (§ 4026) averred that the road was located upon a certain section of land in the county where the action was brought, that a portion of the road upon said section was not fenced, and by reason thereof the stock went upon the road and were then and there injured. *Louisville, N. A. & C. R. Co. v. Wilkerson*, 83 Ind. 153.—FOLLOWING *Toledo, W. & W. R. Co. v. Cory*, 39 Ind. 218.

Where the complaint alleged that the company was indebted to the plaintiff in a

certain sum "for a brown mule killed by the cars and locomotive of the defendant, run," etc., "and passing through the said county of Dearborn, state of Indiana, at said county of Dearborn." *Indianapolis & C. R. Co. v. McKinney*, 24 Ind. 283.

Where the plaintiff alleged that the defendant company owned and operated the road over and across the plaintiff's premises in Reno county, and that the defendant killed the plaintiff's cow "on the said railway track of said defendant and by the operation of said railway," and no other railroad or railway track is mentioned in the pleadings except the one through the plaintiff's farm. *Wichita & C. R. Co. v. Gibbs*, 47 Kan. 274, 27 Pac. Rep. 991.

**330. Must not allege legal conclusions.**—A complaint against a railroad company for killing live stock, which alleges that the "road was not fenced as required by law," states a legal conclusion and is bad. *Indianapolis, P. & C. R. Co. v. Bishop*, 29 Ind. 202.—DISTINGUISHED *Indianapolis & C. R. Co. v. Adkins*, 23 Ind. 340. OVERRULING *Toledo & W. R. Co. v. Fowler*, 22 Ind. 316.—DISTINGUISHED IN *Indianapolis, B. & W. R. Co. v. Lyon*, 48 Ind. 119. FOLLOWED IN *Indianapolis, C. & L. R. Co. v. Robinson*, 35 Ind. 380; *Pittsburgh, C. & St. L. R. Co. v. Keller*, 49 Ind. 211.—*Jeffersonville, M. & I. R. Co. v. Underhill*, 40 Ind. 229.—DISTINGUISHED IN *Indianapolis, B. & W. R. Co. v. Lyon*, 48 Ind. 119. EXPLAINED IN *Jeffersonville, M. & I. R. Co. v. Adams*, 43 Ind. 402.

But in an action, under the statute, against a company for injury to an animal, the allegation that "the road was not securely fenced as required by law" is not the statement of a mere conclusion of law, and is a sufficient allegation as to the fencing of the road. *Indianapolis, B. & W. R. Co. v. Lyon*, 48 Ind. 119.—DISTINGUISHING *Indianapolis, P. & C. R. Co. v. Bishop*, 29 Ind. 202; *Indianapolis, C. & L. R. Co. v. Robinson*, 35 Ind. 380; *Jeffersonville, M. & T. R. Co. v. Underhill*, 40 Ind. 229.

**331. Need not allege evidential facts.**—The degree of negligence on the part of the company is an evidential fact, and gross negligence may be proved under an allegation of negligence. *Chicago, B. & Q. R. Co. v. Carter*, 20 Ill. 390.

A petition by a railroad company charging that the animals of defendant unlawfully and by reason of the negligence of defend-



ant entered upon the track of the road, and thereby plaintiff was injured, shows a good cause of action; plaintiff is not required to set forth the evidence in his pleadings, nor to set out the facts which show negligence in the defendant. *Hannibal & St. J. R. Co. v. Kenney*, 41 Mo. 271. *Indianapolis, C. & L. R. Co. v. Warner*, 35 Ind. 515.

A declaration against a company for negligently and wrongfully killing the plaintiff's cattle on its track need not state the acts of omission or commission which constituted the negligence and wrong. *Hawker v. Baltimore & O. R. Co.*, 15 W. Va. 628.—FOLLOWED IN *Searle v. Kanawha & O. R. Co.*, 37 Am. & Eng. R. Cas. 179, 32 W. Va. 370, 9 S. E. Rep. 248; *Unfried v. Baltimore & O. R. Co.*, 34 W. Va. 260.

**332. Certainty—Indefiniteness.**—(1) *What allegations are sufficient.*—To recover damages for killing a cow, an averment in the complaint that the engine was "so negligently operated by defendant's agents that plaintiff's cow was killed," and that said cow was killed on account of said negligence, is sufficiently certain and definite. *Western R. Co. v. Lazarus*, 88 Ala. 453, 6 So. Rep. 877.—APPLIED IN *Stanton v. Louisville & N. R. Co.*, 91 Ala. 382.

To recover damages for injuries to plaintiff's horse, which was run over and killed by a passing train, an averment that the defendant did, "because of the negligence or want of skill of its employés in the management or running of said train, locomotive, or cars, run over, kill, or disable" the animal; or did, "because of the negligence or want of skill of the employés of said defendant, run over, kill, or injure" it—is each sufficiently certain and definite in the statement of facts constituting negligence. *East Tenn., V. & G. R. Co. v. Watson*, 90 Ala. 41, 7 So. Rep. 813.

An averment in the complaint for the killing of a mule, "that the defendant, without any fault or negligence on plaintiff's part, carelessly, negligently, and wrongfully ran its train over and upon the plaintiff's brown horse mule," is a sufficient allegation of the particular act of negligence complained of to withstand a motion to make more specific. *Ohio & M. R. Co. v. Craycraft*, 5 Ind. App. 335, 32 N. E. Rep. 297.—FOLLOWING *Cincinnati, H. & D. R. Co. v. Chester*, 57 Ind. 297.

In a complaint for killing a horse which had wandered upon the track, the com-

plaint, among other things, stated that the horse entered upon the track immediately north of the city of La Fayette. A motion to make the complaint more specific as to the point where the horse entered the track was correctly overruled. *Louisville, N. A. & C. R. Co. v. Consolidated Tank Line Co.*, 4 Ind. App. 40, 30 N. E. Rep. 159.

A complaint which charges that the company, by its servants, purposely and wilfully ran its locomotive engine and train upon and against the plaintiff's cattle, thereby killing and injuring them, is sufficiently specific. *Louisville, E. & St. L. R. Co. v. Hart*, 2 Ind. App. 130, 28 N. E. Rep. 218.

To recover for negligently killing a horse, the complaint alleged that the defendant was a corporation and operated a railroad; that because of its negligence in failing to repair a certain fence, culvert, and cattle-guard, which it was bound to repair, the plaintiff's horse, without plaintiff's fault, came on the track, and by reason of defendant's negligence in moving its cars was killed. *Held*, that the complaint stated a cause of action in a sufficiently definite manner. *Downs v. Central Vt. R. Co.*, 38 N. Y. S. R. 228, 14 N. Y. Supp. 573, 60 Hun 580.

(2) *What allegations are not sufficient.*—In an action under Alabama Code, § 1711, to recover for stock killed, it is necessary to state in the complaint the time when and the place where the killing or injury occurred, whether the action be before a justice of the peace or in the circuit court, and a complaint stating only the month and the county is bad on demurrer. *East Tenn., V. & G. R. Co. v. Carliss*, 77 Ala. 443.—DISTINGUISHED IN *South and N. Ala. R. Co., v. Schafner*, 78 Ala. 567.

The general allegation, in a declaration, of "damages done to this plaintiff's stock by defendant's engines passing over said railroad," etc., is not sufficiently precise to warrant a recovery for the destruction of a colt run over by a train; this was a specific act, not so necessarily caused by the neglect of fencing that defendant could be expected to meet the charge without having it pointed out directly. *Grand Rapids & I. R. Co. v. Southwick*, 30 Mich. 444.

**333. Dupletty—Stating more than one cause of action in one count.**—

(1) *Bad because of duplicity.*—A count in a declaration averred that a company failed to



fence its road, and that a train was run, conducted, and directed carelessly, whereby plaintiff's horse was killed. *Held*, that plaintiff might recover on proving either ground; that the declaration was obnoxious to a demurrer for duplicity, but that both grounds were traversed by filing the general issue. *Chicago, B. & Q. R. Co. v. Magee*, 60 Ill. 529.

In an action brought to recover for the value of a cow alleged to have been killed at a crossing by a train of defendant, plaintiff charged negligence in not performing a statutory duty to ring a bell or blow a whistle before crossing a public highway, and, by leave of trial court, filed what he called an amendment to his declaration, stating facts which would show that the crossing was a very dangerous one, and that the railroad company ran its trains over the crossing at a high rate of speed, and in a reckless, dangerous manner. This amendment attempted to make out a case of common-law negligence. *Held*, on a general and special demurrer by defendant, that two distinct causes of action cannot be set up in a single count of a declaration, and that judgment for plaintiff be reversed for error of court below in overruling demurrer to the amended declaration, which set up both a common-law and a statutory cause of action. *Louisville, E. & St. L. R. Co. v. Hill*, 29 Ill. App. 582.

A petition against a railroad for killing stock, uniting in one count a cause of action for not maintaining fences, etc., also a cause of action at common law for not sounding the bell, etc., at a crossing, and a cause of action for negligence, is bad. *Harris v. Wabash R. Co.*, 51 Mo. App. 125.

(2) *Not bad because of duplicity.*—In an action for killing stock, brought under § 2611, Missouri Rev. St. 1889, the plaintiff may allege a failure to maintain fences with openings and gates therein, and to maintain cattle-guards, and proof of either, with proof of the other necessary allegations, will authorize a recovery, and there is but one cause of action stated. *Woods v. Missouri, K. & T. R. Co.*, 51 Mo. App. 500.

Negligence in fact may consist of any number of negligent acts preceding the injury and leading up to it and contributing to it. In stating a cause of action, therefore, the plaintiff is not obliged to select one of these acts and rely upon it. And *held*, in this action, which was one for the killing

of stock by a railway train, that the petition, which alleged in one count a number of negligent acts on the part of the company conducting to the injury complained of, stated but a single cause of action. *Hill v. Missouri Pac. R. Co.*, 49 Mo. App. 520.—NOT FOLLOWING *Hoffman v. Missouri Pac. R. Co.*, 24 Mo. App. 546; *Welch v. Hannibal & St. J. R. Co.*, 20 Mo. App. 477.

**334. Several counts for same cause of action.**—In a complaint to recover for stock killed, in one count where of the stock are described as common stock, and in another as stock of full blood, such difference is sufficiently material to sustain and render proper separate counts. *Toledo & W. R. Co. v. Daniels*, 21 Ind. 256.

Plaintiff can unite in the same petition two counts for the same cause of action, one under § 2124, Missouri Rev. St. 1889, and is entitled to go to the jury on both, and will not be compelled to elect. *Straub v. Eddy*, 47 Mo. App. 189.—FOLLOWING *Lincoln v. St. Louis, I. M. & S. R. Co.*, 75 Mo. 27; *Brownell v. Pacific R. Co.*, 47 Mo. 239.

Where several cattle are killed by an engine at one and the same time, all damages resulting therefrom belong to one cause of action, and the petition should contain but one count. *Binicker v. Hannibal & St. J. R. Co.*, 83 Mo. 660.—QUOTED IN *Lamb v. St. Louis Cable & W. R. Co.*, 33 Mo. App. 489.

Under § 3220, Compiled Laws of Utah, 1888, providing for the joinder of several causes of action arising out of injuries to property, the plaintiff may unite two causes of action, each for the killing of the same horse, charged in different ways. *Jensen v. Union Pac. R. Co.*, 6 Utah 253, 21 Pac. Rep. 994.

**335. Joinder of causes of action**—**Several counts.**\*—When a pleader includes in his statement or petition three distinct causes of action for killing live stock, it is unnecessary for him to repeat allegations which are applicable to them all. It is sufficient that such allegations refer to and are applicable to each count which might be defective without them. *Bricker v. Missouri Pac. R. Co.*, 83 Mo. 391.

**336. Misjoinder.**—Where a complaint for killing plaintiff's live stock alleged that the road was not securely fenced, and was otherwise sufficient for an action founded on the statute, and in addition charged the

\*See ante, 293, 303.

company with negligence, but did not allege that the plaintiff was free from negligence, it was insufficient as a complaint at common law. But instead of treating the complaint as bad, for misjoinder of causes of action, the allegations as to negligence might be disregarded as surplusage. *Jeffersonville, M. & I. R. Co. v. Lyon*, 55 Ind. 477.

Two or more causes of action cannot be united in the same suit for the purpose of giving the circuit court or the common pleas court jurisdiction. *Jeffersonville, M. & I. R. Co. v. Bravort*, 30 Ind. 324. *Indianapolis & C. R. Co. v. Kercheval*, 24 Ind. 139. *Toledo, B. & L. R. Co. v. Tilton*, 27 Ind. 71.

**337. Negating the fact that animals were running at large.**—The statement alleged that the horses "escaped" from the plaintiffs' farm, passed down the road to the point of intersection, and thence along the railway to the place where they were struck by a passing train. The only negligence charged was that the defendants had not constructed and maintained cattle-guards or fences. It was not alleged that the horses were in charge of any person. *Held*, upon demurrer, that the horses, being, contrary to the provision of § 271 of the Railway Act of Canada, 51 Vic. ch. 28, within half a mile of the intersection, and not in charge of any person, did not get upon the railway from an adjoining place where, under the circumstances, they might properly be, within the meaning of 53 Vic. ch. 28, § 2 (D), and that therefore the defendants were not liable. *Nixon v. Grand Trunk R. Co.*, 23 Ont. 124.

**338. Alleging actual contact with engine or cars.**—In an action under the statute for killing stock, the complaint must, to be sufficient, clearly allege that the killing complained of was done by the defendant's locomotive or cars. *Pittsburgh, C. & St. L. R. Co. v. Hannon*, 60 Ind. 417.—DISTINGUISHED IN *Louisville, N. A. & C. R. Co. v. Harrington*, 19 Am. & Eng. R. Cas. 606, 92 Ind. 457.

And such a complaint which does not allege that such injury or death was caused by the defendant's locomotive, cars, or other carriages is bad, even in the court of a justice of the peace, on demurrer, motion in arrest, or motion to dismiss. *Pittsburgh, C. & St. L. R. Co. v. Troxell*, 57 Ind. 246.

**339. Alleging ownership, possession, etc., of road by defendant.\***—

(1) *Allegations sufficient.*—A complaint against a railroad company for running over stock of plaintiff, to be good at common law or under the Indiana statutes, must aver that the train by which the mischief was done belonged to defendant, or was run over its road. *Toledo, W. & W. R. Co. v. Weaver*, 34 Ind. 298.—DISTINGUISHED IN *Wabash R. Co. v. Forshee*, 77 Ind. 158.

In an action for the killing of cattle while operating the road of another company it is not necessary to allege in the complaint in what name the road was being operated. See §§ 4001 and 4025, Rev. St. Indiana 1891. *Wabash R. Co. v. Williamson*, 3 Ind. App. 190, 29 N. E. Rep. 455.—REVIEWING *Cincinnati, H. & D. R. Co. v. Leviston*, 97 Ind. 488.—*Cincinnati, H. & D. R. Co. v. Leviston*, 19 Am. & Eng. R. Cas. 633, 97 Ind. 488.—DISTINGUISHING *Indianapolis & M. R. Co. v. Solomon*, 23 Ind. 534.—REVIEWED IN *Wabash R. Co. v. Williamson*, 3 Ind. App. 190.

An allegation that the cattle "entered upon the said railway, and were then and there by the locomotive, cars, and carriages of the said defendant killed," is sufficient to show that defendant was in possession of the road and operating the train. *Wabash, St. L. & P. R. Co. v. Lash*, 103 Ind. 80, 2 N. E. Rep. 250.—DISTINGUISHING *Wabash, St. L. & P. R. Co. v. Rooker*, 90 Ind. 581.—*Pittsburgh, C. & St. L. R. Co. v. Hunt*, 71 Ind. 229.

In a joint action against two railroad companies for killing stock, the action being in the nature of a tort, it is not necessary to show in the complaint the relation that the roads sustain to each other. That is matter of proof, and there may be a joint or several liability, according to the facts. *Indianapolis, C. & L. R. Co. v. Warner*, 35 Ind. 515.—DISTINGUISHED IN *Jeffersonville, M. & I. R. Co. v. Downey*, 61 Ind. 287.

(2) *Allegations not sufficient.*—A complaint under the statute against a railroad company for killing stock, which avers that the act was done by "the defendant, or some lessee thereof, or other person unknown to the plaintiff," is bad on demurrer. *Wabash, St. L. & P. R. Co. v. Rooker*, 15 Am. & Eng. R. Cas. 558, 90 Ind. 581.—DISTINGUISHED IN *Wabash, St. L. & P. R. Co. v. Lash*, 103 Ind. 80.

\* See ante, 73, 74, 135; post, 456.

\* See post, 446, 470, 477.

An action was brought to recover for cattle run over and killed on a railroad occupied and used by the defendants. The declaration alleged that the cattle were killed by reason of the want of cattle-guards and fences where the road crossed the plaintiff's farm and at the plaintiff's farm-crossings on his land, but it did not allege that the defendants were a railroad corporation, but only described them as being in the possession, use, and occupation of said railroad as individuals, without stating that they were the agents of a railroad corporation, or in what character or capacity they were using the road, and it was held that, so far as the counts were based on the neglect of the defendants to maintain fences and cattle-guards, they were insufficient, not coming within the words of the statute, § 47, ch. 28, Gen. St. *Cooley v. Brainerd*, 38 *Vt.* 394.

The action being for the killing of plaintiff's horses by a train on the road of the Ohio & M. R. R. Co., held and operated by defendant as lessee, and the only negligence alleged being defendant's failure to construct one of said cattle-guards on plaintiff's land, the complaint was held bad on demurrer. *Cook v. Milwaukee & St. P. R. Co.*, 36 *Wis.* 45.

**340. Alleging ownership or occupancy of adjoining premises by plaintiff.\***—Under the stock-killing act of Colorado as amended in 1885, before a person could claim that a railway company owed him any duty in respect to fencing its railway, it was necessary for him to allege that he was the owner or holder of land adjacent to such railway, and that he had requested the railway company to fence its line and put in cattle-guards and gateways; moreover, according to said act, the railway company could not, by complying with such request, exempt itself from the unconditional liability otherwise imposed, except as against the party making the request. *Wadsworth v. Union Pac. R. Co.*, 56 *Am. & Eng. R. Cas.* 145, 18 *Colo.* 600.

Where the plaintiff is the mere occupant of the land, and not the owner, he must allege that neither he nor the owner has received compensation for fencing; it is not sufficient to allege that he has not received such compensation; and from the allegation that he "occupied" the premises the presumption must arise that he was not the

real owner. *Louisville & N. Co. v. Belcher*, 40 *Am. & Eng. R. Cas.* 228, 89 *Ky.* 193, 12 *S. W. Rep.* 195.

A declaration against the Ontario, Simcoe, & Huron Railway Co., alleging that plaintiff's horses were lawfully upon certain land belonging to one M., out of which the defendants had taken a strip for their road; that the proprietor of said lands desired them to fence off the land so taken from his land, yet defendants neglected to do so, by means whereof the plaintiff's horses, then being upon said land, escaped therefrom onto the railway and were killed by the train, was held bad on demurrer, as it was not averred that the horses were on the land with the consent of its owner, and defendants therefore were not liable. *Auger v. Ontario, S. & H. R. Co.*, 16 *U. C. Q. B.* 92. —DISTINGUISHED IN *McFie v. Canadian Pac. R. Co.*, 2 *Man.* 6. QUOTED IN *McIntosh v. Grand Trunk R. Co.*, 30 *U. C. Q. B.* 601.

**341. Need not allege that injury occurred on defendant's track.**—In an action on the case against a railroad corporation for killing cattle by carelessly and unskillfully running its locomotives against them, the declaration need not aver that this was done on the defendant's railroad track. *Baylor v. Baltimore & O. R. Co.*, 9 *W. Va.* 270. *Housatonic R. Co. v. Waterbury*, 23 *Conn.* 101.

**342. Alleging negligence on part of company, generally.**—(1) *Statement of the rule.*—A complaint for killing stock to be good at common law must allege negligence on the part of the railroad company. *Toledo, W. & W. R. Co. v. Weaver*, 34 *Ind.* 298.

Negligence on the part of a railroad company is the basis of the right of the owner of live stock to recover in an action at common law, and negligence of the company or of its servants must be averred in the declaration and be proved. *Savannah, F. & W. R. Co. v. Geiger*, 29 *Am. & Eng. R. Cas.* 274, 21 *Fla.* 669, 58 *Am. Rep.* 697. *Stevenson v. New Orleans Pac. R. Co.*, 35 *La. Ann.* 498. *Orange, A. & M. R. Co. v. Miles*, 76 *Va.* 773. *Jacksonville, T. & K. W. R. Co. v. Garrison*, 30 *Fla.* 557, 11 *So. Rep.* 929. *Terre Haute, A. & St. L. R. Co. v. Augustus*, 21 *Ill.* 186. *Indianapolis, P. & C. R. Co. v. Williams*, 15 *Ind.* 486. *Indianapolis, P. & C. R. Co. v. Sparr*, 15 *Ind.* 440. *Terre Haute & R. R. Co. v. Smith*, 19 *Ind.* 42.

\* See *ante*, 313-319; *post*, 445, 471.

*Toledo, W. & W. R. Co. v. Weaver*, 34 Ind. 298.—DISTINGUISHED IN *Wabash R. Co. v. Forshee*, 77 Ind. 158. FOLLOWED IN *Toledo, W. & W. R. Co. v. Cory*, 39 Ind. 218.—*Baltimore, P. & C. R. Co. v. Anderson*, 58 Ind. 413.—FOLLOWED IN *Cincinnati, W. & M. R. Co. v. Stanley*, 4 Ind. App. 364.—*West v. Hannibal & St. J. R. Co.*, 34 Mo. 177.

And a complaint in such an action is demurrable unless it avers that the injury was negligent, or the result of negligence on the part of the defendant, its agents, or servants. *South & N. Ala. R. Co. v. Hagood*, 53 Ala. 647.—QUOTING *Mobile & O. R. Co. v. Williams*, 53 Ala. 595.

Under § 4245 of the Texas St., imposing absolute liability for killing stock, a petition in an action for killing stock need not allege negligence on the part of the company in operating its trains, nor in failing to fence its road. *Houston & T. C. R. Co. v. Loughbridge*, 1 Tex. App. (Civ. Cas.) 754.

(2) *Illustrations*.—Under the Arkansas statute a complaint alleging that stock belonging to plaintiff were injured on a railroad track by defendant's cars, states a *prima facie* case. *St. Louis, I. M. & S. R. Co. v. Brown*, 49 Ark. 253, 4 S. W. Rep. 781.

In an action against a railroad company for causing the death of a horse, plaintiff filed a complaint averring that while the horse was being lawfully driven along a public road for the purpose of crossing defendant's track, defendant's servants negligently posted an engine at said crossing and negligently allowed steam to escape from unusual parts of said engine, whereat said horse became alarmed, reared up, and fell, breaking its neck. *Held*, that the complaint was good, the injury being the natural and proximate result of the defendant's negligence. *Louisville & N. R. Co. v. Schmidt*, 8 Am. & Eng. R. Cas. 248, 81 Ind. 264.

A complaint against a company to recover damages for injury to a horse alleged to have been caused by the negligence of the defendant in not having its switch premises in a safe and suitable condition for use by persons loading cars for shipment of freight on the defendant's road, averred that the plaintiff was engaged with his team of horses in loading timber at the usual place for loading timber on cars, which were on the defendant's switch; that by the removal of a stake a hole had been left in the defendant's right of way, at or near said load-

ing place, which the defendant had negligently omitted to fill; that while the plaintiff was engaged with his team of horses in loading timber at said place one of his horses stepped into said hole and was injured; that a covering of snow prevented plaintiff from seeing said hole; that said injury to the horse was without negligence on the part of the plaintiff. *Held*, that the complaint stated a good cause of action. *Chicago & I. C. R. Co. v. DeBaum*, 2 Ind. App. 281, 28 N. E. Rep. 447.

A declaration to recover for killing a horse alleged that defendant was the owner of the railroad and operating it by running locomotives and trains thereon; that plaintiff's horse strayed and got upon defendant's railroad, and that defendant so carelessly, negligently, and improperly ran, conducted, and directed the locomotive and train of defendant, as that said locomotive struck plaintiff's horse with great force and violence and killed it. *Held*, that the declaration showed a good cause of action at common law. *Rockford, R. I. & St. L. R. Co. v. Phillips*, 66 Ill. 548.

A complaint that defendant, a railroad company, "so carelessly and negligently managed its locomotive, without ringing its bell or using its steam-cock, that it ran against and over plaintiff's cow," states a cause of action at common law. *Mapes v. Chicago, R. I. & P. R. Co.*, 76 Mo. 367.—DISTINGUISHING *Collins v. Atlantic & P. R. Co.*, 65 Mo. 230.—FOLLOWED IN *Edwards v. Chicago, R. I. & P. R. Co.*, 76 Mo. 399.

In a common-law action against a company for killing stock, it is not liable for a failure to ring a bell when approaching a crossing, unless the intention to hold it liable therefor should in some manner be expressed in the petition, either by a statement of the fact which under the statute created its liability, or by some appropriate reference to the statute. *Meyer v. Atlantic & P. R. Co.*, 64 Mo. 542, 17 Am. Ry. Rep. 249.—QUOTED IN *Woodward v. Oregon R. & N. Co.*, 18 Oreg. 289.

*The following allegations of company's negligence have been held to be sufficient:*

An allegation that a certain number of the plaintiff's cattle, particularly describing them, "were killed, and the other was injured or damaged to the value of ten dollars, by the negligence of the defendant in running a train of cars and locomotives on said railroad, and thus became wholly

lost to the plaintiff." *East Tenn. v. G. R. Co. v. Carliss*, 77 Ala. 443.

An allegation that the engine and cars of the defendant company were so negligently and carelessly managed by the agents and servants of the company that the engine struck an animal described in the declaration, by means whereof it died. *Jacksonville, T. & K. W. R. Co. v. Garrison*, 30 Fla. 557, 11 So. Rep. 926.—DISTINGUISHING *Chicago, B. & Q. R. Co. v. Harwood*, 90 Ill. 425; *Savannah, F. & W. R. Co. v. Geiger*, 21 Fla. 669. REVIEWING *Schneider v. Missouri Pac. R. Co.*, 75 Mo. 295.

An allegation that the defendant's servants, wrongfully "acting in the line of their duty and within the scope of their employment, and under the directions and instructions of the defendant," killed a mule of the plaintiff which had been injured by the defendant's train of cars, etc. *Banister v. Pennsylvania Co.*, 19 Am. & Eng. R. Cas. 570, 98 Ind. 220.

An allegation that the act was done carelessly and negligently. *McPheeters v. Hannibal & St. J. R. Co.*, 45 Mo. 22.

An allegation substantially to the effect that plaintiff's animal, being upon the track of defendant's railroad, was there negligently and carelessly run over and killed by their train. *Smith v. Eastern R. Co.*, 35 N. H. 356.

**343. Alleging gross negligence.**—In an action on the case for killing animals gross negligence need not be alleged in the declaration. When the right of the owner of the killed animals depends on the degree of negligence of the company, it is a matter to be proved, not pleaded. *Chicago, B. & Q. R. Co. v. Carter*, 20 Ill. 390. See also *Central Branch R. Co. v. Phillips*, 20 Kan. 9, 19 Am. Ry. Rep. 99.

**344. Alleging negligence to have been proximate cause.**—The complaint must charge negligence, unskillfulness, or wilful misconduct on the part of the company or its agents, and that such negligence, etc., was the proximate cause of the injury. *Jeffersonville R. Co. v. Martin*, 10 Ind. 416.—FOLLOWED IN *Gabbert v. Jeffersonville R. Co.*, 11 Ind. 365. Compare *Louisville & N. R. Co. v. Schmidt*, 8 Am. & Eng. R. Cas. 248, 81 Ind. 264.

**345. Alleging high or unlawful rate of speed.**—A complaint, in an action for killing stock, which charges that the servants of the railroad company recklessly

did certain things, and wilfully omitted others, for the purpose and intention of running a train of cars over and upon plaintiff's cow, avers facts showing that the animal was purposely and intentionally run upon and killed, and states facts constituting a good cause of action. *Indiana, B. & W. R. Co. v. Overton*, 117 Ind. 253, 20 N. E. Rep. 147.

A complaint against a company charged that through the fault, misconduct, and negligence of the servants and employes of the defendant in running the locomotive and train out of their regular time and at a high rate of speed, to wit, forty miles an hour, and without giving any of the proper signals of their approach, the locomotive struck and killed two mules of the plaintiff, then and there upon the railroad track, at a point where a highway crossed the railroad. *Held*, a sufficient statement of negligence. *Indianapolis, C. & L. R. Co. v. Hamilton*, 44 Ind. 76.

**346. Allegation as to defectively-constructed crossing.**—In an action for an injury to plaintiff's horse at a railway crossing, alleged to have been carelessly constructed, and permitted to remain in an unsafe condition, a complaint is sufficient which alleges that the plaintiff had no knowledge of the unsafe condition of the crossing, and that while the plaintiff's employé was riding the horse over the crossing in a careful manner, one of its feet was caught in a space improperly between the iron on one side of the railroad track and the boards of the crossing, and the horse in trying to extricate itself received such injuries that it was rendered worthless. *Toledo, St. L. & K. C. R. Co. v. Milligan*, 2 Ind. App. 578, 28 N. E. Rep. 1019.

**347. — defectively-constructed gate.**—A petition alleging that, by reason of the negligent construction of a gate of unsound and unsafe material in the defendant's right of way, the plaintiff's colts escaped from a pasture through said gate upon the defendant's track and were killed; that the notice and affidavit required by law had been served upon the defendant; that said colts were of a value named; and asking judgment in double said sum, is sufficient to show a cause of action under § 1289 of the Code, though such statute is not specifically pleaded. *Morrison v. Burlington C. R. & N. R. Co.*, 84 Iowa 663, 51 N. W. Rep. 75.

**348. — Insufficiency of cattle-guard.**—A declaration for an injury caused by the insufficiency of a cattle-guard is demurrable in failing to state the particulars in which it was insufficient. *Smead v. Lake Shore & M. S. R. Co.*, 23 Am. & Eng. R. Cas. 241, 58 Mich. 200, 24 N. W. Rep. 761.

**349. Alleging company's failure to fence.**—(1) *Generally.*—In actions under the stock-killing laws, making companies liable for not fencing their tracks, the plaintiff's pleading must allege that the defendant's road was not fenced. *Kansas Pac. R. Co. v. Taylor*, 17 Kan. 566.—FOLLOWED IN *St. Louis & S. F. R. Co. v. Ellis*, 25 Kan. 108.—*Toledo, W. & W. R. Co. v. Weaver*, 34 Ind. 298.

In an action under the Kansas statute of 1874, the petition must show that the railroad was not inclosed with a good and lawful fence. *Hadley v. Central Branch U. P. R. Co.*, 22 Kan. 359.—FOLLOWED IN *St. Louis & S. F. R. Co. v. Ellis*, 25 Kan. 108.

Where plaintiff relies upon the failure of the railroad company to fence its track according to a contract, that fact must be alleged in the complaint. *Gulf, C. & S. F. R. Co. v. Washington*, 49 Fed. Rep. 347, 4 U. S. App. 121, 1 C. C. A. 286.

In an action to recover damages resulting to domestic animals from the failure of a railroad company to construct and maintain good and sufficient fences along the line of its road, as required by the act of April 26, 1871 (68 Ohio L. 78), the facts upon which the company's liability depends must be stated in the petition, and, if not admitted, must be established by the proof. An allegation that the defendant was, by law, bound to fence and inclose said railroad, tenders an immaterial issue, and is not to be taken as true because not denied. *Baltimore & O. R. Co. v. Wilson*, 31 Ohio St. 555.

In a complaint to recover for stock killed by a locomotive upon a railroad track, an allegation that the track was not fenced where the animal was killed is not necessary. *Wabash R. Co. v. Forshee*, 77 Ind. 158.

(2) *Illustrations.*—An allegation that damage done was caused by the failure to maintain a proper fence, includes all defects in the fence, and does not necessitate particular reference thereto. *McCoy v. Southern Pac. R. Co. (Cal.)*, 26 Pac. Rep. 629.

A complaint in an action for killing stock,

which alleges that the fence along the road took fire, and the company's servants in extinguishing the fire threw down a gate in the fence which was negligently left open, whereby plaintiff's cattle escaped from his field near by and were killed on the track, is equivalent to an averment that the fence was not properly maintained, and is therefore sufficient. *Indianapolis, P. & C. R. Co. v. Truitt*, 24 Ind. 162.—DISTINGUISHED IN *Cleveland, C., C. & I. R. Co. v. Brown*, 45 Ind. 90.

Where a petition alleges that the line of a railway runs through a county where a cow was killed, and that the line of the railway through the county and at the place where the cow was killed was not fenced, and further alleges that the cow was killed at a place where the railroad could be fenced, the allegations are sufficient concerning the failure to inclose the road with a fence to render the railroad company liable under the stock law of 1874. *St. Louis & S. F. R. Co. v. Dudgeon*, 28 Kan. 283.—DISTINGUISHED IN *St. Louis & S. F. R. Co. v. Mossman*, 30 Kan. 336.

The plaintiff alleged in his original bill of particulars that "said colt was injured and killed by said defendant at a place where said roadbed and railway were not fenced, but ought to have been fenced, as required by law, to keep stock from crossing on, over, along, and near the railroad and bed of the defendant; and that said animal was not injured and killed at or near any public road or crossing." Held, under the circumstances of this case, that said allegation is sufficient with regard to alleging the want of a sufficient fence. *Missouri Pac. R. Co. v. Piper*, 26 Kan. 58.

General allegations of the continuous operation of the road, and the continuous neglect to fence it, and that damages resulted therefrom, are sufficient to authorize a recovery for such natural mischiefs as invariably follow the destruction of fences and exposure of lands, and which cannot easily be itemized. *Grand Rapids & I. R. Co. v. Southwick*, 30 Mich. 444.

A complaint in an action for killing stock, alleging that they went, without any fault on the part of the plaintiff, upon defendant's track and were struck and killed at a point where the road passed along through an adjoining inclosed and cultivated field, where defendant had failed to build and maintain lawful fences, sufficiently avers a failure to fence. *Terry v. Missouri Pac. R. Co.*, 77



*Mo.* 254.—FOLLOWED IN *Campbell v. Missouri Pac. R. Co.*, 78 *Mo.* 639.

Where it appears from the complaint that defendant's railroad track crossing plaintiff's farm was unfenced, and that plaintiff's bull went upon the track from said farm, without plaintiff's fault, and was killed, a cause of action is stated. *Oregon R. & N. Co. v. Dacres*, 1 *Wash.* 195, 23 *Pac. Rep.* 415.

**350. Alleging company's failure to "securely" fence.**—A complaint for killing an animal, which, with the other necessary averments, alleges that the railroad "was not securely fenced," is good, and if the railroad could not properly be fenced at the place, the fact is matter of defence concerning which the complaint need not make any averment. *Terre Haute & I. R. Co. v. Penn.*, 15 *Am. & Eng. R. Cas.* 561, 90 *Ind.* 284.

To render a company liable under the statute for killing stock, it must be alleged and proved that the road was not securely fenced. It is not sufficient to aver that the road "was not fenced according to law." *Indianapolis, C. & L. R. Co. v. Robinson*, 35 *Ind.* 380, 4 *Am. Ry. Rep.* 544.—FOLLOWING *Indianapolis, P. & C. R. Co. v. Bishop*, 29 *Ind.* 202. NOT FOLLOWING *Indianapolis & C. R. Co. v. Adkins*, 23 *Ind.* 340. OVER-RULING *Toledo & W. R. Co. v. Fowler*, 22 *Ind.* 316.—DISTINGUISHED IN *Indianapolis, B. & W. R. Co. v. Lyon*, 48 *Ind.* 119.

A complaint, in an action for killing stock, which avers that the road was not fenced at the place where the animals were killed, is equivalent to averring that the road is not "securely fenced in," within the meaning of Indiana act 1863, p. 26, § 7. *Indianapolis & C. R. Co. v. McKinney*, 24 *Ind.* 283.

A complaint against a company for stock killed on the road where it was not fenced will sufficiently aver the want of fence, if it alleges "that said railroad was not, at the time and place aforesaid, fenced in by said defendant in manner and form as in the statute provided;" and under such averment proof may be made that the road had not been duly fenced in at all, or, if it had, that the fence had not been properly maintained. *Toledo & W. R. Co. v. Fowler*, 22 *Ind.* 316.—DISTINGUISHED IN *Bartlett v. Dubuque & S. C. R. Co.*, 20 *Iowa* 188. OVERRULED IN *Indianapolis, P. & C. R. Co. v. Bishop*, 29 *Ind.* 202; *Indianapolis, C. & L. R. Co. v. Robinson*, 35 *Ind.* 380.

1 *D. R. D.*—17.

**351. Alleging that road was not fenced at place of entry.**\*—(1) *Generally*.—The declaration must show where the stock got on the track, but it is immaterial where the killing was done. *Great Western R. Co. v. Hanks*, 36 *Ill.* 281.—APPROVED IN *Cecil v. Pacific R. Co.*, 47 *Mo.* 246. QUOTED IN *Alsop v. Ohio & M. R. Co.*, 19 *Ill. App.* 292.

A complaint in an action for killing stock, which contains no allegations from which it might not be as reasonably inferred that the point where the animal entered on the road may have been where the railroad company was under no duty to fence as where the law requires it to fence, is insufficient. *Moreland v. Missouri Pac. R. Co.*, 17 *Mo. App.* 77.—FOLLOWING *Perriguez v. Missouri Pac. R. Co.*, 78 *Mo.* 91.

In an action against a railroad under *Missouri Rev. St.* 1889, § 2124, for killing stock, it is not necessary for the plaintiff to allege that the defendant was required to fence its road where the animal entered upon it. *Radcliffe v. St. Louis, I. M. & S. R. Co.*, 90 *Mo.* 127, 2 *S. W. Rep.* 277.

In an action under § 809, *Missouri Rev. St.*, for the killing of stock, it is necessary for the statement or petition to allege, by direct averment or necessary implication, that the stock got upon defendant's railroad track at a point where by the law defendant was required to erect and maintain a fence. But the allegations may be made in the words of the statute. *Summers v. Hannibal & St. J. R. Co.*, 29 *Mo. App.* 41.—DISTINGUISHING *Jackson v. St. Louis, I. M. & S. R. Co.*, 80 *Mo.* 147. QUOTING *Morrow v. Missouri Pac. R. Co.*, 82 *Mo.* 169; *Marrett v. Hannibal & St. J. R. Co.*, 84 *Mo.* 413.—*Wilson v. Wabash, St. L. & P. R. Co.*, 18 *Mo. App.* 258.—FOLLOWING *Nance v. St. Louis, I. M. & S. R. Co.*, 79 *Mo.* 196.

In an action under *Missouri Rev. St.*, § 809, for double damages for injury to stock, it must affirmatively appear from the plaintiff's petition that the animal got upon the railroad track at a point where the company had failed to fence as required by law, and that the injury resulted therefrom; or facts must be averred from which such inference may legitimately be drawn. A petition merely averring that the stock "strayed upon the track of defendant's road

\* See *ante*, 127; *post*, 474.



at the times and places above stated, etc., where the road was not fenced, \* \* \* and not at any public or private crossing, is insufficient. *Morrow v. Missouri Pac. R. Co.*, 82 Mo. 169.—DISTINGUISHING *Sloan v. Missouri Pac. R. Co.*, 74 Mo. 47; *Nance v. St. Louis, I. M. & S. R. Co.*, 79 Mo. 196; *Dryden v. Smith*, 79 Mo. 325; *Jackson v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 147.—QUOTED IN *Summers v. Hannibal & St. J. R. Co.*, 29 Mo. App. 41.

But under the Oregon statute for killing or injuring live stock on an unfenced track, it is not necessary to allege the point at which the animals entered upon the track of the railroad. *Eaton v. Oregon R. & N. Co.*, 45 Am. & Eng. R. Cas. 481, 19 Oreg. 371, 24 Pac. Rep. 413.

(2) *Sufficient allegations.*—It is sufficient to allege, on that point, that the place where the stock entered upon the track "was not fenced." *Louisville, N. A. & C. R. Co. v. Shanklin*, 19 Am. & Eng. R. Cas. 552, 94 Ind. 297.—FOLLOWED IN *Louisville, N. A. & C. R. Co. v. Pixley*, 94 Ind. 603.

Although in an action for the killing of stock by a railroad it is essential to allege that the animal was killed at a point on the track where it was the duty of the company to erect and maintain fences, and it is also essential to aver that the animal got upon the track where it was the company's duty to erect and maintain fences, these averments may be inferentially made, and it is sufficient if the essential facts are necessarily inferred. *Briscoe v. Missouri Pac. R. Co.*, 25 Mo. App. 468.

A complaint under the 43d section of the railroad law omitted to aver that the cattle injured came upon the track at a point where it was not fenced, but did state that the injury was occasioned "solely on account of the defendant's failure to maintain fences." *Held*, that this averment excluded every other implication than the one that the cattle came upon the track where it was not fenced, and sufficiently supplied the omission. *Fields v. Wabash, St. L. & P. R. Co.*, 80 Mo. 203.

A complaint which charges that plaintiff's horse went upon defendant's track through defendant's fault and was killed by reason of its failure to fence its track, and charges that the same was not done upon a highway crossing or depot grounds, is sufficient, though it does not directly charge that the horse went upon the track where

the company was bound to fence. *Blomberg v. Stewart*, 67 Wis. 455, 30 N. W. Rep. 617.

(3) *Insufficient allegations.*—To recover for stock killed upon the company's road, it is not enough to aver in the declaration that the road was not fenced at the place where the injury occurred, it not appearing from the pleading but that the stock may have gone on the track at another place, and where the road was fenced; and in averring that the road had been opened for six months, it is not sufficient if such averment relates only to the place where the injury occurred, it not being shown but that the stock strayed upon the track at another place, nor where the road had not been opened for six months before the accident occurred. *Toledo, P. & W. R. Co. v. Darst*, 51 Ill. 365.—DISTINGUISHING *St. Louis, A. & T. H. R. Co. v. Linder*, 39 Ill. 433.

A statement of a cause of action, under Missouri Rev. St. 1879, § 809, for double damages for the killing of stock by a railroad company, is fatally defective if it fails to show that the stock came upon or was killed on the railroad track at a place where the railroad company was required by statute to fence. *Wood v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 63.—DISTINGUISHING *Jackson v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 147. FOLLOWING *Ward v. St. Louis, I. M. & S. R. Co.*, 91 Mo. 168.

A petition which only alleges that the defendant's cars ran over plaintiff's horses where its road was not inclosed by a lawful fence, and not in the crossing of a public highway, is not sufficient, for it must allege that the animal entered at a place which should have been but was not fenced. *Smith v. Missouri Pac. R. Co.*, 29 Mo. App. 65.

In an action for killing plaintiff's hogs, founded on the 43d section Railroad Law, the petition failed to state that the hogs came upon defendant's track at a point where defendant was required by law to fence. *Held*, that it was for this reason fatally defective. *Asher v. St. Louis, I. M. & S. R. Co.*, 19 Am. & Eng. R. Cas. 593, 79 Mo. 432.—FOLLOWED IN *Stanley v. Missouri Pac. R. Co.*, 84 Mo. 625. REVIEWED IN *Jackson v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 147.

**352. Alleging failure to "securely" fence at place of entry.**—Where an action against a railroad company to recover for stock killed is commenced in

the circuit court, it must be averred in the complaint and proved upon the trial that at the point where the animals entered upon the track the railroad was not securely fenced. *Louisville, E. & St. L. R. Co. v. Thomas*, 106 Ind. 10, 5 N. E. Rep. 198.

It is not sufficient to allege that a horse was killed on the track at a point where it was not sufficiently fenced, without showing whether the horse came on the track at a point where it was securely fenced or not. *Louisville, N. A. & C. R. Co. v. Quade*, 19 Am. & Eng. R. Cas. 595, 91 Ind. 295.

In a complaint under the Indiana statute against a railroad company for the value of hogs killed by a passing train, it is not sufficient to allege, in regard to the fence, "that said railroad was not, at the time and place where said animals were killed, fenced in by said defendant in manner and form as in the statute provided." *Pittsburgh, C. & St. L. R. Co. v. Keller*, 49 Ind. 211.—FOLLOWING *Indianapolis, P. & C. R. Co. v. Bishop*, 29 Ind. 202.—FOLLOWED IN *Pittsburgh, C. & St. L. R. Co. v. Keller*, 49 Ind. 217.

In a complaint to recover the value of animals killed by its cars, it is not sufficient to aver, generally, that the road was not securely fenced in, etc., without connecting the want of such fence with the injury by an averment that the road was not so fenced at the place where the animals entered upon it. *Bellefontaine R. Co. v. Suman*, 29 Ind. 40.—APPROVED *Indianapolis & C. R. Co. v. Adkins*, 23 Ind. 340.—DISTINGUISHED IN *Louisville, N. A. & C. R. Co. v. Detrick*, 91 Ind. 519; *Louisville, N. A. & C. R. Co. v. Porter*, 20 Am. & Eng. R. Cas. 446, 97 Ind. 267. OVERRULED IN *Hunt v. Lake Shore & M. S. R. Co.*, 35 Am. & Eng. R. Cas. 176, 112 Ind. 69, 11 West. Rep. 107, 13 N. E. Rep. 263.

But a complaint which avers that the animals entered upon the railroad at a point where the railway was not securely fenced is sufficient. *Louisville, N. A. & C. R. Co. v. Overman*, 88 Ind. 115. *Toledo, W. & W. R. Co. v. Harris*, 49 Ind. 119. *Pittsburgh, C. & St. L. R. Co. v. Brown*, 44 Ind. 409.

Averments in the complaint that at a certain point in a town said railroad was not securely fenced, but ought to have been, and that the plaintiff's horse entered upon the railroad at said point and was run down and killed by a train of cars owned and operated by the defendant, show sufficiently that the absence of the fence was the re-

sponsible cause of the injury. *Ohio, I. & W. R. Co. v. Neady*, 5 Ind. App. 328, 32 N. E. Rep. 213.

A complaint stating that at the time and place when and where the stock were killed the railroad was not securely fenced as required by law, is a sufficient statement of the fact that the road was not securely fenced where the animals entered upon it. *Jeffersonville, M. & I. R. Co. v. Chenoweth*, 30 Ind. 366.—FOLLOWING *Indianapolis & C. R. Co. v. Adkins*, 23 Ind. 340.

A complaint which avers "that at the place and time said animal was killed by defendant's locomotive and cars the same was not securely fenced as required by law," is a sufficient averment that the road was not securely fenced at the point where the animal entered upon it. *Indianapolis & C. R. Co. v. Adkins*, 23 Ind. 340.—APPROVED IN *Bellefontaine R. Co. v. Suman*, 29 Ind. 40. DISTINGUISHED IN *Indianapolis, P. & C. R. Co. v. Bishop*, 29 Ind. 202. FOLLOWED IN *Jeffersonville, M. & I. R. Co. v. Chenoweth*, 30 Ind. 366. NOT FOLLOWED IN *Indianapolis, C. & L. R. Co. v. Robinson*, 35 Ind. 380. OVERRULED IN *Baltimore, O. & C. R. Co. v. Kreiger*, 13 Am. & Eng. R. Cas. 602, 90 Ind. 380.

**353. Negating statutory exceptions as to fencing.**—(1) *Illinois*.—A declaration, under the Illinois statute, in an action for killing stock must negative the killing at all the places where the company is not required by statute to fence, and must show that the road was open for six months before the killing. *Ohio & M. R. Co. v. Brown*, 23 Ill. 94.—EXPLAINED IN *Great Western R. Co. v. Hanks*, 36 Ill. 281.—*Galena & C. U. R. Co. v. Sumner*, 24 Ill. 631.

In an action, under the statute, for killing stock, the declaration must negative all the exceptions in the statute; but the burden of proof is not upon plaintiff to prove the averment, that there was no contract between the company and the owner of the ground, that the latter should build the fence where the accident occurred. *Great Western R. Co. v. Bacon*, 30 Ill. 347.—EXPLAINED IN *Great Western R. Co. v. Hanks*, 36 Ill. 281.

Where it appears that the plaintiff relied for a recovery upon statutory negligence—the failure to erect and maintain a fence, as provided by the law, upon its line of railroad—and the evidence utterly fails to show that the hogs killed got upon the track at

a place where the company was required by the statute to fence against them, the plaintiff must negative the exceptions contained in the statute. *St. Louis, A. & T. H. R. Co. v. Overturf*, 19 Ill. App. 656, mem.

In an action for stock killed, under the act requiring the roads to fence (Scate's Comp. 953), except at certain places, it is only necessary to negative in the complaint the killing in the excepted places as set out in the enacting clause, and not those also at the end of the first section of the statute. *Great Western R. Co. v. Hanks*, 36 Ill. 281. —EXPLAINING *Chicago, B. & Q. R. Co. v. Carter*, 20 Ill. 390; *Ohio & M. R. Co. v. Brown*, 23 Ill. 94; *Great Western R. Co. v. Bacon*, 30 Ill. 347.

Where a statute provides that a railroad company need not fence its track through "uninclosed" lands, a declaration in an action for killing stock that uses the word "unimproved" is a sufficient compliance with the statute. *Illinois C. R. Co. v. Wade*, 46 Ill. 115.

Where the declaration in such a case negatives in substance all the exceptions in the statute although not in the most formal manner, it is not demurrable on that ground alone. *St. Louis, J. & C. R. Co. v. Thomas*, 47 Ill. 116.

Where plaintiff sues to recover for animals killed by reason of the company failing to fence its track, the complaint should contain necessary averments that the killing was not within a village or at any other point where the company is not required to fence under the statute. *Chicago, B. & Q. R. Co. v. Carter*, 20 Ill. 390. —EXPLAINED IN *Great Western R. Co. v. Hanks*, 36 Ill. 281.

A complaint in an action to recover for killing cattle need not negative the killing at a farm crossing. If the track is properly fenced at such place it is a matter of defense, and if not the company is liable. *Great Western R. Co. v. Helm*, 27 Ill. 198. —DISTINGUISHED IN *Bartlett v. Dubuque & S. C. R. Co.*, 20 Iowa 188; *Gill v. Atlantic & G. W. R. Co.*, 27 Ohio St. 240.

(2) *Indiana*.—In a complaint, against a railroad company, to recover under the statute the value of an animal killed by the cars of such company, it is sufficient to allege that the railroad was not fenced at the place, etc. If the killing was at a point where the company was not required to fence its track, that is a matter of defense,

and need not be negated in the complaint. *Ohio & M. R. Co. v. McClure*, 47 Ind. 317. *Louisville, N. A. & C. R. Co. v. Kiouss*, 82 Ind. 357. *Jeffersonville, M. & I. R. Co. v. Lyon*, 72 Ind. 107. —DISTINGUISHED IN *Indianapolis & V. R. Co. v. Sims*, 92 Ind. 496. —*Louisville, E. & St. L. R. Co. v. Hart*, 2 Ind. App. 130, 28 N. E. Rep. 218.

In an action to recover the value of two horses belonging to the plaintiff, alleged to have been killed by the defendant's locomotive and train of cars, where the complaint charged, *inter alia*, "that the railroad of the defendant was not fenced at the place where said horses got on the track and where said horses were killed," the allegation as to want of fence is sufficiently definite and certain on a demurrer to the complaint for the want of facts. *Louisville, N. A. & C. R. Co. v. Harrigan*, 19 Am. & Eng. R. Cas. 598, 94 Ind. 245.

A complaint is sufficient which alleges that stock, being the property of the plaintiff, had entered upon the defendant's right of way and track at a point where the same had been carelessly and negligently left unfenced, and, whilst there, was, by the defendant's train of cars, driven into a cut through which such track ran and there killed. *Jeffersonville, M. & I. R. Co. v. Lyon*, 55 Ind. 477.

Where the complaint alleged, among other things, that the cattle entered the defendant's "track and right of way at a place where the same was not fenced," the complaint stated facts sufficient to constitute a cause of action. The facts that the place where the cattle entered upon the track was a public highway; that the track could not be fenced at said place; that the company was not bound to fence it at such place, or any other matters of defense, were to be taken advantage of by the defendant. *Terre Haute & I. R. Co. v. Schaefer*, 5 Ind. App. 86, 31 N. E. Rep. 557.

A complaint under the statute for the killing of animals is sufficient if it alleges that the right of way was not *securely* fenced at the point where the animal entered upon the track and was killed; and if it was not the duty of the company to fence the road at the place in question, such fact is a matter of defense concerning which the complaint need not make any averment. *Chicago & E. R. Co. v. Brannegan*, 5 Ind. App. 540, 32 N. E. Rep. 790.

(3) *Kentucky—Missouri*.—The plaintiff must, by his petition, negative an exception which forms a part of the clause imposing the liability. *Louisville & N. R. Co. v. Belcher*, 40 *Am. & Eng. R. Cas.* 228, 89 *Ky.* 193, 12 *S. W. Rep.* 195.

In an action under the statute for double damages for killing stock, the complaint need not specifically allege that the injury was occasioned by the failure to fence or to maintain cattle-guards, or that the injury was not within the limits of an incorporated city or town. It is sufficient if these facts may be inferred from the allegations of the complaint. *Campbell v. Missouri Pac. R. Co.*, 78 *Mo.* 639.—DISTINGUISHING *Rowland v. St. Louis, I. M. & S. R. Co.*, 73 *Mo.* 619; *Schulte v. St. Louis, I. M. & S. R. Co.*, 76 *Mo.* 324. FOLLOWING *Edwards v. Kansas City, St. J. & C. B. R. Co.*, 74 *Mo.* 117; *Williams v. Missouri Pac. R. Co.*, 74 *Mo.* 453; *Scott v. St. Louis, I. M. & S. R. Co.*, 75 *Mo.* 136; *Belcher v. Missouri Pac. R. Co.*, 75 *Mo.* 514; *Terry v. Missouri Pac. R. Co.*, 77 *Mo.* 254; *Kronski v. Missouri Pac. R. Co.*, 77 *Mo.* 362.

To constitute a sufficient cause of action, under Missouri Rev. St. 1889, § 2611, for killing stock, it must be stated, directly or inferentially, that the animal killed came upon the railroad at a point where the road extended through, along, or adjoining inclosed or cultivated fields or uninclosed lands; but this appears inferentially where there are allegations that the animal was killed at a place not within the limits of any town, nor within the limits of any switch or cattle-yards, nor at any public or private crossing. *McGuire v. St. Louis, I. M. & S. R. Co.*, 43 *Mo. App.* 354.

A petition in an action, under § 809 of the Missouri Rev. St., which does not aver that the killing did not occur within an incorporated town, is not sufficient. *Holland v. West End N. G. R. Co.*, 16 *Mo. App.* 172.—FOLLOWING *Schulte v. St. Louis, I. M. & S. R. Co.*, 76 *Mo.* 324. QUOTING *Rowland v. St. Louis, I. M. & S. R. Co.*, 73 *Mo.* 619.

In an action under Missouri Rev. St. 1879, § 809, to recover double damages for stock killed, the complaint must negative the fact of killing within the limits of an incorporated town; but this will be inferred from an averment that the killing was where defendant's track passed along and adjoining plaintiff's inclosed and cultivated field, and at a point where there was no public or

private road crossing. *Lainiger v. Kansas City, St. J. & C. B. R. Co.*, 41 *Mo. App.* 165. *Rozzelle v. Hannibal & St. J. R. Co.*, 19 *Am. & Eng. R. Cas.* 591, 79 *Mo.* 349.—FOLLOWING *Rutledge v. Hannibal & St. J. R. Co.*, 78 *Mo.* 286.—*Perriques v. Missouri Pac. R. Co.*, 19 *Am. & Eng. R. Cas.* 578, 78 *Mo.* 91.—DISTINGUISHING *Rowland v. St. Louis, I. M. & S. R. Co.*, 73 *Mo.* 619; *Sloan v. Missouri Pac. R. Co.*, 74 *Mo.* 47; *Bates v. St. Louis, I. M. & S. R. Co.*, 74 *Mo.* 60. QUOTING *Edwards v. Kansas City, St. J. & C. B. R. Co.*, 74 *Mo.* 117.—FOLLOWING *Moreland v. Missouri Pac. R. Co.*, 17 *Mo. App.* 77; *Martrett v. Hannibal & St. J. R. Co.*, 84 *Mo.* 413; *Stanley v. Missouri Pac. R. Co.*, 84 *Mo.* 625.—*Kinney v. Hannibal & St. J. R. Co.*, 27 *Mo. App.* 610. *Dorman v. Missouri Pac. R. Co.*, 17 *Mo. App.* 337. *Williams v. Hannibal & St. J. R. Co.*, 80 *Mo.* 597.—REVIEWING *Rowland v. St. Louis, I. M. & S. R. Co.*, 73 *Mo.* 619; *Schulte v. St. Louis, I. M. & S. R. Co.*, 76 *Mo.* 324.—*Meyers v. Union Trust Co.*, 82 *Mo.* 237.

A petition for double damages for killing stock, which alleges that the animals came upon the track of the road where it passes through uninclosed lands, and where there was no crossing of the railroad by any public road, and that the company failed and neglected to keep and maintain a lawful fence at the point where the stock got upon the track and were killed, and that the killing of the stock was occasioned, then and there, by the failure of defendant to erect and maintain such lawful fences on the sides of its roads, is sufficient, and satisfies the rule that the petition must charge that the animals got on the track at a point where the defendant was required by law to erect and maintain fences, and that the killing did not occur within the limits of an incorporated town. *Tickell v. St. Louis, I. M. & S. R. Co.*, 90 *Mo.* 296, 2 *S. W. Rep.* 407.

A complaint for a calf killed is sufficient which alleges in effect that the calf strayed upon the track and was killed by defendant's train, at a point where the same was not properly fenced or kept in good condition, such place being neither in an incorporated town or city, nor at a public crossing.—*Martrett v. Hannibal & St. J. R. Co.*, 84 *Mo.* 413.—FOLLOWING *Perriquez v. Missouri Pac. R. Co.*, 78 *Mo.* 91; *Edwards v. Kansas City, St. J. & C. B. R. Co.*, 74 *Mo.* 117; *Campbell v. Missouri Pac. R. Co.*, 78 *Mo.* 639.—QUOTED

IN *Summers v. Hannibal & St. J. R. Co.*, 29 Mo. App. 41.

The complaint may by implication, though not expressly, negative the possibility that the animal was killed at a public crossing or within the corporate limits of a town or city. The averment is, that it was killed at "a certain point of uninclosed timber-land." The complaint also contained an averment that the animal came upon the track and was killed at a place which the law required the company to protect with a fence or cattle-guard. *Held*, that on this ground also it was sufficient. *Wade v. Missouri Pac. R. Co.*, 19 Am. & Eng. R. Cas. 586, 78 Mo. 362. —FOLLOWING *Roland v. St. Louis, I. M. & S. R. Co.*, 73 Mo. 619; *Bates v. St. Louis, I. M. & S. R. Co.*, 74 Mo. 60.

A petition alleging that stock was injured in consequence of the fact that at the point where it strayed upon the road and was killed there were no fences, and that at the said point it was uninclosed prairie-land which the company was bound to fence, and where there was no street, county, or state road, or public crossing, and praying double damages, conclusively fixes the character of the action as founded on the 43d section of the Mo. R. R. Law (Wagn. Mo. St. 310, § 43). *Cary v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 209.

The petition alleged that the defendant's cars "wrongfully and illegally, and against the will of plaintiff," ran over his cattle, and that the same were killed owing to defendant's failure to erect and maintain good and substantial fences on the side of the road "where the same passes through, along, or adjoining inclosed or cultivated fields of plaintiff." Petition held substantially good. *Mumpower v. Hannibal & St. J. R. Co.*, 59 Mo. 245. —COMPARING *Aubuchon v. St. Louis & I. M. R. Co.*, 52 Mo. 522.

The petition alleged that the defendant negligently and carelessly ran over and killed some of the cattle of the plaintiff, and that the same was done at a part of the road that was not inclosed by a lawful fence, and that was not a public road crossing. *Held*, that the petition set out a good cause of action. *Aubuchon v. St. Louis & I. M. R. Co.*, 52 Mo. 522. —COMPARED IN *Mumpower v. Hannibal & St. J. R. Co.*, 59 Mo. 245. FOLLOWED IN *Fickle v. St. Louis, K. C. & N. R. Co.*, 54 Mo. 219.

**354. Alleging killing at place which might have been fenced.**—

(1) *Indiana*.—Where the complaint in an action for killing stock alleged that the railroad was not fenced at the place where the animal entered upon the track, it was not necessary to allege or show that it could have been properly fenced at such place. *Lake Erie & W. R. Co. v. Fishback*, 5 Ind. App. 403, 32 N. E. Rep. 346. *Louisville, N. A. & C. R. Co. v. Hall*, 19 Am. & Eng. R. Cas. 597, 93 Ind. 245. *Jeffersonville, M. & I. R. Co. v. Vancant*, 40 Ind. 233.

For if it could not properly be fenced, this is a matter of defense. *Louisville, N. A. & C. R. Co. v. Hughes*, 2 Ind. App. 68, 28 N. E. Rep. 158.

(2) *Missouri*.—Under Missouri Rev. St. § 2124, providing that railroad companies shall fence their tracks at all points where they may be inclosed by a lawful fence, it is not sufficient to aver that the accident occurred where the road was not inclosed by a lawful fence. *Russell v. Hannibal & St. J. R. Co.*, 83 Mo. 507.

The petition in an action brought under the 43d section of the railroad law for the killing of stock must show that the killing occurred at a place where the company was required by law to fence its track, and was occasioned by failure of the company to comply with the law. A mere statement that "the railroad was not fenced, and there was no crossing" at the place, is insufficient. *Bates v. St. Louis, I. M. & S. R. Co.*, 74 Mo. 60. —APPROVED IN *Hudgens v. Hannibal & St. J. R. Co.*, 79 Mo. 418. DISTINGUISHED IN *Perriquez v. Missouri Pac. R. Co.*, 78 Mo. 91; *Blakely v. Hannibal & St. J. R. Co.*, 79 Mo. 388. FOLLOWED IN *Wade v. Missouri Pac. R. Co.*, 78 Mo. 362; *Dryden v. Smith*, 79 Mo. 525. REVIEWED IN *Jackson v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 147.

A complaint in such a case, which states the obligation of defendant to fence its track where the accident occurred, and that the animals came upon the track where it was not fenced, and where defendant was under obligation to fence, and that they were killed in consequence; and further states that it happened in the adjoining township to the one where the action is brought, is good. *Young v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 52. —FOLLOWED IN *Wood v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 63.

A petition in an action under the 43d section of the Railroad Law (Rev. St. 1879,

§ 809) alleged that the sow "strayed upon said railroad track and was killed in consequence of the failure of defendant to erect and maintain a good and lawful fence on the sides of its said railroad at the point where said sow was killed, as in law it was bound to do." *Held*, that the petition stated a good cause of action. *Blakely v. Hannibal & St. J. R. Co.*, 79 Mo., 388.—DISTINGUISHING *Bates v. St. Louis, I. M. & S. R. Co.*, 74 Mo. 60. FOLLOWING *Edwards v. Kansas City, St. J. & C. B. R. Co.*, 74 Mo. 117; *Belcher v. Missouri Pac. R. Co.*, 75 Mo. 515.

**355. Necessity of alleging place of killing.\***—In an action under Missouri Rev. St. 1855, p. 649, § 5, for killing stock, a complaint which neither charges negligence nor misfeasance, nor facts from which such may be inferred, is insufficient. The complaint should state the place where the accident occurred, and all facts necessary to constitute the ground of action. *Quick v. Hannibal & St. J. R. Co.*, 31 Mo. 399.—FOLLOWED IN *Dyer v. Pacific R. Co.*, 34 Mo. 127.

In an action under the statute (Rev. Code 1855, p. 649, § 5) the petition should state explicitly on what ground the liability of the company is placed. It is not sufficient to charge negligence and wilfulness, and also to allege that the road was not fenced and that there were no cattle-guards at the crossings, without stating where the accident occurred. Negligence and unskillfulness are not essential to a recovery if the accident happened where there was no fence and where there was no crossing, or where the crossing was not protected by a cattle-guard. *Miles v. Hannibal & St. J. R. Co.*, 31 Mo. 407.

A complaint in a suit against a company for killing stock need not negative the defense that the company was not bound to fence at the place where the killing or injury occurred, such matters being proper for the answer. *Jeffersonville, M. & I. R. Co. v. Brevoort*, 30 Ind. 324.

A complaint is defective for not alleging the place where the animal was killed, as such allegation is a jurisdictional fact; but the defect cannot be taken advantage of under a demurrer averring that the complaint did not state facts sufficient "to constitute a cause of action." The demurrer

must specifically challenge the jurisdiction of the court. *Lake Erie & W. R. Co. v. Fishback*, 5 Ind. App. 403, 32 N. E. Rep. 346.

**356. Alleging failure to fence as proximate cause.\***—It is not enough to charge that stock were killed at a point where the company had failed to fence, without showing that they came on the track by reason of such failure. A complaint against a railroad company for killing stock, alleging that the stock were killed where defendant failed to construct lawful fences—*held*, defective in not alleging that the stock got on the track because of the failure to fence. *Dryden v. Smith*, 79 Mo. 525.—FOLLOWING *Luckie v. Chicago & A. R. Co.*, 67 Mo. 245; *Bates v. St. Louis, I. M. & S. R. Co.*, 74 Mo. 60; *Sloan v. Missouri Pac. R. Co.*, 74 Mo. 47.—DISTINGUISHED IN *Morrow v. Missouri Pac. R. Co.*, 82 Mo. 169.—*Hudgens v. Hannibal & St. J. R. Co.*, 79 Mo. 418.—APPROVING *Luckie v. Chicago & A. R. Co.*, 67 Mo. 245; *Cunningham v. Hannibal & St. J. R. Co.*, 70 Mo. 202; *Sloan v. Missouri Pac. R. Co.*, 74 Mo. 48; *Bates v. St. Louis, I. M. & S. R. Co.*, 74 Mo. 60; *Schulte v. St. Louis, I. M. & S. R. Co.*, 76 Mo. 324.—FOLLOWED IN *Clark v. Hannibal & St. J. R. Co.*, 79 Mo. 419, *n*.

To authorize a judgment against a railroad company for double the value of an animal killed on its track, the petition must aver, either directly or inferentially, that the killing was occasioned by the failure of the company to erect and maintain fences, as required by § 809, Missouri Rev. St. 1879. *Sloan v. Missouri Pac. R. Co.*, 74 Mo. 47.—APPROVED IN *Hudgens v. Hannibal & St. J. R. Co.*, 79 Mo. 418. DISTINGUISHED IN *Edwards v. Kansas City, St. J. & C. B. R. Co.*, 74 Mo. 117; *Belcher v. Missouri Pac. R. Co.*, 75 Mo. 514; *Perriquez v. Missouri Pac. R. Co.*, 78 Mo. 91; *Morrow v. Missouri Pac. R. Co.*, 82 Mo. 169. FOLLOWED IN *Dryden v. Smith*, 79 Mo. 525. REVIEWED IN *Jackson v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 147.—*Luckie v. Chicago & A. R. Co.*, 67 Mo. 245.—APPROVED IN *Hudgens v. Hannibal & St. J. R. Co.*, 79 Mo. 418. DISTINGUISHED IN *Williams v. Missouri Pac. R. Co.*, 74 Mo. 453; *Lincoln v. St. Louis, I. M. & S. R. Co.*, 75 Mo. 27. FOLLOWED IN *Cunningham v. Hannibal & St. J. R. Co.*, 70 Mo. 202; *Dryden v. Smith*, 79 Mo. 525.

A complaint under Missouri Rev. St. § 809,

\* See ante, 329; post, 475.

\* See ante, 34, 130.



that a cow was killed "at a point on said railway where said road was not inclosed by a fence, as required by law"—held, insufficient, because not alleging that the cow got on the track and was killed because of the failure of the defendant to fence, and that no negligence being alleged, it showed no action at common law, and that it showed no action under the 5th section of the damage act, Rev. St. § 2124, as fences are not by that section required to be constructed. *Johnson v. St. Louis, K. C. & N. R. Co.*, 76 Mo. 553. See also *Dyer v. Pacific R. Co.*, 34 Mo. 127.

It is not necessary, in an action under the Missouri statute to recover double damages, that the complaint charge directly that the injury was caused by a failure of the company to maintain proper fences. It is sufficient to state facts from which such may be inferred. *Bowen v. Hannibal & St. J. R. Co.*, 75 Mo. 426.—QUOTING *Edwards v. Kansas City, St. J. & C. B. R. Co.*, 74 Mo. 117.—REVIEWED IN *Jackson v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 147.

In an action for injuring stock, it is not necessary that the petition allege that the failure to erect and maintain a sufficient fence along the side of the road "occasioned" the injury, as used in the statute, if words equivalent thereto are used; neither is it necessary to instruct the jury that they must believe the failure to fence "occasioned" the injury. *Williams v. Missouri Pac. R. Co.*, 74 Mo. 453.—DISTINGUISHING *Luckie v. Chicago & A. R. Co.*, 67 Mo. 245; *Cunningham v. Hannibal & St. J. R. Co.*, 70 Mo. 202. FOLLOWING *Moore v. Missouri Pac. R. Co.*, 73 Mo. 438.—FOLLOWED IN *Terry v. Missouri Pac. R. Co.*, 77 Mo. 254.

The complaint alleged that the killing occurred where the railroad "was not fenced, and where there was no crossing on said railroad, \* \* \* that defendant had failed and neglected to maintain good and sufficient fences on the side of its road where said mare got on the track and was killed; and that by reason of the killing of said mare, and by virtue of the 80th section of the Missouri Rev. St., "judgment for double damages was prayed. Held, that it sufficiently implied that it was defendant's duty to erect and maintain fences at that place, and that the mare got on the track in consequence of defendant's failure to do this, and that the complaint was good after ver-

dict. *Jackson v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 147.—APPLYING *Edwards v. Kansas City, St. J. & C. B. R. Co.*, 74 Mo. 117. REVIEWING *Sloan v. Missouri Pac. R. Co.*, 74 Mo. 47; *Bowen v. Hannibal & St. J. R. Co.*, 75 Mo. 427; *Belcher v. Missouri Pac. R. Co.*, 75 Mo. 515; *Asher v. St. Louis, I. M. & S. R. Co.*, 79 Mo. 432; *Bates v. St. Louis, I. M. & S. R. Co.*, 74 Mo. 60.—DISTINGUISHED IN *Morrow v. Missouri Pac. R. Co.*, 82 Mo. 169; *Summers v. Hannibal & St. J. R. Co.*, 29 Mo. App. 41; *Wood v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 63. FOLLOWED IN *Cowan v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 423; *Carpenter v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 446; *Greer v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 555; *Watson v. Chicago, R. I. & P. R. Co.*, 80 Mo. 662; *Busby v. St. Louis, K. C. & N. R. Co.*, 81 Mo. 43. QUOTED AND FOLLOWED IN *Johnson v. Missouri Pac. R. Co.*, 23 Am. & Eng. R. Cas. 180, 80 Mo. 620.

Under Missouri Rev. St. § 809, an averment that plaintiff's cow went upon defendant's track, where it runs adjoining inclosed fields and through uninclosed prairie-lands, where the track was entirely uninclosed, and was killed, is sufficient, it being unnecessary to allege that the cow went upon the track because it was not fenced. *Briggs v. Missouri Pac. R. Co.*, 82 Mo. 37.—QUOTING *Edwards v. Kansas City, St. J. & C. B. R. Co.*, 74 Mo. 122.

Where a complaint, in an action for double damages for injury to stock, avers that "one of plaintiff's horses went upon the track of said railroad at the point on said road described above, where the road is not fenced so as to prevent stock from their track, \* \* \* and that the west-bound train struck said horse," etc., the implication is irresistible that the failure to fence caused the injury, and the statement must be held sufficient. *Thomas v. Hannibal & St. J. R. Co.*, 23 Am. & Eng. R. Cas. 183, 82 Mo. 538.—QUOTED IN *Vail v. Kansas City, C. & S. R. Co.*, 28 Mo. App. 372.

**357. Need not allege particular defects in fence.**—In an action for killing stock, under Missouri Rev. St. 1879, § 809, the complaint need not allege that the defects in the company's fence, which caused the injury complained of, were permitted to remain longer than was necessary, by the exercise of reasonable diligence, to repair them. *Chubbuck v. Hannibal & St. J. R. Co.*, 77 Mo. 591.



**358. Alleging time road has been in operation.\***—A charge in a complaint, in an action to recover for injuries to stock, under the Illinois statute, to the effect that the road had been in use more than six months and was still unfenced, is a material averment, and must be proven to entitle plaintiff to recover. *Chicago & A. R. Co. v. Taylor*, 40 Ill. 280. See also *Ohio & M. R. Co. v. Brown*, 23 Ill. 94. *Galena & C. U. R. Co. v. Sumner*, 24 Ill. 631.

Where a railroad is sued under the statute requiring companies to fence within six months after the road, or any part of it, is open, an averment in the declaration that "more than six months after said railroad was in use, to wit, \*\*\* said defendant neglected to erect" fences, is good on general demurrer. *Great Western R. Co. v. Hanks*, 36 Ill. 281.

In an action to recover damages arising from the neglect of a railroad company to fence its road, where the injuries complained of extended over a period within which there had been changes in the statute imposing the duty of fencing, as to the extent of liability for the neglect, but not such changes as affected the duty of maintaining fences, a declaration which made no specific reference to the statutes—held, good, in the absence of demurrer; there would be no practical difficulty in determining the admissibility of proofs by the laws in force at the time to which they refer. *Continental Imp. Co. v. Ives*, 30 Mich. 448.

**359. Need not allege other negligence than failure to fence.†**—Complaints in actions for stock killed or injured by a railroad company, under statutes imposing liability for failure to perform certain duties, such as securely fencing the track, need only allege a failure to perform such statutory duties, other allegation of negligence on part of the company being unnecessary. *Terre Haute & St. L. R. Co. v. Augustus*, 21 Ill. 186. *West v. Hannibal & St. J. R. Co.*, 34 Mo. 177. *Bigelow v. North Mo. R. Co.*, 48 Mo. 510. *Indianapolis, P. & C. R. Co. v. Williams*, 15 Ind. 486. *Indianapolis, P. & C. R. Co. v. Sparr*, 15 Ind. 440. *Toledo, W. & W. R. Co. v. Weaver*, 34 Ind. 298. *Baltimore, P. & C. R. Co. v. Anderson*, 58 Ind. 413.—FOLLOWED IN

*Cincinnati, W. & M. R. Co. v. Stanley*, 4 Ind. App. 364.

But in a suit in the common pleas or circuit court for killing stock, an averment that the road was not fenced, without a further averment of negligence, is insufficient. *Terre Haute & R. R. Co. v. Smith*, 19 Ind. 42.

A petition stating that there was no sufficient fence on the sides of the railroad where the injury was caused, and alleging no other negligence, does not state a good cause of action, where it does not appear that the injury did not happen at a public highway crossing. *Dyer v. Pacific R. Co.*, 34 Mo. 127.—FOLLOWING *Quick v. Hannibal & St. J. R. Co.*, 31 Mo. 399; *Brown v. Hannibal & St. J. R. Co.*, 33 Mo. 309.

To entitle the owner of stock injured or killed on the track to recover of the company one half the loss sustained, under section 2 of chapter 57, Gen. St. of Kentucky, the plaintiff need not allege or prove negligence. *Louisville & N. R. Co. v. Belcher*, 40 Am. & Eng. R. Cas. 228, 89 Ky. 193, 12 S. W. Rep. 195.

**360. Need not allege that plaintiff did not agree to fence.**—In an action to recover for stock killed for not fencing under the Illinois act making railroads liable for stock killed, it is not necessary to allege in the declaration that plaintiff did not agree to fence, nor receive pay for so doing. *Toledo, P. & W. R. Co. v. Lavery*, 71 Ill. 522.

**361. Rule where allegations state a good cause of action at common law, though bad as stating statutory cause of action.**—A complaint for killing stock under Alabama Code, § 1711, must allege with reasonable certainty the time when and the place where the killing or injury occurred, if it charges that it was done by the cars or locomotive of defendant company; but where it does not show that the injury was so caused, the statute does not apply, and as a complaint at common law it is sufficient. *South & N. Ala. R. Co. v. Schafner*, 78 Ala. 567.—DISTINGUISHING *East Tenn., V. & G. R. Co. v. Carloss*, 77 Ala. 443.

A party, in an action against a company to recover for stock killed by its engines and cars, may allege in his petition that the injury was caused by the negligence of the employes in the management of the engine and cars, and also facts showing a cause of

\* See ante, 91, 123-125.

† See ante, 29-33, 126.

action under the laws of Kansas, 1874, ch. 94, and may prove either or both, and recover accordingly. *Stewart v. Manhattan, A. & B. R. Co.*, 27 Kan. 631.

The fact that the petition in an action for killing stock closes with a prayer for double damages will not prevent recovery of single damages if the petition states a cause of action either at common law or under the 5th section of the Missouri damage act, and there is nothing besides the prayer to show that plaintiff intends to claim under the 43d section of the railroad law. *Scott v. St. Louis, I. M. & S. R. Co.*, 75 Mo. 136.—FOLLOWED IN *Campbell v. Missouri Pac. R. Co.*, 78 Mo. 639.

As a railroad is liable for gross negligence resulting in the destruction of plaintiff's property, irrespective of the question of the erection of fences, where the declaration charges negligence, as at common law, all allegations respecting the want of sufficient fences may be rejected as surplusage, and recovery had upon the common-law liability. *Rockford, R. I. & St. L. R. Co. v. Phillips*, 66 Ill. 548.

A complaint in an action for killing stock, which charges with proper formality that, while running its locomotive, the defendant company negligently struck the cattle of plaintiff at a place named with its locomotive and killed them, of a certain value, states a good cause of action at common law; and being sufficient at common law, other irrelevant allegations may be stricken out as surplusage. *Garner v. Hannibal & St. J. R. Co.*, 34 Mo. 235.

Plaintiff stated specially a cause of action to have accrued before the passing of the stat. 20 Vic. ch. 12, for the better prevention of railway accidents, and alleged a duty in defendant to erect and maintain sufficient fences on the line of its railway, and charged a breach of that duty, by means whereof certain fillies or colts of plaintiff, one of which was lawfully in a certain close near the railway, and the other was lawfully on the highway near the railway, by and through defendant's breach of duty, got upon the railway, and by means thereof and by and through the negligence of defendant in running and propelling its locomotive engines, and while said fillies or colts were so upon the railway, a locomotive of defendant ran against them, etc. *Held*, that all the allegations respecting the duty of defendant to fence and its breach of

that duty, by which plaintiff's fillies got on the railway, being struck out, the declaration, in alleging negligence on defendant's part in running and propelling its locomotives, still disclosed a good cause of action. *Chisholm v. Great Western R. Co.*, 10 U. C. C. P. 324.—APPROVING *Gillis v. Great Western R. Co.*, 12 U. C. Q. B. 427.

**302. Pleading ordinances.**—The cause of action not being founded on the ordinance, it is not necessary to plead it, but if the defendant was running its train in violation of it, such fact is competent to support the charge of negligence. *Robertson v. Wabash, St. L. & P. R. Co.*, 84 Mo. 119.—APPLIED IN *Windsor v. Hannibal & St. J. R. Co.*, 45 Mo. App. 123; *Fusill v. Missouri Pac. R. Co.*, 45 Mo. App. 535. FOLLOWED IN *Judd v. Wabash, St. L. & P. R. Co.*, 23 Mo. App. 56. REVIEWED IN *Welch v. Hannibal & St. J. R. Co.*, 26 Mo. App. 358.

In an action for the killing of stock within the corporate limits of the city of Macon, and alleging the violation of an ordinance of that city regulating the running of trains, it was neither averred in the petition that the city of Macon was incorporated under a public law, nor was the title of the act of incorporation referred to, as by the statute provided, nor was the charter of said city offered or read in evidence. *Held*, there was no evidence of the power of the city to enact the ordinance in question. *O'Brien v. Wabash, St. L. & P. R. Co.*, 21 Mo. App. 12.—QUOTING *Apitz v. Missouri Pac. R. Co.*, 17 Mo. App. 426. REVIEWING *Wisdom v. Wabash, St. L. & P. R. Co.*, 19 Mo. App. 324.

**303. Necessary allegations to recover attorney's fee.\***—To recover an attorney's fee, under the Kansas railroad stock law, it is not essential that the plaintiff should state in his pleading that the employment of an attorney in the case was necessary. A full statement of the facts concerning the injury, and a prayer for an attorney's fee, will sustain such a recovery. *Kansas City, Ft. S. & G. R. Co. v. Burge*, 40 Am. & Eng. R. Cas. 181, 40 Kan. 736, 21 Pac. Rep. 589.

**304. Negating plaintiff's contributory negligence.†**—A complaint against a railroad company for the negligent killing of live stock, which does not allege

\* See ante, 9; post, 584.

† See ante, 213-288.

that the killing was done without fault or negligence on the part of plaintiff, is not good at common law. *Jeffersonville, M. & I. R. Co. v. Lyon*, 72 Ind. 107.—DISTINGUISHED IN *Louisville, N. A. & C. R. Co. v. Porter*, 20 Am. & Eng. R. Cas. 446, 97 Ind. 267.—*Indianapolis, C. & L. R. Co. v. Robinson*, 35 Ind. 380.—FOLLOWED IN *Jeffersonville, M. & I. R. Co. v. Lyon*, 55 Ind. 477.—*Indianapolis, P. & C. R. Co. v. Caudle*, 60 Ind. 112. *Jeffersonville, M. & I. R. Co. v. Lyon*, 55 Ind. 477.—FOLLOWING *Indianapolis C. & L. R. Co. v. Robinson*, 35 Ind. 380. *Toledo, W. & W. R. Co. v. Harris*, 49 Ind. 119. *Jeffersonville, M. & I. R. Co. v. Underhill*, 40 Ind. 229.

A complaint for killing cattle upon a highway crossing by reason of the company's negligent failure to sound a whistle and ring a bell, as the statute requires, without any negligence of plaintiff, states a good cause of action. *Cincinnati, W. & M. R. Co. v. Hiltzauer*, 99 Ind. 486.—DISTINGUISHED IN *Wemy v. Indianapolis & V. R. Co.*, 24 Am. & Eng. R. Cas. 371, 105 Ind. 55. But where the killing of stock by a railroad company is alleged to have been *wilfully* done, it is not necessary to aver affirmatively that the plaintiff's carelessness did not contribute to it. *Indianapolis, P. & C. R. Co. v. Petty*, 30 Ind. 261.—QUOTED IN *Evansville & T. H. R. Co. v. Willis*, 80 Ind. 225.

**305. What allegations may be stricken out as surplusage.**—Where a declaration or petition in an action for killing stock states a good cause of action for negligence at common law, all other allegations respecting fencing and such statutory duties are surplusage, and may be stricken out. *Rockford, R. I. & St. L. R. Co. v. Phillips*, 66 Ill. 548. *Garner v. Hannibal & St. J. R. Co.*, 34 Mo. 235. *Chisholm v. Great Western R. Co.*, 10 U. C. C. P. 324. *Jeffersonville, M. & I. R. Co. v. Lyon*, 55 Ind. 477.

**306. Amendments.**—(1) *Allowable.*—A complaint founded on the statute, averring neither negligence nor intentional injury resulting from direct force, is neither in case nor in trespass, and shows no cause of action; and an amended complaint, averring that the injury was caused by the negligence of the company's servants, is allowable. *Simpson v. Memphis & C. R. Co.*, 66 Ala. 85.

In a complaint for the killing of a horse,

the substitution by amendment of the word *mare* for the word *horse* does not make a new case. *South & N. Ala. R. Co. v. Bees*, 82 Ala. 340, 2 So. Rep. 752.

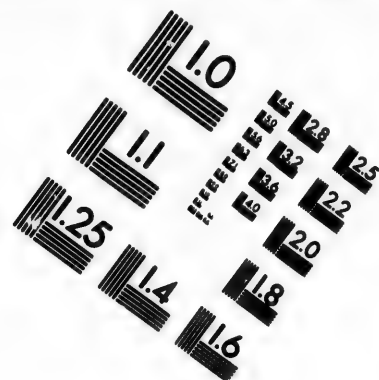
In an action for double damages for killing cattle, a complaint which fails to show that the injury occurred at a point on the road where there should have been fences, but were none, or that it was occasioned by the failure to fence, is defective, but under the present statute (Mo. Rev. St. 1879, § 3060) may be amended after appeal to the circuit court. *Dryden v. Smith*, 79 Mo. 525.—FOLLOWING *King v. Chicago, R. I. & P. R. Co.*, 79 Mo. 328.

Where a complaint is filed against a company for killing stock, charging that the stock strayed upon the track without the fault of the owner and was injured through the negligence of the company in the operation of a train, it is proper to allow an amendment to the effect that the animal strayed upon the track through the negligence of the company in failing to build and maintain a proper fence, as required by statute. *Becker v. New York, L. E. & W. R. Co.*, 31 N. Y. S. R. 750, 57 Hun 585, 10 N. Y. Supp. 413.—APPROVING *Smith v. Eastern R. Co.*, 35 N. H. 356. REVIEWING *Corwin v. New York & E. R. Co.*, 13 N. Y. 42; *Hungerford v. Syracuse, B. & N. Y. R. Co.*, 46 Hun 339, 12 N. Y. S. R. 204.

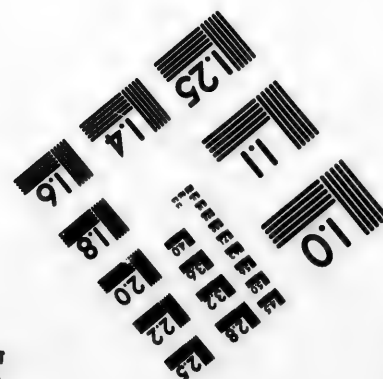
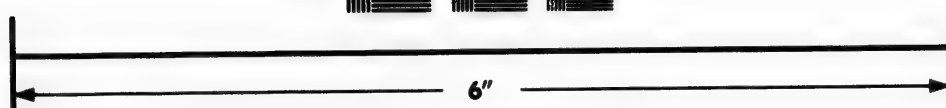
(2) *Not allowable.*—A plaintiff cannot be allowed, after issue joined, to amend his original petition so as to alter the substance of his demand. In an action against a railroad company for killing cattle plaintiff cannot amend his petition for the purpose of alleging that the company had no right of way over his lands, as the responsibility of a company running trains under legal rights is different from that of a trespasser. *Day v. New Orleans Pac. R. Co.*, 35 La. Ann. 694.

**307. Defective allegation cured by subsequent allegation.**—A declaration in an action against a railroad contained but one count, and that was for killing and crippling a mare and a mule, but it was not averred which animal was killed and which crippled. This defect was cured by a subsequent averment that by the act of defendant in running its train upon them they were lost to the owner. *Toledo, W. & W. R. Co. v. Cole*, 50 Ill. 184.

**308. Defective allegations cured by subsequent proceedings.**—The dec-



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laration averred that the company had failed to fence the road at the place where the animal was killed, or where it got upon the track, and that it was not killed, nor did it get upon the track, at any of the excepted places. Upon the objection that it was not directly averred that the injury was the result of the company's failure to fence—*held*, that the facts averred would raise a *prima facie* presumption that the injury resulted from that cause, and, at least after verdict, on motion in arrest, the declaration would be sufficient. *Toledo, P. & W. R. Co. v. Darst*, 52 Ill. 89.

In an action under the statute, commenced in the circuit court, the complaint alleged that, "at a place on the track of said railroad where the same was not securely fenced," the defendant, "by its servants, locomotives, and cars, ran upon, against, and over" the stock and killed it. *Held*, on motion in arrest, that as the defect in the allegation as to fencing could be and was supplied by the evidence and cured by the verdict, the complaint was sufficient. *Louisville, N. A. & C. R. Co. v. Spain*, 61 Ind. 460.

In a suit to recover for animals killed, the complaint averred "that the railroad aforesaid was not securely fenced in, and the fence properly maintained." *Held*, that this language may mean that the railroad was not securely fenced anywhere, and therefore imply that it was not so fenced where the animals entered upon the road; and, after verdict for the plaintiff, it is fair to assume, no objection appearing to have been made to the evidence, and the evidence not being in the record, that proof of the fact thus implied was made without objection. *Indianapolis, P. & C. R. Co. v. Petty*, 30 Ind. 261.

In an action under Iowa Code, § 1289, for double damages for stock killed on a railroad track on account of a failure to fence, the petition did not in terms aver that the animals were running at large. *Held*, that, as defendant had notice that the action was brought under the statute, and admitted all the averments of the petition except the value of the animals, and went to trial without moving for a more specific statement, the petition ought to be held sufficient after verdict. *Shuck v. Chicago, R. I. & P. R. Co.*, 73 Iowa 333, 35 N. W. Rep. 429.

In an action for double damages for stock killed, the petition alleged "that defendant

had been duly notified of the killing of said cow, and payment thereof duly demanded," which defendant had refused, *Held*, sufficient to warrant a judgment for double damages, where no objection was made until after judgment. *Clary v. Iowa Midland R. Co.*, 37 Iowa 344.

In an action for double damages for killing a sow, an averment that she strayed upon the track at a point where it was not fenced "as the law directs" is, after verdict, to be regarded as equivalent to an averment that the road at the given point ran through the character of land required by the statute to be fenced, and that the sow was killed in consequence of the want of such fence. *Nicholson v. Hannibal & St. J. R. Co.*, 82 Mo. 73.—DISTINGUISHING *Hudgens v. Hannibal & St. J. R. Co.*, 79 Mo. 418.

In an action, under Missouri Rev. St. 1879, § 809, for double damages for killing plaintiff's hog, the petition alleged that the hog was killed at a point on defendant's railroad track where the same was not inclosed by a lawful fence sufficient to prevent the hog from getting on the track, and that plaintiff's damage was caused by the failure of defendant to erect and maintain lawful fences sufficient to prevent the hog from straying on the track. *Held*, that this sufficiently showed that the animal came upon the track by reason of the company's failure to fence, and the petition was good after verdict. *Morris v. Hannibal & St. J. R. Co.*, 19 Am. & Eng. R. Cas. 666, 79 Mo. 367.—FOLLOWING *Edwards v. Kansas City, St. J. & C. B. R. Co.*, 74 Mo. 117.

Where plaintiff's petition alleged that the cattle injured entered upon the track where it ran through his inclosed field, and also stated facts showing that the action was brought under § 43, Missouri Corporation Act, which could not have been done had the killing occurred within a town or city, it was held to contain averments sufficient, after verdict, to show that the stock entered upon the track at a point not within the limits of an incorporated town or city. *Farrell v. Union Trust Co.*, 13 Am. & Eng. R. Cas. 552, 77 Mo. 475.

*The following allegations have been held to be sufficient after verdict:*

A complaint alleging that the railroad was not fenced at the point where the animals entered, but where, instead of such averment, it is alleged that the road was

not fenced at the point where the animals were killed. *Louisville, N. A. & C. R. Co. v. Goodbar*, 102 Ind. 596, 2 N. E. Rep. 337, 3 N. E. Rep. 162.

A complaint under the statute, otherwise sufficient, but containing no formal averment that the plaintiff was damaged by the killing of his cattle. *Louisville, N. A. & C. R. Co. v. Peck*, 99 Ind. 68.

An allegation that a company, "by its locomotive and cars, etc., on its railroad," ran over and killed animals, etc., is a good allegation as to the ownership of the road. *Pittsburgh, C. & St. L. R. Co. v. Hunt*, 71 Ind. 229.

An allegation that the company ran against and over the animal and killed it, but not alleging that the injury was done by the locomotive or cars. *Louisville, N. A. & C. R. Co. v. Harrington*, 19 Am. & Eng. R. Cas. 606, 92 Ind. 457.—DISTINGUISHING *Pittsburgh, C. & St. L. R. Co. v. Troxell*, 57 Ind. 246; *Pittsburgh, C. & St. L. R. Co. v. Hannon*, 60 Ind. 417; *Ricketts v. Sandifer*, 69 Ind. 318.

In an action under Missouri Rev. St. § 809, for damages for cattle killed by a railroad train, an allegation that "the cow did, without fault of plaintiff, stray upon the track of said railroad at a point where it runs through and along cultivated fields, and where said road was not sufficiently or lawfully fenced or guarded by cattle-guards, and where there was no public crossing on said road." *Edwards v. Kansas City, St. J. & C. B. R. Co.*, 74 Mo. 117.—DISTINGUISHING *Cunningham v. Hannibal & St. J. R. Co.*, 70 Mo. 202; *Sloan v. Missouri Pac. R. Co.*, 74 Mo. 47.—APPLIED IN *Jackson v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 147. FOLLOWED IN *Morris v. Hannibal & St. J. R. Co.*, 19 Am. & Eng. R. Cas. 666, 79 Mo. 367; *Belcher v. Missouri Pac. R. Co.*, 75 Mo. 514; *Campbell v. Missouri Pac. R. Co.*, 78 Mo. 639; *Blakely v. Hannibal & St. J. R. Co.*, 79 Mo. 388; *Marrett v. Hannibal & St. J. R. Co.*, 84 Mo. 413; *Stanley v. Missouri Pac. R. Co.*, 84 Mo. 625. QUOTED IN *Bowen v. Hannibal & St. J. R. Co.*, 75 Mo. 426; *Perriquer v. Missouri Pac. R. Co.*, 78 Mo. 91; *Busby v. St. Louis, K. C. & N. R. Co.*, 81 Mo. 43; *Briggs v. Missouri Pac. R. Co.*, 82 Mo. 37.

A declaration alleging negligence in the management of the train, although it may have appeared in evidence that the negligence of the defendant existed in relation

to fences, and not in the management of the train. *Smith v. Eastern R. Co.*, 35 N. H. 356.

A declaration merely alleging that the defendant neglected to keep a suitable fence along its track, and that "for want of such fence the plaintiff's horse escaped from his pasture and went at large, and by means of going at large the horse was greatly injured." *Holden v. Rutland & B. R. Co.*, 30 Vt. 297.

**369. Defective allegations not cured even after verdict.**—A complaint against a company for stock killed by the machinery of the company will be bad, even after verdict, if it fails to aver negligence or that the road was not fenced. *Indianapolis, P. & C. R. Co. v. Brucey*, 21 Ind. 215.

Action for four head of cattle. First and second counts allege that animals were killed by negligence or improper conduct of defendant's agents. Third and fourth counts contain no such allegation. As to killing of three of the animals, there is no evidence of negligence. But as to the fourth, there is ample. On demurrer to plaintiff's evidence—*held*: (1) Third and fourth counts are fatally defective, and not cured by verdict under statute of jeofails; (2) That statute is intended to cure defective statements of cause of action, but not a statement which makes no case; (3) There being no evidence of defendant's negligence in killing the jack, the bull, and the cow, there can be no recovery therefor; but as to the horse, it is otherwise. *Orange, A. & M. R. Co. v. Miles*, 76 Va. 773.

#### b. Other Matters of Pleading.

**370. Sufficiency of general denial.**—In a statutory action to recover for cattle killed, the defendant need not allege that the point where the stock entered upon its track was one which could not properly be fenced, but may show it by proof, under the general denial. *Jeffersonville, M. & I. R. Co. v. Lyon*, 55 Ind. 477.

**371. Necessity of specific denial.\***—Where a company is sued under Missouri Gen. St. 1865, ch. 63, for killing stock, and files an answer containing no specific denial of the allegations of the complaint, but sets up gross negligence on the part of the plaintiff in turning his animal out on unclosed lands, whereby it went upon the track and

\* See post, 380.



was killed, and by reason of which the company's cars were thrown off the track and injured to the amount of \$5000, such answer is properly stricken out as constituting neither a denial of the cause of action, nor a counterclaim in the nature of a set-off. *Tarwater v. Hannibal & St. J. R. Co.*, 42 Mo. 193.—FOLLOWED IN *Vickers v. Hannibal & St. J. R. Co.*, 42 Mo. 198.

To an action to recover the value of a mare killed on the defendants' line, the defendants pleaded specially that the fences on each side of their railway were good and sufficient; that there was no negligence; and that they had never been put *en demeu.* with regard to their fences being out of order. This was followed by a *defense en fait*. In the course of the *enquete* there was evidence which indicated that the locality where the accident occurred was not on the defendants' railway line, but on that of the Grand Trunk Company, which controlled the defendants' line. On defendants' offering evidence on this point, the court below maintained the objection to the testimony on the ground that there was no contestation raised as to the road on which the accident occurred. *Held*, that the defendants having pleaded specially, without raising any question as to their ownership of the road, the plaintiff was not obliged to prove the truth of an allegation which had not been specially denied, and which must be taken as admitted. *La Compagnie Du Chemin De Fer De Junction De Montreal et Champlain v. Severe Ste.-Marie*, 4 Montr. L. R. (Q. B.) 283.

**372. Pleading new matter, generally.**—A complaint charged in one paragraph the killing and injury of plaintiff's cattle by the servants and agents of the defendant company, and charged in another paragraph the failure of the company to fence its track at a point where it ought to have been fenced, resulting in the killing and injury. *Held*, that a paragraph of answer which assumed to answer the entire complaint, but which contained nothing which could amount to a defense of the charge of wilful injury, was bad; and that it was also bad in assuming that the railroad company was not bound to fence its track through unclosed land. *Louisville, E. & St. L. R. Co. v. Hart*, 2 Ind. App. 130, 28 N. E. Rep. 218.

In an action for the killing of plaintiff's cow, which had entered upon the defendant's

track where the track ought to have been securely fenced but was not, an answer setting up matters of evidence from which it might be inferred that it could not have been fenced without interfering with the rights of the public, or the free use of the track by the company, or jeopardizing the safety of its servants, but without alleging any issuable facts to that effect, is demurrable. *Pennsylvania R. Co. v. Zwick*, 1 Ind. App. 280, 27 N. E. Rep. 508.

The excuse that a reasonable time has not elapsed in which to repair known defects in a fence must be alleged in the answer. *Jeffersonville, M. & I. R. Co. v. Sullivan*, 38 Ind. 262.

**373. Alleging plaintiff's contributory negligence.**\*—To a complaint under the statute for killing the plaintiff's mare, the road not being fenced, etc., it was answered: 1. That the plaintiff was the defendant's servant; that as such it was his duty to keep the railroad track, near a certain station, free from trespassing animals; that, in violation of such duty, he turned his mare out at such a place, near which the track was not fenced, whereby, etc. 2. That a certain station was a public place, with side-tracks and switches where large shipments of goods were made and received, and that plaintiff turned his mare loose in that immediate vicinity, and she went upon the track at a place where it was not securely fenced, etc. *Held*, that both paragraphs were bad on demurrer; the first for not averring that, at the place where the animal entered upon the track and was killed, the employé was required by contract to keep off trespassing animals; and the second, for failure to show that the animal was killed at the station, where no fence was required. *Louisville, New A. & C. R. Co. v. Skelton*, 19 Am. & Eng. R. Cas. 542, 94 Ind. 222.

An answer that the plaintiff had negligently, or in violation of a city ordinance, allowed the stock killed to run at large within the limits of an incorporated city, and in the vicinity of the defendant's railroad, amounts only to an answer of contributory negligence, and is sufficient on demurrer. *Louisville, N. A. & C. R. Co. v. Cahill*, 63 Ind. 340.—DISTINGUISHING *Knight v. Toledo*, & W. R. Co., 24 Ind. 402.

Where an action is brought against a

\* See ante, 371.

railroad to recover for a bull killed upon the track at a place where it was unfenced, an answer to the effect that plaintiff knowingly allowed the bull to range at large and upon the track, in violation of the laws of Oregon, § 3393, when struck and killed, which was the result of the wrongful and unlawful act of plaintiff in allowing it to so range at large, states a good defense on demurrer, whether the bull was at large in violation of said section or not, as it showed contributory negligence. *Hindman v. Oregon R. & N. Co.*, 38 *Am. and Eng. R. Cas.* 310, 17 *Oreg.* 614, 22 *Pac. Rep.* 116.\*

**374. Alleging plaintiff's gross contributory negligence.**—Where the answer charges that the injury was the result of the "gross negligence of the plaintiff," it should aver in what particular act or omission his negligence consisted. *Jeffersonville, M. & I. R. Co. v. Dunlap*, 29 *Ind.* 426.—DISTINGUISHING *Buffalo v. Holloway*, 7 *N. Y.* 493; *Seymour v. Maddox*, 16 *Q. B.* 326.—DISTINGUISHED IN *Wabash R. Co. v. Savage*, 28 *Am. & Eng. R. Cas.* 288, 110 *Ind.* 156.

**375. Alleging that animal was trespassing upon the track.**—To an action against a railroad corporation, for negligently killing plaintiff's cattle, the defendant filed a plea of not guilty, and also a special plea in writing in these words, viz.: "And the said defendant says that said plaintiff ought not to have or maintain his action aforesaid against it, because, it says, that at the time the cattle of the plaintiff received the injury complained of in the declaration they were unlawfully trespassing upon the railroad track of defendant, etc." *Held*, that such a special plea is not good. *Baylor v. Baltimore & O. R. Co.*, 9 *W. Va.* 270.

**376. Alleging that animal was unlawfully upon the adjoining lands.**—In a declaration in case for injury done to plaintiff's steers, defendants pleaded that just before said time, etc., said steers were unlawfully depasturing in and upon certain lands adjoining the lands of defendants and said railway, which lands were not the lands of plaintiff, but of one Richard Roe, who had not given license for said steers to be there; and that said steers strayed from said land where they were so unlawfully depasturing and being as afore-

said upon defendants' lands adjoining, and thence at said time when, etc., onto said railway, and then being so upon said railway, were accidentally injured without any design or default of defendants. *Held*, bad on demurrer. *McDowell v. Great Western R. Co.*, 5 *U. C. C. P.* 130.—APPROVING *Fawcett v. York & N. M. R. Co.*, 16 *Q. B.* 610; *Parneil v. Great Western R. Co.*, 4 *U. C. C. P.* 517.

In an action for running over and killing plaintiff's mare, the first count alleged that the mare was in the close of one W. by his leave, and that defendants neglected to fence along their line, whereby the mare strayed upon the railway. Defendants pleaded (among other pleas) that W. was not possessed of the close, and that the mare was not there by his leave. *Held*, that issues taken upon these pleas were material, and necessary to be proven. *Connors v. Great Western R. Co.*, 13 *U. C. Q. B.* 401.

**377. What may be pleaded in abatement.**—The failure of the owner of live stock killed to have their value appraised before bringing suit, as provided by Colorado Gen. Laws 1877, p. 850, may be taken advantage of by a plea in abatement, but if not so taken advantage of it will be regarded as waived. *Atchison, T. & S. F. R. Co. v. Lujan*, 6 *Colo.* 338.—RECONCILED IN *Denver & R. G. R. Co. v. Henderson*, 31 *Am. & Eng. R. Cas.* 559, 10 *Colo.* 1. See also 10 *Colo.* 4.

**378. Demurrer—Necessity of separate demurrers.**—Where suit is under the Iowa act giving double damages for stock killed, an objection that the petition does not set out the notice provided by statute to be served on the company must be raised by demurrer, and when not so raised will be regarded as waived. *McKinley v. Chicago, R. I. & P. R. Co.*, 47 *Iowa* 76.

When a complaint for negligently killing a horse contains two paragraphs or counts, one under the statute charging a failure to fence, and the other at common law, and the first is bad and the second good, a single demurrer to both paragraphs is rightly overruled, but a separate demurrer to the first paragraph should be sustained. *Indianapolis, P. & C. R. Co. v. Taffe*, 11 *Ind.* 458.

**379. Replication, sufficiency of.**—A company set up the defense to an action against it for killing stock that the plaintiff had contracted to fence the road, and that

\* See post, 390.

by reason of his failure to do so the stock went upon the road and were killed. Plaintiff filed a replication denying that he was bound by any contract to build such fence, and denied that his stock "came on said road by reason of plaintiff not building a fence that he was bound to build by reason of any contract that he had made." *Held*, that the replication was sufficient, under the Missouri practice, to require the company to produce the contract at the trial. *Ells v. Pacific R. Co.*, 55 Mo. 278.

Action against railroad corporation for injuries to stock; plea, that defendant had ceased to own or control the road, and was not interested in the control or ownership of it at the time of the alleged injury; replication, that the parties owning and controlling the road "run said property as a corporation, under the name of" the defendant corporation. *Held*, that the replication was demurrable because it was a departure and sought to introduce new parties. *Western R. Co. v. Davis*, 66 Ala. 578.

**380. What may be set up by way of counterclaim.**—In an action for killing stock at a public crossing, when the negligence is alleged to have been a failure to blow the whistle and to ring the bell, the defendant cannot set up by counterclaim that the plaintiff negligently permitted his stock to stray upon such crossing and that the collision damaged his locomotive. *Lake Shore & M. S. R. Co. v. Van Auken*, 1 Ind. App. 492, 27 N. E. Rep. 119.—FOLLOWING *Terre Haute & I. R. Co. v. Pierce*, 95 Ind. 496.

In an action to recover for the value of a horse killed by the defendant's cars, wherein one paragraph of the complaint was based upon the defendant's failure to fence its track, and another alleged a negligent killing, the defendant could not set up, by way of counterclaim, that the plaintiff had negligently suffered his horse to stray upon the track, where the cars ran upon it, and were thrown from the track, causing the defendant great damage, for which judgment was demanded. *Terre Haute & I. R. Co. v. Pierce*, 19 Am. & Eng. R. Cas. 581, 95 Ind. 496.—DISTINGUISHING *Judah v. Vincennes University*, 16 Ind. 56; *Grimes v. Duzan*, 32 Ind. 361.—FOLLOWED IN *Lake Shore & M. S. R. Co. v. Van Auken*, 1 Ind. App. 492.

Where a company set up as a defense, to an action for killing stock, a counterclaim

that plaintiff knowingly and intentionally permitted his stock to run at large and on defendant's premises, in violation of the herd law of the state, whereby defendant's train was wrecked and great damage done it, it is not necessary to further aver that the defendant itself was free from fault and negligence. Defendant's fault or negligence is matter to be shown by plaintiff. *Central Branch U. P. R. Co. v. Walters*, 24 Kan. 504.

In an action against appellant to recover the value of mules killed by one of its trains, the appellant pleaded as a counterclaim the damages sustained by reason of plaintiff's negligence in allowing his stock to stray on the track, the plaintiff's alleged negligence consisting in his not having a good and lawful fence, such as would keep the mules within his own inclosure. The damages claimed resulted from the wrecking of the train by reason of the collision with the stock. The company's road was not inclosed. *Held*, that a demurrer to the counterclaim was properly sustained. But even if it presented a good defense, it could not have availed in this case, for the reason that the jury, by a verdict for the plaintiff, have found that the damages sustained by the defendant were the result of its own negligence. *Louisville & N. R. Co. v. Simmons*, 85 Ky. 151, 3 S. W. Rep. 10.

Horses on a railroad track were killed by a passing train, which was thereby thrown from the track and its engine injured. *Held*, that the injury to the engine was no proper counterclaim in an action for damages brought by the owner of the horses against the company. *Simkins v. Columbia & G. R. Co.*, 19 Am. & Eng. R. Cas. 467, 20 So. Car. 258.

**381. Evidence admissible under the pleadings.**\*—The animal killed being described in the complaint as a cow, and shown by the evidence to be partly of Jersey stock, though not full-blooded or thoroughbred, the testimony of a witness cannot be excluded from the jury because he speaks of her as a Jersey cow. *Western R. Co. v. Lazarus*, 88 Ala. 453, 6 So. Rep. 877.

Upon a complaint averring that the injury was done "on or about 20th of September," the plaintiff may prove that it was "on or about the 18th September," or "between the 16th and 20th September;" and,

\* See post, 391-523.

under an averment that it was at a place on the railroad "about seventy-five or one hundred yards distance from Cowles station," may prove that it was at a place on the railroad within one hundred and fifty yards of said station. *Western R. Co. v. Sistrunk*, 85 Ala. 352, 5 So. Rep. 79.—DISTINGUISHED IN *North Birmingham St. R. Co. v. Calderwood*, 89 Ala. 247.

In an action to recover damages for the wrongful killing of plaintiff's colt, caused by the removal of cattle-guards, which defendant's grantor had agreed in writing to maintain, such agreement is not the foundation of the action, and neither the original nor a copy thereof need be filed with the pleading. *Toledo, St. L. & K. C. R. Co. v. Fenstermaker*, 3 Ind. App. 151, 29 N. E. Rep. 440.

Where a company is sued for killing stock as owner of a road, when in fact it is but a lessee, the record of the lease is admissible in evidence, under the general denial, on the question of ownership. *Pittsburgh, C. & St. L. R. Co. v. Hunt*, 71 Ind. 229.

The courts take judicial notice of a public act incorporating a city; and where a railroad company is sued for negligently killing stock within the corporate limits of the city, an ordinance may be introduced showing that the train was running at a prohibited rate of speed, without being specially pleaded. *Nutter v. Chicago, R. I. & P. R. Co.*, 22 Mo. App. 328.—APPLIED IN *Fusili v. Missouri Pac. R. Co.*, 45 Mo. App. 535.

Evidence as to the speed of the train and the sounding of the whistle is admissible under the allegation "that defendant so carelessly and negligently managed its locomotive, without ringing its bell or using its steam-cock, that it ran over plaintiff's cow." *Mapes v. Chicago, R. I. & P. R. Co.*, 76 Mo. 367.—FOLLOWED IN *Edwards v. Chicago, R. I. & P. R. Co.*, 76 Mo. 399.

In a common-law action against a company for negligently killing stock at a highway crossing it is competent to prove that a bell was not rung nor a whistle sounded, though not specially pleaded, as at common law any mismanagement on the part of common carriers might be shown to establish negligence. *Goodwin v. Chicago, R. I. & P. R. Co.*, 11 Am. & Eng. R. Cas. 460, 75 Mo. 73.—DISTINGUISHING *Stoneman v. Atlantic & P. R. Co.*, 58 Mo. 503; *Holman v. Chicago, R. I. & P. R. Co.*, 62 Mo. 562.—FOLLOWED IN *Schneider v. Missouri Pac.*

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*R. Co.*, 75 Mo. 295; *Alexander v. Hannibal & St. J. R. Co.*, 76 Mo. 494. QUOTED IN *Barr v. Hannibal & St. J. R. Co.*, 30 Mo. App. 248.

Under an allegation that the company, by "carelessness and negligence in the management of its engine and cars," ran over and killed stock belonging to plaintiff, it is competent for plaintiff to show failure to ring the bell or sound the whistle, provided such omission contributed to the injury complained of. *Ravenscraft v. Missouri Pac. R. Co.*, 27 Mo. App. 617.

A charge in a complaint for killing stock that the killing was negligently done, is sufficiently broad to admit proof of any act of the company which caused or contributed to the injury. *Mack v. St. Louis, K. C. & N. R. Co.*, 77 Mo. 323.

In an action for injuries to stock, under the allegation of contributory negligence on the part of the owner, evidence may be properly introduced respecting the condition of the defendant's gates at the place of the accident. *McMaster v. Montana Union R. Co.*, 49 Am. & Eng. R. Cas. 564, 12 Mont. 163.

Under a complaint which alleges that the plaintiff was put to expense in caring for and trying to cure the injured cattle, and demands damages therefor, evidence is admissible and instructions may properly be given as to the cost of such care. *Plunkett v. Minneapolis, S. St. M. & A. R. Co.*, 79 Wis. 222, 48 N. W. Rep. 519.

On a plea of the general issue, a railroad sued for killing stock may show by evidence that the stock were killed on the road of another company, and by the servants of such other company, and not by its own servants. *Richmond & D. R. Co. v. Buice*, 88 Ga. 180, 14 S. E. Rep. 205.

**382. Evidence inadmissible under the pleadings** \*—Where complainant alleges the killing or injury of the plaintiff's animals on the defendant's railroad track, through the alleged careless, negligent, and wilful acts of the defendant's employes, the suit is one at common law, and the fact that defendant's track was not fenced cannot be shown. *Pittsburgh, C. & St. L. R. Co. v. Stuart*, 71 Ind. 500.—QUOTED IN *Chicago, St. L. & P. R. Co. v. Nash*, 1 Ind. App. 298.

Animals killed or injured at different times constitute separate and distinct causes

\* See post, 391-523.

of action, each of which should be stated in a separate paragraph of the complaint; and where the complaint indicates but one cause of action, the plaintiff should be confined in his evidence to a single transaction. *Jeffersonville, M. & I. R. Co. v. Brevoort*, 30 Ind. 324.

Where it is charged that the negligence of an engineer caused the killing of cattle, it is not competent to prove habitual negligence of other employés of the company. *Mississippi C. R. Co. v. Miller*, 40 Miss. 45. —FOLLOWED IN *Southern R. Co. v. Kendrick*, 40 Miss. 374; *New Orleans, J. & G. N. R. Co. v. Enochs*, 42 Miss. 603; *Memphis & C. R. Co. v. Orr*, 43 Miss. 279.

Where a complaint charges that stock were killed through the careless or negligent running of a train, it is not competent at the trial to prove negligence in permitting grass or water at or near its track, whereby the stock were attracted. *Milburn v. Hannibal & St. J. R. Co.*, 21 Mo. App. 426.

It is not competent to prove that horses were killed by going on the track through an open gate in a fence along the railroad track, where there is no allegation in the complaint charging any negligence on the part of the company in allowing the gate to be open which would operate as the proximate cause of the injury. *Jahant v. Central Pac. R. Co.*, 74 Cal. 9, 15 Pac. Rep. 362.

In an action to recover for the killing of animals, based on a neglect of the company to keep a gate in a fence built by it in repair, through which stock escaped and got upon the track, where they were killed, the defendant offered to prove that the erection of cattle-guards or a fence along its side-tracks would greatly endanger the lives of its employés, and inconvenience the public at large in loading and unloading cars from the side-tracks, and the cattle-guards would weaken the roadbed and thereby endanger the lives of passengers. Held, that the evidence was properly excluded, as the neglect to make cattle-guards was not complained of as a ground of recovery. *Chicago & E. I. R. Co. v. Guertin*, 24 Am. & Eng. R. Cas. 385, 115 Ill. 466, 4 N. E. Rep. 507.

In an action to recover, under the statute, the value of stock alleged to have been killed by the defendant's cars on its railroad, where the same was not but ought to have been securely fenced, it is error to admit evidence that such killing had been done by

the defendant's cars on the railroad of another company. *Cincinnati, H. & D. R. Co. v. Bunnell*, 61 Ind. 183.

It is also error in such a case to permit the plaintiff, over the objection of the defendant, to so amend his complaint as to conform to such erroneous evidence, where such action is commenced in the circuit court. *Cincinnati, H. & D. R. Co. v. Bunnell*, 61 Ind. 183.

In an action for injury to a horse which had got upon the track, it was error, while admitting evidence of his reduced value, to allow testimony of what his use would have been worth during a certain period after the injury, if he were sound, especially if the declaration made no claim for the value of his services, and the plaintiff sought to show that he was absolutely worthless. *Davidson v. Michigan C. R. Co.*, 49 Mich. 428, 13 N. W. Rep. 804.

In an action for killing stock the petition alleged that the defendant carelessly and negligently ran its train over the stock, and that the point on the road where this occurred was not at the crossing of any public road or highway, and was at a point where the railroad ran through unclosed prairie-lands and was not fenced. Held, 1st, that the action was based exclusively on the 43d section of the railroad law; 2d, that evidence of negligence in running the train, or evidence to prove that the killing occurred within eighty rods of a public crossing, and that the whistle was not blown or the bell rung, as required by the 38th section, was irrelevant. *Collins v. Atlantic & P. R. Co.*, 65 Mo. 230.—DISTINGUISHED IN *Mapes v. Chicago, R. I. & P. R. Co.*, 76 Mo. 367.

**383. Variance, what is material.**—In an action for injuries to cattle, the only negligence alleged being the failure of the engineer "to reverse the engine, blow the whistle, or use the proper diligence and means at his command to avoid the accident," a recovery cannot be had on proof of his negligence in failing to keep a proper lock-out, whereby he might sooner have discovered the animal on or near the track. *Mobile & B. R. Co. v. Ladd*, 92 Ala. 287, 9 So. Rep. 169.

A declaration in an action to recover for stock killed, which charges negligence in failing to keep a fence in repair, is not sustained by proof showing carelessness in leaving a gate open at a farm crossing. *Illinois C. R. Co. v. McKee*, 43 Ill. 119.—

**DISTINGUISHED** IN *Chicago & A. R. Co. v. O'Brien*, 34 Ill. App. 155.

Where a complaint for a cow killed at a railway crossing alleges that the injury was intentionally and wilfully committed, there can be no recovery on the ground of defendant's negligence. *Indiana, B. & W. R. Co. v. Overton*, 117 Ind. 253, 20 N. E. Rep. 147.

Where the petition alleges that the injury was caused by the want of a fence, plaintiff cannot have the question of general negligence adjudicated. *Asbach v. Chicago, B. & Q. R. Co.*, 74 Iowa 248, 37 N. W. Rep. 182.—**REVIEWED** IN *Brockett v. Central Iowa R. Co.*, 82 Iowa 369.

Where petition does not allege negligence to that effect particularly, there can be no recovery; under evidence to the effect that plaintiff was compelled to open the fence along defendant's railroad at a point where the wires composing it ended, because of a ditch which prevented the driving of his cattle to the desired place by any other route. *Davidson v. Central Iowa R. Co.*, 35 Am. & Eng. R. Cas. 158, 75 Iowa 22, 39 N. W. Rep. 163.

When there is an averment made in a pleading that a railroad crossing had been "negligently and defectively constructed," and there is no evidence in the cause sustaining it, there cannot be recovery upon other and different grounds not alleged. It is a familiar rule in this state that if one alleges the negligence to be the doing or omitting to do certain acts, he must stand by the statement with his proofs. *Ellis v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 126.—**FOLLOWING** *Price v. St. Louis, K. C. & N. R. Co.*, 72 Mo. 414; *Waldhier v. Hannibal & St. J. R. Co.*, 71 Mo. 514. **QUOTING** *Judson v. New York & N. H. R. Co.*, 29 Conn. 434.

Where the petition (under Wagn. Mo. St. 310, § 43) alleges that the killing of stock was caused by the company's failure to fence its road at a point where it was required to fence, and where the accident occurred, there can be no recovery on mere proof of negligence other than a failure to fence. *Cary v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 209.—**DISTINGUISHED** IN *Lindcoln v. St. Louis, I. M. & S. R. Co.*, 75 Mo. 27. **FOLLOWED** IN *Edwards v. Hannibal & St. J. R. Co.*, 66 Mo. 567.

A complaint alleged that the defendant negligently and wrongfully permitted to be

and remain open a certain gate in a railroad fence, whereby a certain cow of plaintiff's entered upon defendant's railroad and was killed. The proof showed that the gate, some sixty yards from the right of way, had been put in for its own use by a coal company, whose land abutted upon the right of way, and that there was no fence between the coal land and the right of way. *Held*, that plaintiff can predicate no right to recovery against defendant upon its failure to keep the gate of the coal company closed. *Davis v. Wabash R. Co.*, 46 Mo. App. 477.

Where it appeared that cows were pastured in a lot adjoining a railroad, between which and the railroad there was no fence, and there was no allegation in the pleadings to authorize evidence that they escaped upon the road through a defect of fences which the defendants were bound to repair, and no averment that the defendants were bound to fence at that point, or showing from what place, in what manner, or how the cattle came upon the road—*held*, that no action could be maintained against the railroad company for running over and killing the cows by means of their engine and cars. *Clark v. Syracuse & U. R. Co.*, 11 Barb. (N. Y.) 112.—**REVIEWED** IN *Terry v. New York C. R. Co.*, 22 Barb. (N. Y.) 574.

The declaration avers that the injury to the cattle was caused "solely by the negligence and carelessness of the defendant in this, that the defendant, seeing the plaintiff's cattle on the track, carelessly and wrongfully drove its locomotive on them." The plaintiff cannot under such a declaration recover if the evidence shows that the defendant's servants were guilty of no wrong or carelessness after the cattle were seen on the railroad, though they may have been guilty of such carelessness before they were seen. *Hawker v. Baltimore & O. R. Co.*, 15 W. Va. 628.—**DISTINGUISHED** IN *Spicer v. Chesapeake & O. R. Co.*, 34 W. Va. 514.

**384. Variance, what is not material.**—Under a general allegation of negligence on the part of a company, in an action against it for single damages for the killing of stock, the plaintiff may succeed either by proving negligence at common law, or by proving the constructive statutory negligence in failing to erect and maintain fences at a requisite place. *Hill v. Missouri Pac. R. Co.*, 49 Mo. App. 520.—**EXPLAINING** *Boone v. Wabash, St. L. & P. R. Co.*, 20 Mo. App. 232.



It is no variance for the statement of a statutory cause of action for double damages for the killing of stock, to allege a failure of the railway company to maintain a fence on the sides of its road, and for evidence to show a failure of the company to maintain a cross-fence connecting the main fence with a cattle-guard. *Foster v. St. Louis, I. M. & S. R. Co.*, 44 Mo. App. 11.

There is no variance between an allegation that a calf was killed at a certain station, and proof that it was killed nine hundred feet distant from the station. *Brown v. Missouri Pac. R. Co.*, 14 Mo. App. 580.

In an action to recover damages for the alleged killing of animals, the complaint charged negligent and careless conduct on the part of the railroad employes, and the answer admitted the killing, but denied negligence and charged contributory negligence. The complaint contained no reference to the railroad fences. On the trial evidence was introduced in reference to the fences along the track, without objection by either party. There was no law requiring the defendant to fence its right of way, and the plaintiff did not contend that it was the duty of the defendant to keep its right of way inclosed so as to prevent stock from going on the track; but the defendant had alleged in its answer that "such killing and destroying was the result of plaintiff's own carelessness contributing thereto, for which this defendant was in no wise responsible," this allegation being denied in the plaintiff's reply. Neither party made any explanation of the bearings of this evidence on the pleadings. The defendant relied to some extent upon the fact of having constructed the fence inclosing its right of way as evidence of due care in the attempt to keep stock from going on its track. As against this evidence, the plaintiff introduced testimony to show the condition of certain gateways in the said fence, through which the animals had strayed upon the track. *Held*, that it could not reasonably be contended that there was no foundation laid in the pleadings for the introduction of such evidence, since it might have been justified under the allegation and denial of contributory negligence. *McMaster v. Montana Union R. Co.*, 56 Am. & Eng. R. Cas. 195, 12 Mont. 163, 30 Pac. Rep. 268.

It is not a fatal variance in an action to recover for the value of a jennet, killed by cars of defendant, to allege that the jennet

was killed on April 26, 1886, when testimony on trial proved the killing to be on April 26, 1889. *St. Louis, A. & T. R. Co. v. Evans*, 78 Tex. 369, 14 S. W. Rep. 798.

#### 5. Matters of Defense.\*

**385. What may constitute a valid defense.**—Under the statute (§ 806 Missouri Rev. St. 1879, as amended in 1881) the company may show by way of defense that the failure to ring a bell or sound a whistle was not the cause of the injury. *Smith v. Wabash, St. L. & P. R. Co.*, 19 Mo. App. 120.

Where a company is sued for killing stock which has gone upon the track through a defect in the fence, the fact that the company has not had time in which to repair the fence is a matter of defense. *Busby v. St. Louis, K. C. & N. R. Co.*, 22 Am. & Eng. R. Cas. 589, 81 Mo. 43.

After plaintiff has made out a *prima facie* case in an action for killing stock, by proving the killing, the question as to how far a regulation of the company as to rate of speed will constitute a defense depends upon whether the regulation was reasonable or not, and whether it was carried out by prudent and reasonable persons. *Molair v. Port Royal & A. R. Co.*, 31 So. Car. 510, 10 S. E. Rep. 243.

Where one whose cattle has been killed through the failure of a railroad to fence its track accepts a due bill from the company for the amount of the damages, and signs a receipt in full, he cannot disregard the settlement, and, failing to present the due bill for collection, recover double damages under § 1289 Code Iowa, allowing such damages where the company fails to pay the value of stock injured within thirty days after receiving written notice of the injury. *Shaw v. Chicago, R. I. & P. R. Co.*, 82 Iowa 199, 47 N. W. Rep. 1004.

**386. What does not constitute a valid defense.**—In an action for double damages for injuries to stock caused by the defendant, the latter admitted the killing of the stock, the amount of actual damages sustained to be as alleged in the petition, and that notice thereof had been duly served as provided by statute, but in excuse for its failure to make payment thereof pleaded that, before the expiration of the thirty

\* See *ante*, 43-60, 114-121, 126, 152-159, 163, 166, 167, 181, 182, 213-288, 370-377.



days allowed by statute after receipt of said notice, the defendant was at the residence of the plaintiff, ready to pay him the full value of the stock injured, but the plaintiff was absent from home, and that the defendant was still ready to pay the amount of the actual damages sustained. *Held*, that a demurrer to the defendant's plea was properly sustained. *Hammans v. Chicago, R. I. & P. R. Co.*, 83 *Iowa* 287, 48 *N. W. Rep.* 978.—*REVIEWING MANWELL v. Burlington, C. R. & N. R. Co.*, 80 *Iowa* 662.

Under Mississippi Code 1880, § 1204, providing that a mortgagor, before foreclosure, shall be deemed the owner of the property mortgaged, it is no defense to an action against a railroad company for killing stock that the property was mortgaged and the mortgage past due. *Illinois C. R. Co. v. Hawkins*, 31 *Am. & Eng. R. Cas.* 561, 65 *Miss.* 200, 3 *So. Rep.* 410.

The statute expressly requires a railroad company to fence along uninclosed lands, and it is no defense to an action for killing plaintiff's horse that it strayed away from him onto such lands and thence through defendant's gate onto its track, or that the gate was at a private crossing. *Duncan v. St. Louis, I. M. & S. R. Co.*, 91 *Mo.* 67, 3 *S. W. Rep.* 835.

Under Texas Rev. St. art. 4245, making railroads liable for stock killed or injured, but providing that if the track is fenced the company shall only be liable where there is a want of ordinary care, a company that has failed to fence cannot in defense raise the question whether the accident would have happened had the track been fenced. *Gulf, C. & S. F. R. Co. v. Hudson*, 77 *Tex.* 494, 14 *S. W. Rep.* 158.—*FOLLOWING TEXAS C. R. Co. v. Childress*, 64 *Tex.* 346.

That the animal was trespassing when it came upon the track where the company had failed to perform its statutory duty as to fencing, constitutes no defense in an action for killing or injuring it. *Holland v. West End N. G. R. Co.*, 16 *Mo. App.* 172. *McCall v. Chamberlain*, 13 *Wis.* 637. *Taft v. New York, P. & E. R. Co.*, 157 *Mass.* 297, 32 *N. E. Rep.* 168. *Burlington & M. R. R. Co. v. Webb*, 22 *Am. & Eng. R. Cas.* 617, 18 *Neb.* 215. *Curry v. Chicago & N. W. R. Co.*, 43 *Wis.* 665. *Chicago & N. W. R. Co. v. Harris*, 54 *Ill.* 528. *New Albany & S. R. Co. v. Aston*, 13 *Ind.* 545. *Gillam v. Sioux City & St. P. R. Co.*, 26 *Minn.* 268, 3 *N. W. Rep.* 353. *Krebs*

*v. Minneapolis & St. L. R. Co.*, 20 *Am. & Eng. R. Cas.* 478, 64 *Iowa* 670, 21 *N. W. Rep.* 131. *Missouri Pac. R. Co. v. Roads*, 23 *Am. & Eng. R. Cas.* 165, 33 *Kan.* 640, 7 *Pac. Rep.* 213. *Duffy v. New York & H. R. Co.*, 2 *Hill. (N. Y.)* 496. *Corwin v. New York & E. R. Co.*, 13 *N. Y.* 42.\*

**387. Release.**—A party whose cattle had been killed through the failure of a company to build proper fences agreed to release the company from all liability, provided they would furnish him with a cattle pass, construct certain fences, etc. *Held*, that until the company furnished such pass, fences, etc., the release was inoperative, and that the evidence was insufficient to show that the company had furnished them. *Terre Haute & I. R. Co. v. Flanigan*, 20 *Am. & Eng. R. Cas.* 452, 94 *Ind.* 336.

The release of a right of way through his lands by a plaintiff suing for stock killed, the building of fences along the line of the railroad through the lands by the railroad company, and the use of the fields adjoining for pasturage by the plaintiff, relying on the fences for protection to his cattle, will not make the fences partition fences, which the plaintiff would be bound to keep up; and a release by the plaintiff to the company of the right of way through his land, and "of all damages and rights of damages, actions and causes of action, which I might sustain or be entitled to by reason of anything connected with or consequent upon the location or construction of said work, or the repairing thereof when finally established or completed," does not extend to actions for damages for stock killed. *Cleveland, C., C. & I. R. Co. v. Crossley*, 36 *Ind.* 370.

A release in a right-of-way deed to a railroad company, which "hereby releases all damages and claims thereto to all his [the grantor's] other lands by reason of, or occasioned by, the location, construction, and operation of a railway over and upon the premises hereby conveyed," does not constitute a defense to an action by the grantor for damages for killing stock occasioned by the failure to build the fence required by the statute. *Stoutimore v. Chicago, M. & St. P. R. Co.* 39 *Mo. App.* 257.

**388. Animals unlawfully within Indian Territory.**†—A railroad company in the Indian Territory cannot excuse a lack

\* But for the rule in some of the States and in Canada, see *ante*, 153.

† See *ante*, 16, 318.

of care which leads to an injury to cattle, by showing that the cattle are unlawfully within the Territory. *Gulf, C. & S. F. R. Co. v. Washington*, 49 Fed. Rep. 347; 4 U. S. App. 121; 1 C. C. A. 286.

**389. Animals coming from lands not belonging to owner.\***—That the cattle were killed while roaming on lands which did not belong to their owner is no defense to the action, as the doctrine of the common law in relation to damage feasant has never been adopted in this state. *Nashville & C. R. Co. v. Peacock*, 25 Ala. 229.—DISTINGUISHED IN *Nashville & D. R. v. Comans*, 45 Ala. 437.

**390. Where the animal is a bull—Wagn. Mo. St. 134, § 5.**—Under the statute concerning animals at large, Wagn. Stat. 134, § 5, it is not unlawful for bulls to run at large until after notice has been given to the owner, and even then the only remedy would be the one prescribed by the statute; and under this view the fact that a bull was so permitted to run at large would be no defense to an action by his owner for his killing by a railroad train. *Owens v. Hannibal & St. J. R. Co.*, 58 Mo. 386.—FOLLOWING *Schwarz v. Hannibal & St. J. R. Co.*, 58 Mo. 207.

In a suit for the killing of stock, it is no defense that the animal was a bull and subject to the provisions of § 5 of the act passed for the restraint of certain animals therein named. *Schwarz v. Hannibal & St. J. R. Co.*, 58 Mo. 207.—FOLLOWED IN *Owens v. Hannibal & St. J. R. Co.*, 58 Mo. 386. REVIEWED IN *Windsor v. Hannibal & St. J. R. Co.*, 45 Mo. App. 123.—*Mumfower v. Hannibal & St. J. R. Co.*, 59 Mo. 245.

#### 6. Evidence.†

##### a. In General.

**391. What evidence is admissible, generally.**—A witness testified that while going to look for his own cattle he saw plaintiff's near the railroad, and about an hour and a half afterward, on returning, he saw a train just starting that had stopped at the place where the cattle were killed. *Held*, that after having testified as above, it was proper to allow him to further state that he was in a position to hear trains pass and that no others did pass in the meantime. *East Tenn., V. & G. R. Co. v. Carliss*, 77 Ala. 443.

\* See ante, 94, 154, 155, 166, 181, 376; post, 308.

† See ante, 381-384.

Where a company is sued for killing a mule, and introduces its engineer as a witness, who testifies that the animal was not discovered until the engine was too close to be stopped, it is competent for plaintiff, in rebuttal, to show that the mule ran along the track some distance before it was struck. *Ross v. Natchez, J. & C. R. Co.*, 61 Miss. 12.

**392. What is relevant, generally.**—Where plaintiff sued for damages on account of injuries to his horse, which was run over and killed by a railroad train, and the railroad employes testify that they did not see the animal until it was very near to the track, it is competent for the plaintiff to prove, as bearing on the question of negligence, that the land near that point, covering the right of way on each side, was cut off, or cleared of obstructions. *East Tenn., V. & G. R. Co. v. Watson*, 90 Ala. 41, 7 So. Rep. 813.

In an action for injuries to stock by a railroad train at night, the defendant's engineer and fireman having testified that they did not discover the animal on the track in time to avert the injury, and that the headlight did not enable them to see an animal on the track more than sixty feet in advance of the engine, it is competent for the plaintiff, in rebuttal, to prove facts showing that on other occasions, in the same neighborhood, and under circumstances no more favorable, objects on or near the track were visible at a distance of two or three hundred yards by the aid of the headlight. *Alabama G. S. R. Co. v. Moody*, 92 Ala. 279, 9 So. Rep. 238.

Where cattle lawfully upon a highway are killed by an engine at the crossing of a railway and the highway, evidence that the employes of the railway omitted to ring a bell or blow a whistle before reaching the crossing, as required by statute, is competent. *Palmer v. St. Paul & D. R. Co.*, 35 Am. & Eng. R. Cas. 447, 38 Minn. 415, 38 N. W. Rep. 100.—DISTINGUISHED IN *Sanborn v. Detroit, B. C. & A. R. Co.*, 91 Mich. 538.

Where the action for killing stock is based upon the company's common-law liability, proof of any negligence which tends to produce the killing is competent, whether it be a failure to ring a bell or sound a whistle or otherwise. *Braxton v. Hannibal & St. J. R. Co.*, 13 Am. & Eng. R. Cas. 494, 77 Mo. 455.

Evidence as to the manner in which the engine was operated was material and rele-

vant on a trial under § 2612 Missouri Rev. St. 1889, for injury to live stock. *Briggs v. St. Louis & S. F. R. Co.*, 111 Mo. 168, 20 S. W. Rep. 32.

**393. Relevant to show plaintiff's duty to fence.**—Where a company is sued for killing stock by reason of a defective fence, it is competent for it to show that in the assessment of plaintiff's damages for right of way the increased cost of fencing was considered, and that he was allowed compensation therefor; such evidence tending to show that it was the duty of the plaintiff to fence. *Georgia R. & B. Co. v. Anderson*, 33 Ga. 110.

**394. Relevant to show that fence was defective.**—It was claimed that the cattle sued for went upon the railroad track by reason of the defective wing-fence on one side of a cattle-guard, and at the trial plaintiff was permitted to prove by a witness, who lived in the neighborhood, that he had repeatedly seen live stock pass over the fence, and had seen a boy ride a horse across the fence. *Held*, that the evidence was properly admitted. *Chicago & N. W. R. Co. v. Hart*, 22 Ill. App. 207.

To recover damages for the killing of stock caused by defective fences, plaintiff is not entitled to the admission of testimony to show that others of the plaintiff's stock had, on several occasions, months before, been seen on defendant's right of way. *Jebb v. Chicago & G. T. R. Co.*, 31 Am. & Eng. R. Cas. 532, 67 Mich. 160, 10 West. Rep. 905, 34 N. W. Rep. 538.

In an action for killing stock because of a defective fence, evidence that the fence was defective for several yards up and down the track from the place of killing is admissible. *Maberry v. Missouri Pac. R. Co.*, 83 Mo. 664.—FOLLOWED IN *Foster v. St. Louis, I. M. & S. R. Co.*, 44 Mo. App. 11.

**395. Relevant to show place of entry.\***—Where it is claimed that an animal killed on the track escaped from an adjoining close by reason of a defective fence which the company was bound to maintain, it is competent to prove the condition of the fence where tracks were found, tending to show that the animal went on the track at that place, and in the immediate vicinity. *McGuire v. Ogdensburg & L. C. R. Co.*, 44 N. Y. S. R. 348, 63 Hun 632, 18 N.

Y. Supp. 313.—**DISTINGUISHING** *Reed v. New York C. R. Co.*, 45 N. Y. 574; *Calligan v. New York C. & H. R. R. Co.*, 59 N. Y. 651.

**396. Relevant to show contributory negligence.\***—Ordinance forbidding the running at large of cattle within the city limits is admissible, as tending to show contributory negligence of the owner of a cow killed while running at large within the city limits. *Chicago, B. & Q. R. Co. v. Richardson*, 28 Neb. 118, 42 Am. & Eng. R. Cas. 592, 44 N. W. Rep. 103.

**397. Relevant to disprove contributory negligence.**—Where a company defends an action for killing stock on the ground of the contributory negligence of the owner, it is competent for the plaintiff to show the condition of a gate through which the animal killed went upon the track. *Ohio & M. R. Co. v. Stribling*, 38 Ill. App. 17.

**398. Relevant to show defective gate fastenings.†**—Where it is claimed that cows passed through a gate onto the railroad track by means of the imperfect fastenings of the gate, it is proper to allow testimony tending to show that other like fastenings had proved insufficient, where the court charges the jury that before such evidence could be considered it must appear that the fastenings were not only alike, but that the manner in which they were put on, and in which the gates were hung, was in all respects the same. *Payne v. Kansas City, St. J. & C. B. R. Co.*, 35 Am. & Eng. R. Cas. 113, 72 Iowa 214, 33 N. W. Rep. 633.

**399. Relevant to show how gate was opened.**—Where it appears that cows escaped onto a company's track through a gate, it is competent to prove that their calves were on the other side of the track, as tending to show that the gate was opened by the cows themselves, and tending therefore to disprove negligence. *Payne v. Kansas City, St. J. & C. B. R. Co.*, 35 Am. & Eng. R. Cas. 113, 72 Iowa 214, 33 N. W. Rep. 633.

**400. Relevant to show unlawful rate of speed.‡**—Where a company is sued for negligently killing stock within the limits of a village, it is competent to put in evidence the village ordinances regulating

\* See ante, 126, 148, 213-288, 364, 373.

† See ante, 178; post, 462, 504, 543.

‡ See ante, 69-72, 198, 210, 211, 345; post, 457, 481, 502, 545.

\* See ante, 117, 127, 128, 351, 352; post, 463, 474, 519.

the speed of trains. *Cleveland, C., C. & St. L. R. Co. v. Ahrens*, 42 Ill. App. 434.

In a common-law action against a railroad for negligently running over and killing a cow, it is competent for the plaintiff to prove that the train was running in excess of the speed permitted by an ordinance of the town in which the killing occurred. *Robertson v. Wabash, St. L. & P. R. Co.*, 84 Mo. 119.

In an action for the value of a cow killed within the corporate limits of the city of L. the killing of the cow and her value were admitted. The question was whether the employees of the company were negligent in killing said cow. As bearing upon this question, the ordinances of the city limiting the rate of speed at which trains of cars might be run were proper evidence, but not conclusive proof of the fact of negligence, even if violated. *Chicago, B. & Q. R. Co. v. Richardson*, 42 Am. & Eng. R. Cas. 592, 28 Neb. 118, 44 N. W. Rep. 103.

**401. Relevant to show that car was calculated to frighten horses.**—Evidence that another horse had become frightened at the same car, on a previous occasion, was competent to show that it was calculated to frighten horses, and negligence in permitting it to remain at that place. *Harrell v. Albemarle & R. R. Co.*, 110 N. Car. 215, 14 S. E. Rep. 687.

**402. What is irrelevant.**—The evidence showed that it was not killed near any depot, road crossing, town, or other place at which the statute requires the bell to be rung, the whistle blown, and speed reduced. At the trial the engineer who was in charge of the train appeared as a witness and was asked on cross-examination if he could remember, after making a trip, at which points he rang the bell and blew the whistle, including depots and other points. Held, that the inquiry was irrelevant. *Memphis & C. R. Co. v. Lyon*, 62 Ala. 71.

Evidence that the company had at different times paid other persons for cattle killed by its trains at the same place was irrelevant and inadmissible. *Georgia R. & B. Co. v. Walker*, 87 Ga. 204, 13 S. E. Rep. 511.

An instruction that the jury had no right to consider whether or not the fence of the defendant was good or poor, sufficient or insufficient, on the sides of its right of way adjoining the land and premises of the plaintiff, other than the panel of a fence

where the animals got through on the night they were killed or injured, cures the error made in admitting irrelevant testimony as to the condition of the fence for years prior to the accident, and its condition at places other than that where the accident occurred. *Chicago, M. & St. P. R. Co. v. Kendall*, 49 Ill. App. 398.

Where it clearly appears that an animal was killed through the negligence of the company's employees operating the train, proof of an agreement between the plaintiff and the company for the construction of a fence may be rejected as irrelevant. *Illinois C. R. Co. v. Person*, 65 Miss. 319, 3 So. Rep. 375.

**403. What is immaterial.**—Where suit is brought against a company to recover for the killing of a horse, and the negligence relied upon is a failure on the part of the company to fence and erect cattle-guards at a crossing, the alleged negligence is immaterial, and the company is entitled to a verdict where it appears that the horse went on the track at a public highway crossing and was there killed. *Mobile & O. R. Co. v. Moore*, 34 Ill. App. 519.

Where a company is sued for killing stock alleged to have gone on the track through an open gate which had been erected by the company, evidence that some ten or twelve years before bars had been used at the place instead of the gate is immaterial. *Taft v. New York, P. & B. R. Co.*, 157 Mass. 297, 32 N. E. Rep. 168.

Where it is proper to build a fence with gates, the sufficiency of the fence elsewhere does not arise where cattle pass through an open gate. *Detroit, G. H. & M. R. Co. v. Hayt*, 19 Am. & Eng. R. Cas. 627, 55 Mich. 347, 21 N. W. Rep. 367, 911.

Where a company is required to fence its track, it is immaterial where an animal is killed, if it appears that it went on the track at a point where the company was required to fence. *Withhouse v. Atlantic & P. R. Co.*, 64 Mo. 523.

Under the Tennessee Code, railroads were *prima facie* liable for every injury to live stock by their moving trains, but were permitted to exonerate themselves by affirmative proof of observance of all the prescribed statutory precautions. The condition of track as to fencing was not material. *Cincinnati, N. O. & T. P. R. Co. v. Russell*, 92 Tenn. 108, 20 S. W. Rep. 784.

**404. What is too remote.**—Where

the particular place where the stock went through the fence is identified and is not in dispute, it is error to allow the plaintiff to introduce evidence of the condition of the fence for a considerable distance from the place in question along the lands of the plaintiff, and for years prior to the accident. *Chicago, M. & St. P. R. Co. v. Kendall*, 49 Ill. App. 398.

The condition of a fence some time after animals have been killed by a train is not admissible unless it be followed up and shown that its condition had not changed. *Brentner v. Chicago, M. & St. P. R. Co.*, 7 Am. & Eng. R. Cas. 574, 58 Iowa 625, 12 N. W. Rep. 615.

Evidence of the condition of a gate, through which stock strayed upon the track and were injured, three days after the injury—held competent, it not being shown that its condition had been changed during the interval. *Mackie v. Central R. Co.*, 54 Iowa 540, 6 N. W. Rep. 723.

**405. Admissibility of circumstantial evidence.**\*—Where it is claimed that cattle are killed through the negligence of those in charge of a train, it is competent, as circumstances touching such negligence, to show that it was foggy and the light was imperfect at the time. *St. Louis, I. M. & S. R. Co. v. Vincent*, 36 Ark. 451.

In an action for the killing of cattle which, it was alleged, entered upon the railroad and were killed at a point where it was not securely fenced, where the defendant sought to show that the animals were killed at a highway crossing, plaintiff had the right to prove that there were cattle tracks along the railroad near the point where he claimed his cattle were killed, without proof that the tracks were made by the cattle actually killed. *Ohio & M. R. Co. v. Wrape*, 4 Ind. App. 108, 30 N. E. Rep. 427.

Where there is no direct evidence of a collision, nor of traces of one, along the track, evidence to show that such traces are always found when stock is struck by a train is not admissible. *Clark v. Kansas City, St. L. & N. W. R. Co.*, 55 Iowa 455, 8 N. W. Rep. 328.—REVIEWING *Stu'sman v. Burlington & S. W. R. Co.*, 53 Iowa 760.

As the company must exercise the utmost care, in the enjoyment of their own privileges, to avoid doing injuries to others, it was held that, where recovery was sought for

injury to cattle, the fact that the road was not fenced must be taken into consideration by the jury in determining the degree of care and diligence to be used by the company. *Gorman v. Pacific R. Co.*, 26 Mo. 441.

Where there is no direct evidence that a cow was killed by a passing train, it is competent to prove that her body was found near the track, torn and mutilated, and that there was blood and cow-hair on and near the track. *Blewett v. Wyandotte, K. C. & N. W. R. Co.*, 72 Mo. 583.—REVIEWED IN *Hesse v. St. Louis, I. M. & S. R. Co.*, 36 Mo. App. 163.

Where there is no direct evidence that an animal was killed by a passing engine, it is competent to prove that on the day when the animal was killed a passing engine at a station seventeen miles beyond had fresh blood and hair on it. *International & G. N. R. Co. v. Hughes*, 81 Tex. 184, 16 S. W. Rep. 875.

**406. Negative evidence.**—Where the witness testified that the whistle of the engine was not sounded for a highway crossing near the place of the injury, he may also be permitted to state that his attention was particularly called to the omission by an inquiry by his son as to why the engine did not whistle. *Louisville, E. & St. L. R. Co. v. Hart*, 2 Ind. App. 130, 28 N. E. Rep. 218.

**407. Judicial notice.**—Where cattle are shown to be on a highway approaching a railroad track, a court will take judicial knowledge of the fact that the sight and sound of an approaching train will often frighten them back, while at other times the ringing of a bell or the sounding of a whistle will not do so. *St. Louis, V. & T. H. R. Co. v. Hurst*, 25 Ill. App. 181.

The supreme court takes judicial notice of county boundaries, and that a certain distance from a place named in a county is within that county. So held, in an action for killing cattle. *Terre Haute & I. R. Co. v. Pierce*, 19 Am. & Eng. R. Cas. 581, 95 Ind. 496.—OVERRULING *Louisville, N. A. & C. R. Co. v. Breckinridge*, 64 Ind. 113.

The evidence showed that the animals were killed between two named geographical points, and upon some railroad by the rolling stock thereof; but did not show, in terms, that they were killed in Shelby county, nor by the railroad company defendant. Held, that as the court below knew judicially the boundaries of the county, it will be presumed that the first

\* See post, 452, 486.

point was correctly determined. *Held*, also, that as the evidence tends to support the finding in relation to the killing by the cars of defendant, the judgment will not be reversed. *Indianapolis & C. R. Co. v. Moore*, 16 Ind. 43.

Where a statute provides that the board of commissioners shall specify, by an entry upon their records, what kind of animals shall be allowed to run at large on the public commons in their respective counties, the implication of such statute is, that without such order no kind of animal has a right to run at large; and as this court cannot judicially know what orders are made by county boards, in the absence of proof of such orders it will determine cases upon the general rules of law. *Indianapolis & C. R. Co. v. Caldwell*, 9 Ind. 397.

But where it is shown that such an order had been made, and that the animal killed or doing damage was one licensed to run at large, then the court will consider, in connection with such statute (1 Ind. Rev. St. 102), the act relative to fencing against such animals (1 Ind. Rev. St. 292), and also the power of the legislature to authorize the depasturage of the cattle of one man upon the uninclosed land of another. *Indianapolis & C. R. Co. v. Caldwell*, 9 Ind. 397.

#### 408. Best and secondary evidence.

—In an action for the killing of stock, if a claim made by the plaintiff be in possession of a person residing in another state or jurisdiction, and not in any way under the control of the party wishing to introduce it, secondary evidence may be admitted to prove the contents thereof, without giving preliminary notice to produce it. *Memphis & C. R. Co. v. Hembree*, 35 Am. & Eng. R. Cas. 128, 84 Ala. 182, 4 So. Rep. 392.

Parol testimony that a street has been abandoned is not admissible to prove that it has been vacated, for that is properly a matter of record (Code Iowa, § 464); nor is it admissible for the purpose of showing that the public has lost its rights by non-user, for as to that it would be the legal conclusion of the witness. So *held*, in an action for injury to stock at an unfenced street crossing. *Lathrop v. Central Iowa R. Co.*, 69 Iowa 105, 28 N. W. Rep. 465.

**409. Hearsay evidence.**—In an action for double damages for cattle killed by a train on defendant's railroad, at a place where defendant had a right to build fences

but failed to do so, the testimony of a witness of what he had seen and knew from acquaintance with the locality is not hearsay or evidence based upon the opinion of the witness. *Dunn v. Chicago & N. W. R. Co.*, 7 Am. & Eng. R. Cas. 573, 58 Iowa 674, 12 N. W. Rep. 734.

Where the exact point where the accident happened is disputed, the plaintiff may testify to the place pointed out to him by a section foreman as the point where the colt was killed, but he may not state what the foreman said. *Karr v. Chicago, R. I. & P. R. Co. (Iowa)*, 54 N. W. Rep. 144.

Statements made as to the pedigree of a heifer killed by a railroad company, as that she was a thoroughbred, are not competent evidence where it does not appear that the party making the statements was either dead or beyond the process of the court; and on the same principle a paper purporting to give such pedigree is not admissible, and its admission by the trial court is ground for reversal. *Hamilton v. Wabash, St. L. & P. R. Co.*, 25 Am. & Eng. R. Cas. 294, 21 Mo. App. 152.

**410. Showing similar accidents at same place.**—Where a horse has been killed at a crossing through an alleged defect in a railroad track, it is not competent to prove other accidents at the same place. *North Chicago St. R. Co. v. Hudson*, 44 Ill. App. 60.

Evidence tending to show the defective condition of the crossing some months previous to the injury, and that one of the horses driven by the witness was caught in the same way and at the same place, is admissible on the question of notice. *Toledo, St. L. & K. C. R. Co. v. Milligan*, 2 Ind. App. 578, 28 N. E. Rep. 1019.

There was no error in rejecting evidence offered by plaintiff that other cattle were in the habit of running at large in the vicinity of the place of accident, and that some of them had been killed on the track, as those facts would not aid his case. *McCandless v. Chicago & N. W. R. Co.*, 45 Wis. 365.

**411. Showing custom to allow animals to run at large.**—In California, where a railroad company is sued for killing stock on a track, and sets up as a defense the negligence of the owner in permitting it to run at large, it is competent for the plaintiff to show that it was the custom of the country to permit such animals to go



at large upon uninclosed lands. *Waters v. Moss*, 12 Cal. 535.

**412. Showing that repairs were made after the accident.**—Where a company is sued for an injury to a horse at a planked crossing, it is error to allow plaintiff to prove that soon after the accident the company took up the planks at the crossing and put down new ones. *Payne v. Troy & B. R. Co.*, 9 Hun (N. Y.) 526.—REVIEWING *Salter v. Delaware & H. C. Co.*, 3 Hun (N. Y.) 338.—REVIEWED IN *Nalley v. Hartford Carpet Co.*, 51 Conn. 524, 50 Am. Rep. 47.

Evidence of repairs made to a gate by a company after cattle were killed, owing, as alleged, to the bad condition of such gate, is admissible in an action to recover damages therefor. *Page v. Great Eastern R. Co.*, 24 L. T. N. S. 585.

That a place on a railroad where an animal is killed is within a city is not sufficient to excuse the company from fencing the road; and the plaintiff, in a suit against the company, may show that after the killing the company repaired and built a fence at the point where the injury occurred, for the purpose of showing that the company regarded the place as one that might legally be fenced. *Toledo, W. & W. R. Co. v. Owen*, 43 Ind. 405.

**413. Opinions as evidence, generally.**—Where a company is sued for killing stock, a witness may testify as to where the stock came on the track, and which way they were going, and their speed, where his opinion as to these things is made up from an examination of the animals' tracks left on the ground. *Chicago & A. R. Co. v. Legg*, 32 Ill. App. 218.

It is not error to permit the plaintiff to prove by a witness his opinion as to which direction the animals were thrown in by force of the collision, as bearing upon the direction of the train which collided with them, although the witness did not see the animals upon the track, but testified to indications and appearances along the track shortly after the injury, an opportunity being afforded to cross-examine the witness and obtain the basis of his knowledge upon the question. The appearances, in the judgment of the trial court, could not be described to the jury with sufficient vividness to enable them to form as accurate conclusions thereon as the witnesses could, and, under such circumstances, opinions are ad-

missible. *Ohio & M. R. Co. v. Wrape*, 4 Ind. App. 108, 30 N. E. Rep. 427.

A question to a witness, "Where was the steer when the train struck him, as indicated by the marks on the ground and track?" is not objectionable as calling for an opinion merely. *Fanning v. Long Island R. Co.*, 2 T. & C. (N. Y.) 585.

**414. Opinions as to cause of injury or death.**—Where a witness stated the condition in which an animal was found on the side of a track, it was held error to allow him to be asked what, in his opinion, caused the injury. *Muff v. Wabash, St. L. & P. R. Co.*, 22 Mo. App. 584.—QUOTING *Koons v. St. Louis & I. M. R. Co.*, 65 Mo. 597.

Where a company is sued for killing stock, and the question is whether the injury inflicted by the company caused death, it is error to permit a witness to give his opinion or conclusion that the injury caused the death of the animals, where he merely testifies that he has handled stock for twenty years, and is well acquainted with their propensities and dispositions, but it does not appear that he was better acquainted with such stock and with causes producing death than men of ordinary experience. *Texas & P. R. Co. v. Weakly*, 2 Tex. App. (Civ. Cas.) 728.

**415. Opinions as to whether it was possible to have stopped train.**

—The vital question being whether the defendant's servants could have stopped the train in time to avoid the injury, after the cows were first seen on the track, it was error to take the opinions of witnesses who had no practical familiarity with the running of trains, had never been employed on a locomotive, and whose only knowledge about the running and stopping of trains was derived from seeing them arrive and depart at the station in their vicinity. *Gourley v. St. Louis & S. F. R. Co.*, 35 Mo. App. 87.—QUOTING *Eckert v. St. Louis, I. M. & S. R. Co.*, 13 Mo. App. 352; *Maier v. Atlantic & P. R. Co.*, 64 Mo. 276; *Robertson v. Wabash, St. L. & P. R. Co.*, 84 Mo. 119; *Boston & W. R. Co. v. Old Colony & F. R. R. Co.*, 3 Allen (Mass.) 142.—FOLLOWED IN *Igo v. Chicago & A. R. Co.*, 38 Mo. App. 377.

**416. Opinions as to the number of animals that were killed.**—In an action to recover for the death of stock through a flood occasioned by defendant's negligence, a witness who has stated fully his means of information as to the loss of



the stock, and shown that he was in a position to enable him to form an estimate, may give his opinion as to the number of dead animals when no better evidence can be obtained. *Sabine & E. T. R. Co. v. Brouard*, 34 *Am. & Eng. R. Cas.* 199, 69 *Tex.* 617, 7 *S. W. Rep.* 374.

**417. Opinions as to how far an animal may be seen.**—Where stock is killed in the morning before it is fully light, as touching the question of whether due care was used by those in charge of the train in not seeing the stock and avoiding the accident, it is competent to prove by witnesses their experience as to how far such an animal could be seen at that time in the morning. *Chicago & A. R. Co. v. Bock*, 17 *Ill. App.* 17.

**418. Expert testimony, generally.**—An experienced grazier is competent to testify as an expert, in regard to the condition of cattle and to causes affecting their health and weight, on a supposed state of facts, and is competent to give his opinion of the effect of disturbance on cattle, but not to say, as matter of opinion, that the construction of a railroad through the pasture on which they were feeding would disturb them and set them to running. *Baltimore & O. R. Co. v. Thompson*, 10 *Md.* 76.

**419. Expert testimony as to the management of train.**—Where the engineer, having several years' experience in that capacity, testified that he sounded the stock-alarm, put on the air-brakes, and reversed the engine when he saw the cattle, he may further testify that, in his opinion, he did all that he could to prevent killing the cattle. *Little Rock & M. R. Co. v. Shoecraft*, 56 *Ark.* 465, 20 *S. W. Rep.* 272.

The engineer in charge of the locomotive at the time of such killing, who saw the horses when they came upon the track, who is shown to be acquainted with the business of running railroad locomotives and trains, and had been engaged in such business for five years, is competent to testify, as an expert, upon questions in respect to the management of locomotives and trains, and to give an opinion whether, in view of the distance between the engine and the horses when latter came upon the track, it was possible to avoid the injury complained of. *Bellefontaine & I. R. Co. v. Bailey*, 11 *Ohio St.* 333.—DISTINGUISHED IN *Burns v. Chicago, M. & St. P. R. Co.*, 69 *Iowa* 450.

**420. Expert testimony as to the necessity and sufficiency of cattle-guards.\***—It is not error to exclude the opinion of an expert witness that the placing of a cattle-guard within a given distance from the end of a switch would endanger the safety of the trainmen. *Pennsylvania R. Co. v. Lindley*, 2 *Ind. App.* 111, 28 *N. E. Rep.* 106.

Where it is claimed that a horse was killed by reason of the defective construction of a railroad, it is incompetent to prove by an expert that cattle-guards were, in his opinion, necessary. *Amstein v. Gardner*, 16 *Am. & Eng. R. Cas.* 585, 134 *Mass.* 4.

**421. Expert testimony as to the sufficiency of a fence.†**—Where it is claimed that a fence is generally defective and insecure, it is proper for the plaintiff to inquire of competent witnesses whether such fence was such as good husbandmen usually kept. *Louisville, N. A. & C. R. Co. v. Spain*, 61 *Ind.* 460.

**422. Admissibility of experiments made by witnesses.**—Where it is attempted to show that those in charge of a train were negligent in killing stock, it is proper to prove experiments by witnesses, made for the purpose of determining whether stock could have been seen under such circumstances as those existing at the time of the killing. *Chicago & A. R. Co. v. Legg*, 32 *Ill. App.* 218.

And this is true though the conditions at the time of the accident were somewhat different from those at the time of the experiments. *Illinois C. R. Co. v. Burns*, 32 *Ill. App.* 196.

**423. Showing value of animal killed, generally.‡**—In an action for killing a cow, it is competent to admit all evidence tending to show the good qualities of the cow which affect her market value. *St. Louis & S. F. R. Co. v. Dudgeon*, 28 *Kan.* 283.

Upon the question of damages, it is proper to allow witnesses to testify as to the value of animals before and after the injury. *Louisville, N. A. & C. R. Co. v. Peck*, 99 *Ind.* 68.

Where suit is brought for the killing of a horse, and the plaintiff states that he had bought it some four or five years before, and

\* See ante, 162, 348; post, 461.

† See ante, 109-113, 349-353; post, 460, 488, 506.

‡ See post, 579-594.

that it was worth so much at the time of the killing, it is not competent on cross-examination to ask him what he paid for it. *Johnson v. Baltimore & O. R. Co.*, 25 W. Va. 570.

So where a plaintiff testifies as to its value, and states that he paid for the horse by exchanging other animals, it is not competent on cross-examination to further inquire where he got such other animals, what he paid for them, etc. *Holstine v. Oregon & C. R. Co.*, 8 Oreg. 164.

Where the owner of stock killed procures an appraisal of it under the Alabama statute, the value fixed by the appraisers is evidence of an admission on the owner's part that the appraisal is the full value of the animal; but this is only a presumption, and may be rebutted, as that he told the appraisers to fix the lowest cash value of the animal, under some agreement with an agent of the road that it should be paid without delay. *East Tenn., V. & G. R. Co. v. Bayliss*, 19 Am. & Eng. R. Cas. 480, 74 Ala. 150.

The plaintiff introduced a witness who stated that he was acquainted with the value of horses, but had never seen the horse in controversy. The witness was then asked, "What, on the 10th day of May (the day of the killing), was the average price of a horse fifteen or sixteen hands high, three or three and one-half years old, and sound, except the ringbone on the hind foot, which had been killed?" Held, that the court erred in permitting the witness to answer the question. *Toledo, & W. R. Co. v. Smith*, 25 Ind. 288.

**424. Showing market value of the animal.**—In an action for killing a mare, it is not error to permit the following question to be answered: "Suppose 'Little Miss' (the mare) was in as good condition, sound in wind and limb, at the time she was killed in October, 1884, if she was killed then, as she was when you knew her last, then I will ask you to state what was her fair market value;" especially so where counsel apprise the court that if they do not maintain the hypothesis upon which the question is put, the evidence will be struck out. *Cincinnati, H. & I. R. Co. v. Jones*, 31 Am. & Eng. R. Cas. 491, 111 Ind. 259, 9 West. Rep. 602, 12 N. E. Rep. 113.

**425. Showing market value of thoroughbreds.**—Where animals killed by a train are only ordinary stock, it is incompetent to prove the market value of thoroughbreds. *Western R. Co. v. Lazarus*, 88 Ala. 453, 6 So. Rep. 877.

**426. Showing what horse was worth at private sale.**—Where suit is brought for the killing of a horse six years old, the trial judge in his discretion may exclude evidence as to what the horse was worth at private sale two years before the killing. *Miner v. Connecticut River R. Co.*, 153 Mass. 398, 26 N. E. Rep. 994.

**427. Showing value long before killing.**—Evidence of the value of the animal a month before the killing is admissible, though the witness can identify the animal only as one belonging to the plaintiff, said to have been killed. *Louisville, N. A. & C. R. Co. v. Detrick*, 91 Ind. 519.

**428. Showing that animal was sired by famous horse.**—Where a mare is killed on the track it is competent for the plaintiff to prove, as affecting the amount of the recovery, that the mare was both sired and with foal by famous horses. *Ohio & M. R. Co. v. Stribling*, 38 Ill. App. 17.

**429. Showing reputation of horse.**—Evidence of the general reputation among horsemen and turfmen of the mare killed, with reference to her being rattle-headed or disposed to break when racing, is not admissible. *Cincinnati, H. & I. R. Co. v. Jones*, 31 Am. & Eng. R. Cas. 491, 111 Ind. 259, 9 West. Rep. 602, 12 N. E. Rep. 113.

**430. Who may testify as to animal's value.**—Every one is presumed to have some idea of the value of property which is in almost universal use; and it is not necessary to show that a witness is a drover or butcher before he is allowed to give an opinion as to the value of a cow killed. *Ohio & M. R. Co. v. Irvin*, 27 Ill. 178.

Witnesses who are familiar with the kind of animals sued for are competent to testify as to their value without having ever seen them. *Smith v. Indianapolis & St. L. R. Co.*, 7 Am. & Eng. R. Cas. 582, 80 Ind. 233. —QUOTING *Bowen v. Bowen*, 74 Ind. 470; *Johnson v. Thompson*, 72 Ind. 167; *Com'rs of Marion County v. Chambers*, 75 Ind. 409; *Holten v. Com'rs of Lake County*, 55 Ind. 194.

Where the plaintiff testifies that he has bought and sold cattle for twenty years, he may properly be permitted to testify as to the value of the cattle injured. *Plunkett v. Minneapolis, S. St. M. & A. R. Co.*, 79 Wis. 222, 48 N. W. Rep. 519.

**431. Admissions of company's agent, generally.**—Under Mont. Comp.

St. § 717, providing that the body of animals injured by the operation of trains shall belong to the company, unless the owner elects to retain them in payment or part payment of damages, admissions of the company's agent that he had ordered the injured animal to be killed and sold for the benefit of the company establishes a *prima facie* case of admission of negligence, where it appears that such agent acted knowingly and within the scope of his authority. *McCauley v. Montana C. R. Co.*, 49 Am. & Eng. R. Cas. 557, 11 Mont. 483, 28 Pac. Rep. 729.

**432. Declarations of engineer.**—Two mules having been run over and killed or injured by an engine in charge of an engineer or fireman, while running by night, the declaration or exclamation of the fireman to the engineer "immediately after" running over the first mule, "You have knocked off one on this side," is not admissible as evidence against the railroad company, unless facts are shown that bring it within the principle of *res gestæ*. *Western R. Co. v. Sistrunk*, 85 Ala. 352, 5 So. Rep. 79.

Where a company is sued to recover for the value of stock killed through the alleged negligence of an engineer in charge of a train, it is error to allow plaintiff to prove declarations of the engineer, touching the accident, made long after its occurrence. *Price v. New Jersey R. & T. Co.*, 31 N. J. L. 229.—FOLLOWING *Sharrod v. London & N. W. R. Co.*, 4 Exch. 580.

**433. Declarations of section boss.**—There was evidence tending to prove that a colt was killed by an engine; that a servant of the company carelessly put down the fence through which the colt escaped from the field onto the track; that a cherry-tree had been cut at the place where the colt went through the fence; that it could not have been cut without laying down the fence; and that the agent of the company cut the tree, and necessarily put down the fence, following the declaration of the agent, made at another time and at a different place, and on the farm of another, to wit: "The section boss told him [the witness] that he had been ordered by the railroad company to cut all the trees along the line, and that they had cut all the trees from Summit Point down." Held, that the evidence was inadmissible. *Coyle v. Baltimore & O. R. Co.*, 11 W. Va. 94.

**434. Declarations of station agent.**—Under the Kansas act of 1874, Comp.

Laws 1879, p. 784, a demand must be made of a railroad company for the value of stock killed or the injuries thereto; but this demand may be made of any ticket or station agent, and, under § 3 of the act, may be oral. Hence it follows that what the agent says when such a demand is made concerning the matter may be given in evidence against the company as part of the *res gestæ*. *Central Branch U. P. R. Co. v. Butman*, 22 Kan. 639.

**435. Documentary evidence, generally.**—In an action by an administrator against a company for the negligent killing of stock belonging to the estate, the appraisal of such property returned by him as administrator is not competent as evidence of the value of said property, except to rebut the testimony of the persons making such appraisal, if called as witnesses upon that question. *Morrison v. Burlington, C. R. & N. R. Co.*, 84 Iowa 663, 51 N. W. Rep. 75.

A paper purporting to be the pedigree of an animal, to recover damages for the killing of which the action is brought, is inadmissible in evidence to show that said animal was a thoroughbred, and therefore of great value. *Hamilton v. Wabash, St. L. & P. R. Co.*, 25 Am. & Eng. R. Cas. 294, 21 Mo. App. 152.

**—affidavit.**—Where the point in issue is: "Did the horse stray on the bridge and fall off, or was he driven on the bridge by an approaching train?" an affidavit of the plaintiff filed in support of a motion for continuance, and showing that the appearance of a train drove the horse on the bridge, is competent to be admitted as evidence. *Asbach v. Chicago, B. & Q. R. Co.*, 105 Ill. 53 N. W. Rep. 90.

**436. —deed.**—After a plaintiff, under a count in a declaration in trespass on the case against a railroad company for killing his horse, had given to the jury evidence tending to prove that the defendant's agents and servants had, by negligence in running the defendant's locomotive and cars, killed the plaintiff's horse, at the time and in the manner alleged in said count, and also the value of said horse, the defendant offered in evidence a deed from one Waters to the defendant, for the purpose of proving that the said horse which was killed was, when first seen, on land owned by defendant, and that defendant had acquired title thereto from said Waters, and to show that de-

fendant had made a contract with said Waters to fence the track of defendant's railroad through his farm; and the plaintiff admitted that the defendant had acquired and owned title to the land occupied by its track from the said Waters, but objected to the admission of the deed to prove a contract between the defendant and Waters in regard to the fencing of said track; and the court refused to allow the deed to be read for said purpose, stating that the defendant's title to said land was admitted, and excluded the deed. *Held*, that under the circumstances the court did not err to the prejudice of the defendant. *Blaine v. Chesapeake & O. R. Co.*, 9 W. Va. 252.—FOLLOWED IN *Searle v. Kanawha & O. R. Co.*, 37 Am. & Eng. R. Cas. 179, 32 W. Va. 370, 9 S. E. Rep. 248.

**437. — plat.**—Where an animal is killed within the limits of a village, but off the company's depot grounds, as touching the question of its duty to fence, it is competent to introduce a plat, showing that the owners intended to dedicate the grounds to the public use, though the plat was not recorded until after the killing. *Chicago, B. & Q. R. Co. v. Banker*, 44 Ill. 26.

**438. — record of judgment.**—A motion for a writ provided for by 3 Ind. St. 415, 416, §§ 5, 6, to be directed to an employé of a company against which a judgment had been rendered for the value of an animal killed, concluded with a request that the court would "order said agent to pay into the clerk's office of said court one-half of said moneys, or so much thereof as will pay the judgment and costs herein." No objection was made to the motion. *Held*, that, on the proceedings under the writ, the introduction of the record of the judgment in evidence could not be objected to on the ground that the motion did not show that there was such a judgment rendered, or that a transcript of it had been filed and recorded in the clerk's office. *Logansport, C. & S. W. R. Co. v. Byrd*, 51 Ind. 525.

**439. — reports of company's employes.**—The report of an employé of the company as to the killing of an animal, if admissible as evidence on behalf of the company, is not so unless it be shown that it was the duty and business of the employé to make such report, and that it was made contemporaneously with the occurrence; nor should the oral testimony of the employé be stricken out on the ground that his report is

better evidence. *Jacksonville, T. & K. W. R. Co. v. Wellman*, 26 Fla. 344, 7 So. Rep. 845.

Where a company is sued for negligently killing stock, the report of a section foreman giving his opinion as to the cause of the injury is not admissible in evidence. *Ohio & M. R. Co. v. Atteberry*, 43 Ill. App. 80.—QUOTING *Illinois C. R. Co. v. Whalen*, 42 Ill. 396; *Chicago & N. W. R. Co. v. Demment*, 44 Ill. 75. FOLLOWING *Railway Co. v. Ritter*, (Tex. App.) 16 S. W. Rep. 909.

#### b. Sufficiency.

**440. Generally.\***—In a suit for damages for injuring cattle, the witnesses estimated the value of the property, variously, from \$30 to \$40. *Held*, that the court might find the value to be \$37. *Madison & I. R. Co. v. Herod*, 10 Ind. 2.

Where the testimony as to the value of an animal killed by a railroad does not indicate whether the estimate of the value given was based upon the market price, if there is such a price to govern, or upon actual value, and there is nothing to show that an effort was made to ascertain from the witnesses on what basis the valuation was made, this court will not set aside the verdict on the mere supposition that this basis was not the market value. *Jacksonville, T. & K. W. R. Co. v. Wellman*, 26 Fla. 344, 7 So. Rep. 845.

In an action for the killing of a mule it was shown that the mule had been injured, but no proof was made of its death. A verdict for the full value of the mule will not be disturbed, as it could not be presumed that a crippled mule was of any value. *St. Louis, A. & T. R. Co. v. Evans*, 78 Tex. 369, 14 S. W. Rep. 798.

The owner of cattle sued a railroad company before a justice for the killing of four cows valued at \$30 each, and recovered a judgment for \$120. The company appealed to court, and plaintiff amended, fixing the value of the cows at \$50 each. The witness, who made the affidavit of claim, testified that he had made the first affidavit, fixing the value at \$30, in a spirit of compromise, but as a matter of fact their market value was \$50; that they did not have a market value at the time and place of killing, but shortly afterward similar cows were worth \$50 each—is sufficient to support a

\* Sufficiency of evidence to fix liability on company for killing or injuring stock, see note, 11 L. R. A. 428.

judgment fixing the value at \$50 each. *Gulf, C. & S. F. R. Co. v. Gibson* (Tex. Civ. App.), 21 S. W. Rep. 936.

In an action to recover the value of a horse—held, error to instruct the jury that they might find its value upon a description thereof given by the witnesses, and from their own general knowledge of the value of horses, without additional evidence. *Harrow v. St. Paul & D. R. Co.*, 43 Minn. 71, 44 N. W. Rep. 881.

**441. Must prove material allegations.**—Evidence must show that defendant owned the railroad on which the animal was killed. *Fl. Wayne, M. & C. R. Co. v. McClurg*, 47 Ind. 138.

On trial of an action for killing plaintiff's animal on the railroad with a locomotive, a failure to prove that the defendant was operating the road, and that it ran one of its locomotives thereon against the animal and killed it, as alleged, was a failure to prove two of the material allegations of the complaint. *Wabash R. Co. v. Forshee*, 77 Ind. 158.—DISTINGUISHING *Evansville & C. R. Co. v. Smith*, 65 Ind. 92; *Evansville & C. R. Co. v. Snapp*, 61 Ind. 303; *Toledo, W. & W. R. Co. v. Weaver*, 34 Ind. 298.

In a suit against a railroad for killing stock, the evidence must show that the stock were killed by the defendant road. *Logansport, P. & B. R. Co. v. Caldwell*, 38 Ill. 280.—DISTINGUISHED IN *Toledo, P. & W. R. Co. v. Eastburn*, 54 Ill. 381.

In a suit against a company to recover for stock killed, the allegation that the road was not fenced is a material one, and must be proved. *Indianapolis & C. R. Co. v. Wharton*, 13 Ind. 509.

In an action to recover for the killing or injuring of live stock by railroad cars, at a point on its track where the track might have been fenced, but was not, the allegation that the track was not fenced must be proved on the trial. *Pittsburgh, C. & St. L. R. Co. v. Hackney*, 53 Ind. 488.

**442. Must show that killing or injury was caused by company's negligence.**—To sustain a common-law action against a company, by the owner of an animal, for injury negligently inflicted on the animal by the defendant's train of cars, there must be evidence that such injury resulted from the negligence of the defendant's employes operating such train. *Cincinnati, H. & I. R. Co. v. Bartlett*, 58 Ind. 572, 19 Am. Ry. Rep. 17.

A demurrer to plaintiff's evidence is properly sustained where there is no proof except of the killing, but nothing to show that it was negligent. *Flannery v. Kansas City, St. J. & C. B. R. Co.*, 23 Mo. App. 120; affirmed 97 Mo. 192.

To recover for negligently killing stock, there must be shown a connection between the killing and omission of duty required by law of the defendant; and an agreed statement of facts set out in the opinion does not in any way justify the legal conclusion that the defendant negligently killed the plaintiff's cow. *Smith v. Hannibal & St. J. R. Co.* 47 Mo. App. 546.

**443. Must show killing in county where action brought.**\*—In an action, under the Indiana statute, for killing stock, the evidence must affirmatively show, either directly or by inference, that the stock were killed within the county where the action was brought. *Louisville, N. A. & C. R. Co. v. Breckenridge*, 64 Ind. 113.—OVERRULED IN *Terre Haute & I. R. Co. v. Pierce*, 19 Am. & Eng. R. Cas. 581, 95 Ind. 496.—*Croy v. Louisville, N. A. & C. R. Co.*, 19 Am. & Eng. R. Cas. 608, 97 Ind. 126.

Where, in an action under the stock law of 1874, to recover damages for the killing of a horse by the train of defendant, the case coming to this court upon simply the findings of fact and without any testimony, the findings read "that said plaintiff then resided about three-quarters of a mile from the railroad of the defendant, in the county of D. and state of Kansas, and about two and one-half miles north of Baldwin city, and in said county and state," and then state the circumstances of the injury, which took place as he was riding towards a spring on the opposite side of the railroad, and about seventy-five yards therefrom—held, that a general conclusion and judgment in favor of the plaintiff will not be reversed on the ground that it does not appear that the animal was killed in the county of D. *Kansas City, L. & S. R. Co. v. Phillibert*, 25 Kan. 582.—FOLLOWED IN *Missouri Pac. R. Co. v. McCally*, 41 Kan. 639, 655, 21 Pac. Rep. 574.

**444. Need not show that defendant is a corporation.**—Where an action is brought in a justice's court, under § 30, ch. 84, Comp. Laws 1885, against a railway company for the killing of stock, and no answer is filed or appearance made by the defend-

\* See ante, 290, 320; post, 409.

ant before the justice of the peace, and the defendant appeals to the district court, on the trial in the district court it is not necessary for the plaintiff to prove that the railway company is a corporation to entitle him to recover. The proof that the defendant was a railway company operating said railway at the time of the injury, under § 30, is sufficient. *Kansas City, L. & S. K. R. Co. v. Bolson*, 35 *Am. & Eng. R. Cas.* 144, 36 *Kan.* 534, 14 *Pac. Rep.* 5.

Evidence that an animal was injured upon the track of a railway known as the Cincinnati, Hamilton & Indianapolis Railroad, a branch of the Cincinnati, Hamilton & Dayton Railroad, sufficiently indicates that the former is a corporation by that name, and presumptively liable for the injury. *Cincinnati, H. & I. R. Co. v. McDougall*, 108 *Ind.* 179, 8 *N. E. Rep.* 571.

**445. Sufficiency of evidence to show ownership of animal.**—A judgment for plaintiff awarding damages for cattle killed cannot be supported without proof that he owned the cattle. *Turner v. St. Louis & S. F. R. Co.*, 76 *Mo.* 261.

A judgment in favor of plaintiff, in an action to recover for stock killed, cannot be supported without evidence showing that he was either the owner or in possession of property. *Alexander v. Hannibal & St. J. R. Co.*, 76 *Mo.* 494.

Where a company admits the killing of stock and tenders a certain amount in payment therefor, which is not accepted, and suit is brought, the only real question at issue is the value of the stock, as the tender is indirectly an admission that plaintiff is the owner, and he may dispense with proof thereof. *Scott v. Chicago, M. & St. P. R. Co.*, 78 *Iowa* 199, 42 *N. W. Rep.* 645.

Plaintiffs suing as joint owners in an action for killing live stock are required to make reasonably strict proof of their title and ownership. *Illinois C. R. Co. v. Finnigan*, 21 *Ill.* 646.

**446. To show that defendant owned railroad.**—In a suit for killing stock where the road was not fenced, it appeared that the road was part of a line which, when constructed, was supposed to belong to another company than the defendant (the C. & I. A. L. R. Co.), and that before the killing the defendant had mort-

gaged that line of road to secure certain bonds, reciting therein that the defendant had entered into an agreement of consolidation with the C. & I. A. L. R. Co., and agreed to issue the bonds and mortgage. It also appeared that the defendant did not run regular trains over that road until after the killing. Held, that the evidence justified the inference that the defendant owned and controlled the road at the time of the killing. *Louisville, N. A. & C. R. Co. v. Meadows*, 87 *Ind.* 441.

It cannot be said that there was no evidence tending to prove that at the time when the plaintiff's steer was killed trains were running on the defendant's railway, or that the defendant was owner of the railway, when the record shows that the cause was tried on an affirmative theory as to those points, that the testimony of all the witnesses manifestly assumed such running of the trains, that the defendant's answer was under the name of the railway company charged, and the defendant made no objection to the plaintiff's testimony that the animal was killed on the railway identified with that name. *Keltenbaugh v. St. Louis, A. & T. R. Co.*, 34 *Mo. App.* 147.—**DISTINGUISHING** *Gilbert v. Missouri Pac. R. Co.*, 23 *Mo. App.* 65.

**447. Sufficiency of evidence to show company's negligence, generally.**—(1) *What is sufficient.*—In an action for killing a horse a verdict for the plaintiff will not be set aside where it appears that the horse was seen on the track a short distance in front of the engine, and that the engineer had sufficient time to stop the train and failed to do so. *Woodland v. Union Pac. R. Co.*, (*Utah*) 26 *Pac. Rep.* 298.

Where the evidence shows that a horse killed by a train had jumped upon the track forty yards ahead, and was running very fast; that the train was approaching a station, and had already, before the horse got upon the track, shut off steam and signalled for brakes, and the track did not appear to be down-grade, the court will not say the jury were wrong in finding for the plaintiff upon the ground of negligence of agents of the road. *Atlantic & G. R. Co. v. Burt*, 49 *Ga.* 606.

Where it appeared that the engineer, after discovering the mule, reversed his engine, and did all in his power to avoid a collision, but seeing that it was inevitable, and believing that his own life was in danger, jumped

\* See *post*, 471.

† See *ante*, 339; *post*, 470-477.

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from the train. *Held*, that such jumping, under the circumstances, was not such negligence as would make the company liable. *Yazoo & M. V. R. Co. v. Brumfield*, 64 Miss. 637, 1 So. Rep. 905.

When it is alleged and proved that the company failed to fence, and that the plaintiff's stock were killed or injured upon or near such unfenced track by a moving train, the negligence is established, and can only be defeated by proof of contributory negligence or misconduct. *Eaton v. Oregon R. & N. Co.*, 45 Am. & Eng. R. Cas. 481, 19 Oreg. 371.—*FOLLOWING Hindman v. Oregon R. & N. Co.*, 17 Oreg. 619.

(2) *What is insufficient.*—In an action for negligently killing stock, where there is an utter failure of proof of negligence, as in this case, there can be no recovery; mere conjecture will not do. *Perse v. Atchison, T. & S. F. R. Co.*, 51 Mo. App. 171.

Where the only proofs to establish negligence of the defendant in killing stock are the fact that the place where stock was run over and killed by a moving freight train was at a point on the track where the persons in charge and operating said train could have seen the cow in time to have stopped the train, and the fact that the train was moving faster than the regular schedule-time for such trains, in the absence of all showing when the cow went upon the track, the evidence is not sufficient to establish negligence on the part of the defendant to entitle the plaintiff to recover. *Kansas City, L. & S. K. R. Co. v. Bolson*, 35 Am. & Eng. R. Cas. 144, 36 Kan. 534, 14 Pac. Rep. 5.

There can be no recovery against a company for killing stock where there is no evidence on the question of negligence except that of the trainmen, who testify that the train was properly managed, and their evidence is not discredited or contradicted. *St. Louis & C. R. Co. v. Vanover*, 14 Ill. App. 522.

In an action for negligently killing plaintiff's stock, where the plaintiff only shows the injury and the passing of the train at the rate of twenty-five miles an hour at the place of the accident, and it also appears that the whistle was sounded at the usual place, about three hundred yards from where the animals were killed, and there was no proof that the engineer had any knowledge that such animals frequented the locality, a case is not made out, and a demurrer to the evidence should be sustained. *Sloop v. St.*

*Louis, I. M. & S. R. Co.*, 22 Mo. App. 593.—*FOLLOWING Lord v. Chicago, R. I. & P. R. Co.*, 82 Mo. 139; *Milburn v. Hannibal & St. J. R. Co.*, 21 Mo. App. 426.

In an action on the case against a railroad company, to recover for cattle killed, a negligent killing must be shown. If the proof shows that the killing was wilful on the part of the engineer, or that it was entirely accidental, an action will not lie.\* *Danner v. South Carolina R. Co.*, 4 Rich. (So. Car.) 329.—*REVIEWING Piggot v. Eastern Counties R. Co.*, 3 Q. B. 229, 54 E. C. L. 228; *Aldridge v. Great Western R. Co.*, 3 M. & G. 515, 42 E. C. L. 273; *Ellis v. Portsmouth & R. R. Co.*, 2 Ired. (N. Car.) 140.

Proof that a horse was frightened by a train running twenty-five miles an hour and was injured by falling through a railroad bridge is not sufficient to support a verdict finding the company negligent, though it appears that the schedule-time of the train was eighteen miles an hour, where it further appears that the train was behind time and was allowed to run, when behind time, twenty-five miles an hour, and that the persons in charge of the train used all the means in their power after the horse was discovered to prevent injury. *St. Louis, A. & T. R. Co. v. Felton*, 4 Tex. App. (Civ. Cas.) 60, 14 S. W. Rep. 1072.

**448. Merely showing the fact of killing.**†—The killing of a cow or other animal on a railroad, by the trains running over it, is not, of itself, proof of negligence. *Scott v. Wilmington & R. R. Co.*, 4 Jones (N. Car.) 432.—*DISTINGUISHING Ellis v. Portsmouth & R. R. Co.*, 2 Ired. (N. Car.) 138; *Piggot v. Eastern Counties R. Co.*, 3 Q. B. 229, 54 E. C. L. 229. *FOLLOWING Her-ring v. Wilmington & R. R. Co.*, 10 Ired. (N. Car.) 402.—*APPROVED IN Atchison, T. & S. F. R. Co. v. Walton*, 3 N. Mex. 319. *EXPLAINED IN Aycok v. Raleigh & A. A. L. R. Co.*, 89 N. Car. 321. *REVIEWED IN Doggett v. Richmond & D. R. Co.*, 81 N. Car. 459.—*Walsh v. Virginia & T. R. Co.*, 8 Nev. 110.—*APPROVED IN Atchison, T. & S. F. R. Co. v. Walton*, 3 N. Mex. 319. *QUOTED IN Atchison, T. & S. F. R. Co. v. Betts*, 31 Am. & Eng. R. Cas. 563, 10 Colo.

\* See ante, 37.

† See ante, 6, 29-33, 126; post, 480.

As to how far proof of killing of live stock makes company liable without proof of negligence or misconduct, and how far liability is affected by fence laws, see note, 58 AM. REP. 703.



431, 15 Pac. Rep. 821.—*Burlington & M. R. Co. v. Wendt*, 12 Neb. 76.

The mere killing of an animal by a railroad train is not evidence of negligence, and the mere fact that an animal was found killed on a railroad track will not warrant a recovery against the company. *Atchison, T. & S. F. R. Co. v. Betts*, 31 Am. & Eng. R. Cas. 563, 10 Colo. 431, 15 Pac. Rep. 821.—QUOTING *Walsh v. Virginia & T. R. Co.*, 8 Nev. 110.

Neither the fact that the cow was killed by the train, nor that the track was such as to afford a clear view for a considerable distance, nor that the train passed the spot at its usual speed, has any tendency to prove want of care on the part of the company. *Locke v. St. Paul & P. R. Co.*, 15 Minn. 350, (Gill. 283.)

**440. Showing failure to give signals.\***—Where suit is brought to recover for killing a cow at a highway crossing, evidence tending to show that the statutory signals were not given, and that the accident might have been prevented by the exercise of ordinary care, is sufficient to support a verdict for plaintiff. *St. Louis, V. & T. H. R. Co. v. Moudy*, 38 Ill. App. 322. *Chicago & R. I. R. Co. v. Reid*, 24 Ill. 144.

Where suit is brought for killing stock at a highway crossing by reason of the signals not being given, as required by statute, it is necessary to prove all the facts and circumstances to enable the jury to determine whether the killing was by reason of such failure. *Holman v. Chicago, R. I. & P. R. Co.*, 62 Mo. 562.—QUOTING *Stoneman v. Atlantic & P. R. Co.*, 58 Mo. 503—FOLLOWED IN *Harlan v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 483. REVIEWED AND DISTINGUISHED IN *Alexander v. Hannibal & St. J. R. Co.*, 76 Mo. 494.

Under 14 & 15 Vic. ch. 51, § 21, the omission to ring the bell and sound the whistle of a locomotive engine by the engineer on approaching a highway crossing was held evidence of a breach of duty and negligence on the part of the company sufficient to support a verdict of damages for the value of cows killed by the engine at such crossing. *Shields v. Grand Trunk R. Co.*, 7 U. C. C. P. 111.

Where there is a conflict of evidence as to whether a bell was rung or a whistle

sounded within the limits of a city just before an animal was killed by a train, the question of negligence having been settled by the jury, a verdict for the plaintiff will not be disturbed. *Fritz v. First Div. St. F. & P. R. Co.*, 22 Minn. 404.

In an action for damages for killing cattle at a point not on or in the immediate vicinity of a public road crossing, the evidence of a failure to ring a bell or blow a whistle on approaching the crossing, at a considerable distance from the place of the accident, is not such proof of negligence as will warrant a verdict for plaintiff. *Long v. St. Louis, K. & N. W. R. Co.*, 23 Mo. App. 178.

**450. Showing failure to keep lookout, check train, or reverse engine.\***

—(1) *Proof Sufficient.*—Proof that a cow that was killed on a track could have been seen when a mile away, that no effort was made to stop the train, and that no signals were given to frighten her off until within 150 yards of her, is sufficient proof of negligence to warrant a recovery against the company. *Ohio, I. & W. R. Co. v. Klein-smith*, 38 Ill. App. 45.

Proof that several cattle were crowded on a track in plain view of the engineer for 100 rods, but that he ran on without making any effort to stop the train, is sufficient to show such negligence as will make the company liable for an injury thereto. *Lawson v. Chicago, R. I. & P. R. Co.*, 57 Iowa 672, 11 N. W. Rep. 633.

A company will be adjudged guilty of negligence under evidence showing that a cow was injured by a train at a point where she might have been seen eight hundred feet away, and that the train might have been stopped within six hundred feet, but that it ran without slackening its speed or sounding a whistle, and that when near the cow she ran on the track some thirty feet before the engine before she was struck. *Kansas City, Ft. S. & G. R. Co. v. Hines*, 19 Am. & Eng. R. Cas. 495, 32 Kan. 619, 5 Pac. Rep. 172.—FORMER APPEAL, *Kansas City, Ft. S. & C. R. Co. v. Hines*, 29 Kan. 695.

A verdict against a company for the value of a mare and filly killed by a train will not be disturbed where the evidence shows that where the filly was struck it was straight and level, and that an animal on or near the track could be seen for more than half a

\* See ante, 65, 192, 209; post, 480, 562.

\* See ante, 61-72, 115, 120, 164, 173, 195-198.

mile either way, and footprints showed that the filly had run on the track ahead of the train more than two hundred yards before being struck. *Gulf, C. & S. F. R. Co. v. Ellis*, 54 Fed. Rep. 481, 10 U. S. App. 640, 4 C. C. A. 454.—FOLLOWED IN *Gulf, C. & S. F. R. Co. v. Seifred*, 54 Fed. Rep. 485, 10 U. S. App. 650, 4 C. C. A. 459; *Gulf, C. & S. F. R. Co. v. Wallace*, 54 Fed. Rep. 485, 10 U. S. App. 647, 4 C. C. A. 458.

(2) *Proof Insufficient*.—Proof that the engineer did not keep a look-out for stock straying upon the track does not show negligence upon the part of the company, for he is only required to use ordinary and reasonable care after discovering such stock. *Memphis & L. R. R. Co. v. Kerr*, 40 Am. & Eng. R. Cas. 171, 52 Ark. 162, 12 S. W. Rep. 329, 5 L. R. A. 429.

The court instructed that the defendant would be liable if the engineer, "in the exercise of ordinary care, could and should have prevented said accident after he actually saw the cattle on the track." The jury specially found that the engineer "might have seen the cattle sooner." Held, that, with no other evidence of negligence on defendant's part, a verdict for plaintiff was contrary to said instruction, and could not be sustained. *Davidson v. Central Iowa R. Co.*, 35 Am. & Eng. R. Cas. 158, 75 Iowa 22, 39 N. W. Rep. 163.

**451. Showing that train was behind time.**—Evidence merely showing that a train was behind time will not, in the absence of proof of other negligence, render a company liable for an accident occurring at a private crossing. *Annapolis & B. S. L. R. Co. v. Pumphrey*, 42 Am. & Eng. R. Cas. 599, 72 Md. 82, 19 Atl. Rep. 8.

**452. Showing negligence by circumstantial evidence.**\*—Negligence on the part of a company in killing stock may be established either by proof of the facts and circumstances attending the transaction, or by showing that the injury was done on a part of the road not inclosed by a lawful fence, and not at the crossing of a public highway—facts from which the law raises an inference of negligence. *Calvert v. Hannibal & St. J. R. Co.*, 38 Mo. 467.—FOLLOWING *Brown v. Hannibal & St. J. R.*

*Co.*, 33 Mo. 309; *Calvert v. Hannibal & St. J. R. Co.*, 34 Mo. 242.

In order to establish the liability of a company for killing stock that go upon the track through a break in the fence, it is not necessary to show the facts by direct evidence, but they may be inferred from circumstances. *McBride v. Kansas City, St. J. & C. B. R. Co.*, 20 Mo. App. 216.—FOLLOWING *Gee v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 283.—APPLIED IN *Harned v. Missouri Pac. R. Co.*, 51 Mo. App. 482.

In an action brought under § 1289 of the Code of Iowa, to recover damages for injuries to a mare running at large, it appeared that the defendant's track ran east and west, and that the plaintiff's mare was found fast in the north end of the cattle-guard, outside of the north rail, on an embankment of earth some feet from the track, with her back under the ends of the ties, her head to the west and her feet projecting upwards and outwards; that when found the mare had bruises and injuries on the left side of her body, neck, and head, and some on her right side; that the evidence tended to show that two trains passed west on the defendant's line early in the morning on the day the mare was thus found; that the signal for stock on the track was heard; that the trackmen came to take the mare out, and that a horse's tracks were found in the snow, showing that some horse had come onto the grade east of the cattle-guard and travelled west to within twelve or fifteen feet of the guard, where the tracks ended, and that no tracks were seen about the guard. Held, that a verdict awarding the plaintiff damages as provided in the above section was supported by the evidence. *Brockert v. Central Iowa R. Co.*, 82 Iowa 369, 47 N. W. Rep. 1026.—REVIEWING *Moore v. Burlington & W. R.*, 72 Iowa 75; *Asbach v. Chicago, B. & Q. R.*, 74 Iowa 248; *Meade v. Kansas City, St. J. & C. B. R.*, 45 Iowa 699.

Where there is a decided preponderance of evidence that the animals injured were not left in the right of way, but in an adjoining pasture, and that the gate for the private way over the railway was closed, and that there was no way by which the colts could escape from the pasture upon the right of way except by going through or over the railroad fence, evidence that the fence was insufficient and out of repair, and that the colts went over or through it, is sufficient to authorize a verdict for the

\* See ante, 405; post, 486.

For circumstantial evidence as to condition of animal when found that will support a verdict for plaintiff, see 38 AM. & ENG. R. CAS. 505, abstr.

plaintiff. *Cochran v. Iowa C. R. Co.*, (Iowa) 53 N. W. Rep. 225.

Proof that the plaintiff's cow was seen near the defendant company's railway track with one of its legs broken, about the time that two trains had passed over the road, is some evidence in support of the plaintiff's claim for damages. *Boing v. Raleigh & G. R. Co.*, 87 N. Car. 360.

Where a company is sued for negligently killing stock, proof that tracks of animals were found along the track after the accident, apparently made while running, is not sufficient to establish such negligence. *Peoria, D. & E. R. Co. v. Aten*, 43 Ill. App. 68.—DISTINGUISHING *Chicago & N. W. R. Co. v. Barrie*, 55 Ill. 227. QUOTING *Rockford, R. I. & St. L. R. Co. v. Connell*, 67 Ill. 216.

**453. Sufficiency of evidence to show gross negligence.**—Independent of the legal presumption, where cars were left on an inclined plane, where they could be easily set in motion, and were very insecurely fastened, and one of the animals for the killing of which the suit was brought was killed a month previous to the other by a car which had escaped and run down the same grade, and the agents of the defendant, being thus apprised of the danger of such action, did not use proper precautions to prevent future injury—*held*, to be gross negligence for which the company was responsible. *Battle v. Wilmington & W. R. Co.*, 66 N. Car. 343.

The facts that the track was unfenced and that the train was running somewhat faster than usual at that place, and was not slackened nor any alarm given, would not have sustained a verdict that defendant was guilty of any wilful or malicious act, and a compulsory nonsuit was properly directed. *McCandless v. Chicago & N. W. R. Co.*, 45 Wis. 365, 19 Am. Ry. Rep. 374.

In an action for the wilful or grossly negligent killing of a mare which got upon the track in the night-time without the fault of the defendant, it appeared that the train which killed the mare was running from thirty to thirty-five miles an hour; that the engineer first saw some horses on or near the track and blew the whistle, whereupon they went in every direction; that he continued to sound the whistle until he got by

the horses and supposed the track was clear; that after going some distance further he suddenly saw the mare running and stumbling on the track about 150 feet ahead of the engine; that it was then too late, and he did not try to do anything, but struck the mare while going at full speed, and that, though it was a bright moonlight night, the engineer could not, from behind the headlight, see the track more than 150 feet ahead. There was also evidence that the engineer kept on sounding the whistle until he had passed some distance beyond where he first saw the horses, and that the mare had been running rapidly for some distance on the track before she was struck. *Held*, that the evidence was insufficient to support a verdict for the plaintiff. *Jones v. Chicago, M. & St. P. R. Co.*, 77 Wis. 585, 46 N. W. Rep. 884.

**454. To show that company's negligence was the proximate cause.**—Proof that a train was backed, in the night-time, into an unlighted freight depot, without light or signal, and so noiselessly as to come suddenly upon one who was rightfully there with horses, giving no time for their removal, and killing the horses, is sufficient to support a finding that the company's carelessness was the sole cause of the loss. *Hollender v. New York C. & H. R. R. Co.*, 14 Daly (N. Y.) 219, 6 N. Y. S. R. 352, 19 Abb. N. Cas. 18.

Proof that live stock was found 50 to 60 yards from a railroad track, with one leg skinned and bruised, will not support a verdict against a railroad for killing the stock, where it is not shown how long it lived thereafter, or whether its death was the result of such injuries. *Missouri Pac. R. Co. v. Earle*, 4 Tex. App. (Civ. Cas.) 19, 14 S. W. Rep. 1068.

**455. To connect the company with the killing.**†—(1) *Proof sufficient.*—To support a verdict against a railroad for injury to cattle, the evidence should connect defendant with the injury; still it is not necessary that the fact be proven beyond a reasonable doubt. A preponderance of evidence will suffice. *Toledo, P. & W. R. Co. v. Eastburn*, 54 Ill. 381.—DISTINGUISHING *Ohio & M. R. Co. v. Taylor*, 27 Ill.

\* See ante, 34-36, 65, 136, 188, 194, 344, 356, 442; post, 547.

† When finding stock on track dead will not support a finding that it was killed by a train, see 35 AM. & ENG. R. CAS. 140, abstr.

\* See ante, 50, 60, 187, 200, 206, 284, 343; post, 496.

207; *Logansport, P. & B. R. Co. v. Caldwell*, 38 Ill. 280.

In an action to recover the value of a cow killed on defendant's road, it was proven by plaintiff that he found the animal the day after she was injured, in a field, about twenty or thirty feet from the track, and that there were marks on the track indicating such an accident. Another witness saw the cow in the same situation soon after a train had passed, and an employé of the company saw a cow thrown from the track at about the same place, during the month the cow was found dead. *Held*, that the evidence was sufficient to connect the company with the injury. *Toledo, P. & W. R. Co. v. Pino*, 56 Ill. 308, 4 *Am. Ry. Rep.* 534.

And upon objection that the evidence failed to connect defendant with the injury, the testimony of the engineer, "that he was on the train when the cow was killed; that he had been an engineer about ten years, and had been on defendant's road six or seven months," was regarded as sufficient to support the finding of the jury, on that question, against defendant. *Rockford, R. I. & St. L. R. Co. v. Lewis*, 58 Ill. 49, 10 *Am. Ry. Rep.* 396.

(2) *Proof insufficient*.—Where there is no direct testimony as to the train that killed a mule, but witnesses assume that it was a passenger train that passed in the morning, basing their statements on the fact that the body was warm when found, a verdict for the plaintiff will not be affirmed where there is evidence that the mule could have been killed by a freight train which passed a few hours in advance of the passenger train. *Louisville, N. O. & T. R. Co. v. Van Eaton*, (Miss.) 11 *So. Rep.* 111.

If it does not appear, even inferentially, from the evidence that the animal was killed by the defendant's agents, engines, or cars, or that the defendant was operating the road, or that any train of cars or locomotive engine had passed over it at any time, there can be no recovery for the plaintiff under the provisions of Missouri Rev. St., § 809. *Lindsay v. Kansas City, Ft. S. & M. R. Co.*, 36 *Mo. App.* 51.

Where a mare goes through bars that are left down by some one not connected with the company, and strays upon a railroad in the night-time, and is killed within one hundred yards of the point where first seen by those in charge of the train, the railroad company will not be liable. *Campbell v.*

*Atlantic, M. & O. R. Co., & Hughes (U. S.)* 170.

Where cattle are found wounded along the track of a railroad company, the fact that employés of the company assisted in killing and dressing the animals is not sufficient to establish the liability of the company for the injury. *McMillan v. Manitoba & N. W. R. Co.*, 4 *Man.* 220.

**456. To show injury or killing by collision.\***—(1) *Generally*.—Direct proof of a collision between defendant's locomotive and plaintiff's stock which were killed is not necessary to entitle plaintiff to recover, if such collision might be inferred from the facts and circumstances established by the evidence. *Vaughan v. Kansas City, S. & M. R. Co.*, 34 *Mo. App.* 141.—**DISTINGUISHING** *Gilbert v. Missouri Pac. R. Co.*, 23 *Mo. App.* 65.—*Kellenbaugh v. St. Louis, A. & T. R. Co.*, 34 *Mo. App.* 147.

Direct evidence is not required to show that an animal killed got upon the track through a gap in the fence which it was the company's duty to maintain, nor is it necessary to show the collision of the cars with the animal by an eye-witness. Both these facts may be shown by circumstances. *Mayfield v. St. Louis & S. F. R. Co.*, 91 *Mo.* 296, 3 *S. W. Rep.* 201.

(2) *Illustrations*.—Testimony showing that plaintiff's cow was killed, and was found, with her back broken, on the side of a railroad track at a point where there was a ditch filled with water on either side; that a measurement of the cow's tracks indicated that she had run ahead of the train; and that there were indications where she had been struck by the train—*held*, sufficient to sustain the finding of a referee that the train killed the cow. *Jacksonville, T. & K. W. R. Co. v. Garrison*, 30 *Fla.* 557, 11 *So. Rep.* 929.

Proof that stock was found by the side of a railroad track "badly smashed up," justifies a verdict that the injury was done by cars or locomotive of the company. *Illinois C. R. Co. v. Whalen*, 42 Ill. 396.—**QUOTED** IN *Ohio & M. R. Co. v. Atteberry*, 43 Ill. App. 80.

Evidence showing that a horse was well one day, and in a pasture near a railroad track, and the next morning was found dead by the side of the road, with a large scar on one side and otherwise bruised; and that his tracks were found on the railroad, indicating that he had been running along the side of

\* See *ante*, 73-81, 135, 338; *post*, 497.

the track and in attempting to cross had been struck and knocked off, justifies the inference that he had been struck and killed by the locomotive of a passing train. *Louisville, N. A. & C. R. Co. v. Hixon*, 101 Ind. 337.

Testimony of a witness, that he heard a train whistle, saw cattle running away, went to the cattle-guard and saw an injured steer in it, is sufficient evidence that the animal was injured by the company's train. *Baxter v. Chicago, R. I. & P. R. Co.*, (Iowa) 54 N. W. Rep. 350.

Plaintiff's mare was found dead in her pasture near the defendant's right of way, at a place where defendant, though having the right to fence, had neglected so to do. Her right hind leg was broken above the hock and just below the stifle. No bruises were noticed, but some hair was off the leg and right flank. There were hoof-prints near, upon the track. There was also a ditch between the track and where the mare was found. Between the track and the ditch was some hair, and also nearer the ditch than the track was a hoof-mark. In the ditch also there was a hoof-mark, and two or three feet beyond it were indications that an animal had fallen there. From that point to where the mare was found was a broad trail, which appeared as though made by dragging her from that place to the place where she was found, but there were no indications that she had struggled along that trail. One of defendant's trains had shortly before passed over the track. The jury found that the mare was killed, or caused to be killed, by defendant while running a train on its road. *Held*, that, considering all the evidence and the circumstances attending the case, the court could not say that the evidence did not warrant the finding of the jury. *Van Slyke v. Chicago, St. P. & K. C. R. Co.*, 80 Iowa 620, 45 N. W. Rep. 396.—DISTINGUISHING *Asbach v. Chicago, B. & Q. R. Co.*, 74 Iowa 248; *Rhines v. Chicago & N. W. R. Co.*, 75 Iowa 597; *Brockert v. Central Iowa R. Co.*, 75 Iowa 529.

In an action to recover the value of a colt killed, the proof showed that on the morning before the colt was killed it was seen near the track, which was unfenced, a few hours before a train passed; that on the following day it was found dead and buried some fifteen feet from the track; that hair was found along the ends of the ties the same color as that of the colt, and that there were marks along the track, indicating that

an animal had been dragged some distance which evidence was uncontradicted. *Held*, that a verdict in favor of the plaintiff would not be reversed and a new trial granted on the ground that there was not sufficient proof that the colt was killed in the operation of the railroad. *Central Branch U. P. R. Co. v. Pate*, 21 Kan. 539.

Where plaintiff's stock were seen upon the railroad track in the forenoon, and in the afternoon of the same day blood was seen upon the track, with the trace of it leading to the gap in the fence, and the animal was found dead not more than a quarter of a mile off, with a leg broken, it cannot be said that there is no evidence from which to find the fact that it was injured by the cars and died from the effects of that injury. *Mayfield v. St. Louis & S. F. R. Co.*, 91 Mo. 296, 3 S. W. Rep. 201.—APPLIED IN *Harned v. Missouri Pac. R. Co.*, 51 Mo. App. 482.

Where the action for killing stock is under Missouri Rev. St. § 809, the proof must show an actual collision of the cars or engine with the animals; it is not enough to show that animals were found dead near the track, bruised and so marked as to indicate that they had been struck with great force while on the track, but there is no proof that the company at the time was operating the railroad, or that any train of cars had passed over the road at that point at any time. *Gilbert v. Missouri Pac. R. Co.*, 23 Mo. App. 65.—DISTINGUISHED IN *Vaughan v. Kansas City, S. & M. R. Co.*, 34 Mo. App. 141; *Keltenbaugh v. St. Louis, A. & T. R. Co.* 34 Mo. App. 147.

Where plaintiff's cattle were shown to be in his inclosure one evening, and were found during the forenoon of the next day lying along a railroad track, one with a foot crushed and others gashed and cut, it may be fairly inferred that the injury was caused by the company's cars. *McMillan v. Manitoba & N. W. R. Co.*, 4 Man. 220.

Where there is no direct evidence that a horse was struck or killed by a railway train, a verdict based on the fact that the horse's tracks were found on the railroad track after the horse had been found injured in the ditch where he had fallen from the bridge over a creek forty or fifty yards from the railroad track, will be set aside as not supported by the evidence. *New Orleans & N. E. R. Co. v. Jones*, (Miss.) 3 So. Rep. 653.

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A company will not be liable for killing an animal under proof showing that it was found dead thirty feet from the track, with bruises on it not there two days before, and where no one saw it injured, and there was nothing to indicate that it had been on the track, nor that the injuries received might not have been received otherwise than by a collision with a train. *San Antonio & A. P. R. Co. v. Leal*, 4 *Tex. App. (Civ. Cas.)* 213, 16 *S. W. Rep.* 909.

**457. To show immoderate rate of speed.\***—Negligence on the part of the company is sufficiently shown by evidence to the effect that the train was running at a rate of speed greater than that fixed by a city ordinance. *Fritz v. First Div. St. P. & P. R. Co.*, 22 *Minn.* 404, 19 *Am. Ry. Rep.* 404.

In an action for killing stock the evidence showed that they were killed on a Sunday night, when the track was not patrolled, and after a severe storm, but of which the trainmen had full knowledge; and that eight of the cattle were scattered along the track for some distance. *Held*, sufficient evidence to warrant a finding that the train was running at an immoderate rate of speed. *Baker v. Chicago, B. & Q. R. Co.*, 73 *Iowa* 389, 35 *N. W. Rep.* 460.

**458. To show company's duty to fence.†**—Evidence showing that a track could be fenced along both sides up to a highway, and cattle-guards put in and maintained, without interfering with the business of the company or of the public, is sufficient to warrant a judgment against the company for stock killed on the unfenced portion. *Lafferty v. Chicago & W. M. R. Co.*, 71 *Mich.* 35, 15 *West. Rep.* 198, 38 *N. W. Rep.* 660.

Under the Utah statute, making it the duty of railroads to fence their tracks through lands "owned and settled or occupied by private owners," in an action to recover for stock killed, it is sufficient to show that the lands were cultivated, without showing who was the owner or occupier. *Stimpson v. Union Pac. R. Co.*, 9 *Utah* 123, 33 *Pac. Rep.* 369.

**459. To show that the road was unfenced.‡**—Where a company is sued for

killing stock, an allegation that the track was "unfenced" is supported by evidence showing that a fence had been once built, but destroyed. *Fritz v. Kansas City, C. B. & St. J. R. Co.*, 13 *Am. & Eng. R. Cas.* 558, 61 *Iowa* 323, 16 *N. W. Rep.* 144.

Proof that "the railroad of the defendant was not fenced where they [the animals of the plaintiff] were killed," no other evidence being introduced or offered with regard to the railroad being fenced or not fenced, was sufficient to authorize the court below to make a finding that the road was not fenced where the animals entered upon the road. *Kansas City, L. & S. R. Co. v. Neville*, 25 *Kan.* 632.

**460. To show that fence was defective.\***—That plaintiff's injured stock entered upon defendant's track through its defective fence may be inferred from all the surrounding circumstances which the evidence tends to establish. *Woods v. Missouri, K. & T. R. Co.*, 51 *Mo. App.* 500.

In a suit for killing a horse the company contended that its fence, over which the horse escaped, had not been out of repair a sufficient length of time to charge it with negligence, and proved that an employé had passed along the day before and pronounced the fence in a fair condition; but there was nothing to show what examination he actually made, or what he called a fair condition. On the other hand, plaintiff proved that the wires were loose from the posts and that the posts were not sufficient to hold staples, and that one of the wires where the horse went over was found broken, but whether by his going over it was not disclosed. *Held*, sufficient evidence of failure to maintain a proper fence to justify a finding for plaintiff. *Indiana, I. & I. R. Co. v. Dooling*, 42 *Ill. App.* 63. Compare *Louisville, N. A. & C. R. Co. v. Zink*, 95 *Ind.* 345.

In an action to recover damages for the loss of a cow killed by its engine, the defense was that the cow was killed on the public road, and without negligence on the part of the company. The engineer testified that the engine struck the cow on the crossing of a public road over the railway, and carried or threw her 30 or 40 feet, but there were no marks on the ground indicating that the cow had been struck at that point.

\* See *ante*, 36, 69-72, 198, 201, 210, 345, 400; *post*, 481.

† See *ante*, 85-113.

‡ See *ante*, 349-360; *post*, 476, 505.

\* See *ante*, 109-113, 140-151, 349-352, 357, 394; *post*, 506.



The distance from the road crossing to the cattle-guard was 43 feet, and from that point to a place where there were marks on the railway track tending to show that the cow had been struck was 54 feet, the cow being thrown from 8 to 12 feet east and south of that point. *Held*, that the evidence failed to show that the cow was killed on the road crossing, but that a clear preponderance of evidence showed the railway fence to be in a defective and imperfect condition, and that the cow was killed within the right of way. *Union Pac. R. Co. v. Blum*, 35 *Am. & Eng. R. Cas.* 119, 23 *Neb.* 404.

In an action for horses killed, the testimony showed that the railway was fenced with barbed wire; that at a point adjoining a certain bridge the wire was so close to the ground that the horses had stepped over the fence, leaving at least three bunches of hair from their legs on the barbs of the wire; and that their tracks were plainly seen where they had crossed the fence. *Held*, that the evidence sustained the charge of negligence on the part of the company in not protecting its railway by a sufficient fence, and that a verdict for the fair value of the horses would not be set aside. *Missouri Pac. R. Co. v. Metzger*, 35 *Am. & Eng. R. Cas.* 148, 24 *Neb.* 90, 38 *N. W. Rep.* 27.

The proofs showed that plaintiff's horses strayed from his lands, forced their way through a swing gate, and went on the track and were killed. It appeared that the horses were able to pass the gate owing to defective posts. *Held*, sufficient to show a breach of the company's statutory duty to fence, and to make it liable. *Charman v. South Eastern R. Co.*, 37 *Am. & Eng. R. Cas.* 495, 21 *Q. B. D.* 524.—*REVIEWING Manchester, S. & L. R. Co. v. Wallis*, 14 *C. B.* 213.

Where a company is sued for negligently killing stock by reason of not maintaining a proper fence, evidence showing no negligence except that there was a break in a gate which the company maintained, large enough to enable a horse to put his head through, is not sufficient to support a verdict for plaintiff, and the court may properly direct a verdict for defendant. *Bothwell v. Chicago, M. & St. P. R. Co.*, 7 *Am. & Eng. R. Cas.* 570, 59 *Iowa* 192, 13 *N. W. Rep.* 78.—*DISTINGUISHING McKinley v. Chicago, R. I. & P. R. Co.*, 47 *Iowa* 76.—*FOLLOWED IN Youll v. Sioux City & P. R. Co.*, 21 *Am. & Eng. R. Cas.* 589, 66 *Iowa* 346. *QUOTED IN*

*Fitterling v. Missouri Pac. R. Co.*, 20 *Am. & Eng. R. Cas.* 454, 79 *Mo.* 504.

**461. To show that cattle-guard was defective.\***—In an action for killing stock, where the evidence shows that the cattle-guard was insufficient to restrain ordinary domestic animals, a verdict for the plaintiff will not be disturbed for want of evidence. *Wabash R. Co. v. Ferris*, (*Ind. App.*) 32 *N. E. Rep.* 112.

In an action to recover for injury to a horse which got upon the track over an alleged insufficient cattle-guard, the jury may not infer its insufficiency from the fact that the horse passed over it by stepping upon the cross-ties, and the further fact that cattle-guards sometimes differently constructed were in use, but they may properly consider such facts in connection with others in determining the question of the sufficiency of the cattle-guard. *Timins v. Chicago, R. I. & P. R. Co.*, 31 *Am. & Eng. R. Cas.* 541, 72 *Iowa* 94, 33 *N. W. Rep.* 379.—*DISTINGUISHING Case v. Chicago, R. I. & P. R. Co.*, 64 *Iowa* 762.

**462. To show that gate was defective.†**—(1) *Proof sufficient.*—In an action to recover for horses killed, evidence that they went upon the track through a gate, which the facts tended to show was defective, and from every reasonable probability because of such defect, and that the horses themselves pushed it open and thus got on the track and were killed, is sufficient to support a verdict for plaintiff. *Chicago & E. I. R. Co. v. Gernand*, 21 *Ill. App.* 242.

In an action to recover for a cow which escaped from a pasture, through a gate in defendant's fence, and got on the track, and was killed—*held*, that the fact that the fastening of the gate was on the side toward the pasture was proper to be considered by the jury, with other evidence, in determining whether the gate was negligently constructed; but that the mere fact that the fastening was on that side would not warrant a verdict for plaintiff, unless there was evidence tending to show that the gate became open by reason of that fact. *Butler v. Chicago & N. W. R. Co.*, 71 *Iowa* 206, 32 *N. W. Rep.* 262.

Where a company is sued for killing a

\* See *ante*, 162, 348, 420.

† See *ante*, 176-178, 348, 398; *post*, 543, 566.



horse which went upon the track through a gate, evidence showing that the gate had stood open nearly all the time for two years, and that the company's section master knew of it, having frequently passed through it, and that it was so out of repair that it could not be opened or closed by reasonable effort, is sufficient to support a verdict finding that the company had not discharged the duty imposed upon it by Mass. Pub. St. ch. 112, § 115, requiring railroad companies to keep gates in proper repair. *Taft v. New York, P. & B. R. Co.*, 157 Mass. 297, 32 N. E. Rep. 168.

If a company allows a gate separating its track from land where cattle are kept to become thin and decayed, and at a certain time such gate is found broken down and cattle dead upon the track, there is evidence of negligence on the part of the company, and it is liable. *Page v. Great Eastern R. Co.*, 24 L. T. N. S. 585.

(2) *Proof insufficient.*—The evidence tended to show that plaintiff's colt escaped into the field of an adjoining proprietor, in which was a gate leading to a farm-crossing over defendant's road; and that it escaped through the gate onto the railroad track and was killed. The gate, which opened inwards towards the field, was found wide open on the morning after the accident. One of defendant's section men testified that he had closed the gate on the previous evening. *Held*, that, as there was no evidence to show negligence on the part of the defendant, either in regard to the fastening of the gate or that it was pushed open by an animal, the plaintiff could not recover. *Sather v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 283, 40 Minn. 91, 41 N. W. Rep. 458.

Where it appears from the evidence that the gate through which it was alleged plaintiff's mare passed onto the railroad track, where she was killed, was made for plaintiff's convenience, and that it was not discovered to be out of repair until a week after the accident, and was not noticed to be defective on the morning thereafter by plaintiff's son, who passed through it, and that, further, there was a failure of proof tending to show that the gate was open by reason of defective fastenings when the mare passed through it, plaintiff cannot recover, and a demurrer to the evidence should be sustained. *Laney v. Kansas City, St. J. & C. B. R. Co.*, 83 Mo. 466.

#### 463. To show place of entry.\*—

It is not necessary for the plaintiff, in an action for killing cattle, to prove by positive evidence the place where the cattle entered, but it is sufficient if facts are proved from which the place of entry can be inferred. *Evansville & T. H. R. Co. v. Mosier*, 22 Am. & Eng. R. Cas. 569, 101 Ind. 597. *Briscoe v. Missouri Pac. R. Co.*, 25 Mo. App. 468.

Where a company is bound to maintain a fence it is not necessary to prove by direct evidence that cattle killed on the track escaped from an adjoining field by reason of a defective fence. Where it is shown that the fence was so defective as to allow cattle to pass through or under it in divers places, the jury may infer therefrom that they did pass through the fence where it was defective. *Holtz v. Minneapolis & St. L. R. Co.*, 29 Minn. 384, 13 N. W. Rep. 147.

The point in issue being whether a cow was killed at a highway crossing or wandered on the right of way at a point some distance above the crossing, evidence clearly showing that the cow could have got on the right of way through a gate in a fence which the railway company was obliged to maintain, and that there were, in fact, tracks leading from the gate toward the point where she was struck, is sufficient to uphold a verdict for the plaintiff. *King v. Chicago, R. I. & P. R. Co.*, (Iowa) 54 N. W. Rep. 204. Compare also *Vincent v. Current River R. Co.*, 53 Mo. App. 616.

In an action for double damages for killing plaintiff's hogs, where the evidence shows they were killed by defendant's trains in the township in which suit was brought and at a place where the track was not fenced, but was required by law to be fenced, the trial court is justified in concluding that they entered upon the track where it was not fenced, and especially so in the total absence of proof that the road had any fences along its sides in that vicinity. *Asher v. St. Louis, I. M. & S. R. Co.*, 89 Mo. 116, 1 S. W. Rep. 123.

In an action for double the value of horses killed on defendant's track, where they were alleged to have gone by reason of a deficient fence, there was no evidence to show that they entered through the opening in

\* See ante, 127, 128, 351, 352, 395; post, 474, 519, 548.

Evidence as to where animals came on track, see note, 19 AM. & ENG. R. CAS. 577.

the fence rather than at a deficient cattle-guard, except the fact that the last point to which they were traced was nearer to the opening than to the cattle-guard. *Held*, insufficient to sustain a verdict for plaintiff on the cause of action pleaded, where the court instructed that he could not recover unless he proved that they entered through the opening. *Rhines v. Chicago & N. W. R. Co.*, 35 *Am. & Eng. R. Cas.* 123, 75 *Iowa* 597, 39 *N. W. Rep.* 912.—DISTINGUISHED IN *Van Slyke v. Chicago, St. P. & K. C. R. Co.*, 80 *Iowa* 620.

Proof of entry is not material except where stock are killed at a place where the company is not bound to fence, such as a public highway, where such stock have entered where the track was unfenced, and the duty to fence existed, and such killing is the direct consequence of the neglect to fence. *Eaton v. Oregon R. & N. Co.*, 45 *Am. & Eng. R. Cas.* 481, 19 *Oreg.* 371, 24 *Pac. Rep.* 413.

#### 464. To show place of accident.\*

—Evidence that a cow was found killed within a mile and a quarter of the plaintiff's house is sufficient proof that she was killed within five miles of a settlement, to sustain a verdict for plaintiff. So evidence that a colt which was killed was kept tied up, and only ran out to water, is sufficient, from which a jury might infer that it was killed within five miles of a settlement. *St. Louis & S. E. R. Co. v. Casner*, 72 *Ill.* 384.

Where the evidence in a suit against a railroad company for killing stock showed that the stock was not killed within a corporation, nor near a crossing, the jury might infer that it was not killed within the limits of a town, city, or village. *St. Louis & S. E. R. Co. v. Casner*, 72 *Ill.* 384.

A verdict for plaintiff will not be upheld where he fails to show, by direct or circumstantial proof, that the colt was killed on defendant's right of way, the engineer having testified that the colt was struck in the night-time, at a highway crossing, and was carried on the pilot of the engine to the point where it was found. *King v. Chicago, R. I. & P. R. Co.*, (*Iowa*) 54 *N. W. Rep.* 204.

Where it appeared from the evidence that the cattle were killed on plaintiff's farm, at a place where there was no highway or public crossing, this was sufficient to warrant

the jury in finding that the accident occurred at a place where defendant had the right to fence. *Schlegener v. Chicago, M. & St. P. R. Co.*, 19 *Am. & Eng. R. Cas.* 625, 61 *Iowa* 235, 16 *N. W. Rep.* 103.

Proof simply that the killing occurred within the corporate limits of a town is not sufficient to warrant the jury in finding that it occurred in the township charged in the statement. *Backenstoe v. Wabash, St. L. & P. R. Co.*, 86 *Mo.* 492; *affirming* 23 *Mo. App.* 148.—FOLLOWED IN *Manuel v. Missouri Pac. R. Co.*, 19 *Mo. App.* 631.

465. To show knowledge of salt upon the track.\*—Where it was shown that a solution of salt had been permitted to run down an embankment to a railroad track for more than a year, and that several cattle had been killed in the meantime, such evidence is sufficient to justify a finding that the company must have had knowledge of the fact, and that it was negligent in permitting it to remain. *Morrow v. Hannibal & St. J. R. Co.*, 29 *Mo. App.* 432.—FOLLOWED IN *Burger v. St. Louis, K. & N. W. R. Co.*, 52 *Mo. App.* 119.

466. To show unavoidable accident.†—To excuse a company from killing cattle on the ground that the killing was accidental, it is not enough to show that it was not intentional; it must be shown to have occurred unavoidably and without the least fault on the part of the engineer. *Danner v. South Carolina R. Co.*, 4 *Rich. (So. Car.)* 329.

The uncontradicted testimony of the servants of the railroad company showing that they did everything they could to prevent the killing of plaintiff's cow, but that it was impossible to stop the train in time, a recovery by the plaintiff was not warranted. *Western & A. R. Co. v. Trimnier*, 84 *Ga.* 112, 10 *S. E. Rep.* 503.

Where the evidence fails to show that the engineer in charge of the train ever saw the cow sued for before the train struck her, or that after seeing her, if such was the fact, the train could have been stopped with safety before striking her, but, on the contrary, shows that the collision was almost simultaneous with her getting on the track in an attempt to cross before the engine, there can be no recovery. *Davis v. Wabash R. Co.*, 46 *Mo. App.* 477.

\*See ante, 117, 127, 207, 355; post, 475, 520, 549.

\* See ante, 40.

† See ante, 51, 52; post, 493, 515, 550.

Where a beast on the railroad would not be driven off from the track by a person trying to do so, and could not be scared off by the steam-whistle, the engineer striving with all his might to arrest the progress of the train before it reached it, but it was run over and killed—*held*, that there was no negligence on the part of the company. *Montgomery v. Wilmington & W. R. Co.*, 6 *Jones (N. Car.)* 464.—FOLLOWED IN *Winston v. Raleigh & G. R. Co.*, 19 *Am. & Eng. R. Cas.* 516, 90 *N. Car.* 66.

A company is not liable for killing stock on a foggy night when within thirty yards of the engine when first seen, where the evidence shows that the train was carrying a headlight, that the whistle was blown after the stock were seen, and that the speed of the train was reduced from fifteen miles an hour to seven and a half. *Raiford v. Mississippi C. R. Co.*, 43 *Miss.* 233.

In an action for killing cattle, where the evidence shows that the animal ran 150 yards down the track before reaching the trestle, and the engineer testified that he only saw the animal when within forty or fifty yards, and that he could not have seen it earlier under the conditions then existing, and there is no evidence introduced to discredit the engineer's statement, a verdict for the plaintiff is not supported by the evidence. *Kansas City, M. & B. R. Co. v. Deaton, (Miss.)* 9 *So. Rep.* 828.

There is not such evidence of negligence as to make a railroad company liable for an ox killed on the track where it appears that it was grazing on the prairie close to the track and that the engineer reversed his engine and whistled, but that the animal ran on the track and was killed before the train could be stopped. *McFie v. Canadian Pac. R. Co.*, 2 *Man.* 6.—DISTINGUISHING *Renaud v. Great Western R. Co.*, 12 *U. C. Q. B.* 409; *18 Can. Ont. S. & H. R. Co.*, 16 *U. C. Q. B.* 91.

In an action for killing mules, a verdict against the railroad company is not warranted by evidence showing that the mules were in a pasture, in a depression near the track; that they ran along the track for some distance as the train approached, but finally got on the track; and that the engineer sounded the whistle, blew for brakes, and did all in his power to avoid a collision, but without success. *Yazoo & M. V. R. Co. v. Brumfield, (Miss.)* 4 *So. Rep.* 341.

Where in an action against a company

brought within six months, to recover damages for an injury to plaintiff's cow, it was proved that the cow jumped on the track at the opening of a cut some two hundred yards in front of the defendant's engine, which was running at the rate of twenty-three miles an hour; and it was further proved that as soon as the cow was discovered the engineer blew the alarm-whistle and reversed the engine, and the brakes were applied, and that an engine running at that rate of speed could not be stopped under four hundred yards—*held*, that the defendant's agents were not guilty of any neglect, and that the company was not responsible for the injury resulting from the engineer's running against the cow. *Proctor v. Wilmington & W. R. Co.*, 72 *N. Car.* 579.—FOLLOWED IN *Winston v. Raleigh & G. R. Co.*, 19 *Am. & Eng. R. Cas.* 516, 90 *N. Car.* 66. QUOTED IN *Durham v. Wilmington & W. R. Co.*, 82 *N. Car.* 352. REVIEWED IN *Doggett v. Richmond & D. R. Co.*, 81 *N. Car.* 459.

Where an engineer stopped his train in order to prevent a collision with a runaway horse, and when the horse was apparently out of danger started his train, when the horse suddenly turned into another road crossing the track and was killed—*held*, that the jury erred in finding negligence. *Watson v. Philadelphia & T. R. Co.*, 7 *Phila. (Pa.)* 249.

The plaintiff's mare having run along the railway track ahead of the train of her own accord until, reaching a trestle or open culvert, she fell into it and was injured, and the evidence showing that the train was almost stopped to give her time to escape, and that the whistle was continuously blown to frighten her from the track, and that the disaster was caused by her own obstinacy in following the track when she might have left it, the owner of the mare had no cause of action, and the presiding judge did not err in granting a nonsuit. *Gay v. Wadley*, 86 *Ga.* 103, 12 *S. E. Rep.* 298.

Where a mare, frightened by the noise, rapidly crossed the track fifty yards ahead of an approaching train, and the proof showed that she was on the side of the track about ten feet distant from the same during a very short time, where she might have been seen before the collision, and she, through fright, ran upon the engine, striking it about the drive-wheel, and it did not appear that the engineer could have seen her in time to pre-

vent the injury—*held*, that the proof failed to charge the company with negligence. *Rockford, R. I. & St. L. R. Co. v. Linn*, 67 Ill. 109.—DISTINGUISHING *Chicago, B. & Q. R. Co. v. Cauffman*, 38 Ill. 424.

**467. To show that road had been in operation six months.\***—In a suit for killing stock, the first count of the declaration proceeded upon the statutory liability for neglect to fence the road within six months, and the others alleged negligence as at common law. The proof showed that plaintiff's steers were killed in the fall of 1870, and his horses and hogs in the summer of 1871. *Held*, that the proof showed inferentially that the road had been open for six months before the horses and hogs were killed, and therefore sustained the first count of the declaration. *Rockford, R. I. & St. L. R. Co. v. Spillers*, 67 Ill. 167.

**468. To show that an ordinance was in force.†**—Where the liability of a company for injuring stock in a village depends upon whether an ordinance was violated, a stipulation that the ordinance "was duly certified under the seal of the corporation as required by law," and that "it was duly passed and published as required by law," is sufficient to show that the ordinance was in force. *Illinois C. R. Co. v. Fishell*, 32 Ill. App. 41.

#### c. Prima Facie Evidence—Presumptions.‡

**469. Presumptions, generally.**—Where the question is raised, in an action against a railroad company for killing stock, whether a county herd law was in force, which might be put in force by a board of county commissioners upon a petition of more than two-thirds of the legal voters of the county, in the absence of anything to the contrary it will be presumed that the names on such petition were the names and genuine signatures of legal voters of the county. *St. Louis & S. F. R. Co. v. Mossman*, 30 Kan. 336, 2 Pac. Rep. 146.—FOLLOWING *Kansas Pac. R. Co. v. Landis*, 24 Kan. 406. DISTINGUISHING *Noffziger v. McAllister*, 12 Kan. 315; *St. Louis & S. F. R. Co. v. Dudgeon*, 28 Kan. 283.—DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Riggs*, 15 Am. & Eng. R. Cas. 531, 31 Kan. 622.

Where in an action for damages to stock,

brought against a company on the ground of negligence in failing to maintain a fence between the company's right of way and the land of the plaintiff, the defense interposed is that, in the condemnation proceeding by which the company's right of way was acquired, the expense of fencing was taken into account by the jury and included in the verdict, and the company, to sustain such defense, gives in evidence the record of the proceeding, and the record is silent on the subject, no presumption arises that the matter of building and maintaining fences along the line of the railroad was considered, and that compensation to the owner therefor was awarded in the verdict. *Cincinnati, W. & B. R. Co. v. Hoffhines*, 40 Am. & Eng. R. Cas. 221, 46 Ohio St. 643, 22 N. E. Rep. 871.

**470. Presumption as to ownership of road.\***—In an action against a railroad for damages for the killing of stock on the road, it will be presumed, after verdict, in the absence of contrary evidence, that the defendant owned the road at the time of the accident. *Brown v. Missouri Pac. R. Co.*, 14 Mo. App. 580.

**471. — as to ownership of cattle.†**—Proof of possession of the stock killed is *prima facie* evidence of ownership. *Toledo, W. & W. R. Co. v. Stevens*, 63 Ind. 337.

**472. Presumption arising from failure to call employees as witnesses.**—The failure of a company to call the engineer as a witness in a suit against it for killing stock justifies the jury in assuming that if he had been called his evidence would have supported plaintiff's. *Gulf, C. & S. F. R. Co. v. Ellis*, 54 Fed. Rep. 481, 10 U. S. App. 640, 4 C. C. A. 454.

Where the company is charged with the negligent killing of a horse upon the track of the road, the absence at the trial of the agents or servants of the company who were on the train when the horse was killed, raises a strong presumption against the company. *Murray v. South Carolina R. Co.*, 10 Rich. (So. Car.) 227.—QUOTED IN *Brothers v. South Carolina R. Co.*, 5 So. Car. 55.

In an action for killing live stock there was but one witness for the plaintiff—the engineer, who testified that the company had used all ordinary, reasonable care and diligence. A verdict was found for the plaintiff, and it was objected that the ver-

\* See *ante*, 123-125, 358; *post*, 510.

† See *ante*, 211, 362.

‡ See *ante*, 84, 128, 143, 207.

\* See *ante*, 339, 446.

† See *ante*, 340, 445.

dict was against the evidence, as there was nothing to show negligence. The fireman was not produced as a witness, nor was his absence accounted for. *Held*, that it was the duty of the company to produce all the witnesses present to show that it was without fault, and that the absence of the engineer was a circumstance from which the jury might infer that had he been produced his evidence would have shown negligence on the part of the company. *Gainesville, J. & S. R. Co. v. Wall*, 75 Ga. 282.—DISTINGUISHED IN *Savannah, F. & W. R. Co. v. Gray*, 77 Ga. 440, 3 S. E. Rep. 158; *Central R. & B. Co. v. Sims*, 80 Ga. 749.

Where a company is sued for killing stock, if the engineer is introduced as a witness for the company, and the fireman is not accounted for, this will authorize the jury to believe that the fireman has been kept away because he knew something which might be against the interests of the company, but they are not compelled to so believe, and are authorized to believe the testimony of the engineer if they see proper; but where the fireman is in court such inference cannot be drawn because he is not sworn, as the plaintiff might have had him sworn if he had so chosen. *Davis v. Central R. Co.*, 75 Ga. 645.—DISTINGUISHED IN *Savannah, F. & W. R. Co. v. Gray*, 77 Ga. 440, 3 S. E. Rep. 158.

**473. Presumption that animal was killed.**—Evidence that a dead animal was found near a railroad track raises no legal presumption that it was killed, or, if killed, that it was killed on the track or by a train. *St. Louis & S. F. R. Co. v. Sageley*, 56 Ark. 549, 20 S. W. Rep. 413.—FOLLOWING *St. Louis, I. M. & S. R. Co. v. Hagan*, 42 Ark. 122.

**474. Presumption as to place of entry.**—The place of killing or injury of an animal will be presumed to be the place of entrance upon the track, in the absence of evidence to the contrary; and if the place of killing or injury or of entrance on the track is not shown, the company is not liable. *Pearson v. Chicago, B. & K. C. R. Co.*, 33 Mo. App. 543.—FOLLOWING *McGuire v. Missouri Pac. R. Co.*, 23 Mo. App. 325.

In the absence of direct proof upon the subject, the presumption is that an animal came upon the railway track at a point where the railway company was required to

fence but failed to do so, if the evidence shows that the animal was injured at such a point. *Duke v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 105.—FOLLOWING *Jantzen v. Wabash, St. L. & P. R. Co.*, 83 Mo. 171; *McGuire v. Missouri Pac. R. Co.*, 23 Mo. App. 325.

In the absence of proof to the contrary, the law presumes that an animal came on the railroad track where it was killed, and proof that the cow was killed at a place where the railroad company was required by law to fence establishes a *prima facie* case against such company. *Kinion v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 382.—FOLLOWING *Lantz v. St. Louis, K. C. & N. R. Co.*, 54 Mo. 228; *Walther v. Pacific R. Co.*, 55 Mo. 271.—FOLLOWED IN *Wood v. Kansas City, Ft. S. & M. R. Co.*, 43 Mo. App. 294; *Goodwin v. Kansas City, Ft. S. & M. R. Co.*, 43 Mo. App. 359; *Sayer v. Kansas City, Ft. S. & M. R. Co.*, 43 Mo. App. 360.

Where it appears from the evidence that the blood and carcass of the animal are found upon the track at a point which was not but should have been fenced, it will be presumed, in the absence of evidence to the contrary, that it entered upon the track at that point. *Jantzen v. Wabash, St. L. & P. R. Co.*, 83 Mo. 171.

**475. Presumption as to place of killing.\***—The presumption is that the houses compose a village; and if the place where a cow is killed by a railroad is beyond the houses, the presumption is that it is killed beyond the village; if the town extends beyond the houses, defendant should have shown it to be so. *Ohio & M. R. Co. v. Irvin*, 27 Ill. 178.—FOLLOWED IN *Ohio & M. R. Co. v. Taylor*, 27 Ill. 207.

Proof that the killing or injury occurred at or near a mill brings the case *prima facie* within this rule, and puts it upon the plaintiff to show that it occurred at a place where a fence would not be improper. *Indianapolis & C. R. Co. v. Kinney*, 8 Ind. 402.

The jury, in the absence of proof that an injury to cattle was inflicted within the depot grounds of a railroad company where it was not required to fence, may presume that such was not the fact when it is shown that such injury occurred one and one-fourth miles from a certain station. *Smith v.*

\* See ante, 128, 396, 463; post, 519.

\* See ante, 207, 464; post, 520.

*Chicago, M. & St. P. R. Co.*, 13 *Am. & Eng. R. Cas.* 534, 60 *Iowa* 512, 15 *N. W. Rep.* 303.—QUOTING *Comstock v. Des Moines Valley R. Co.*, 32 *Iowa*, 376.

Where the township must be proved in which an injury occurred, the jury are not at liberty to infer that the locality of the injury, not shown to be in such township, was a place in said township. *Harris v. St. Louis, I. M. & S. R. Co.*, 23 *Mo. App.* 328.

**476. Presumption of performance of duty to fence.\***—If the place at which the stock entered was one which the road was required to fence, as alleged, the presumption is that the company had done its duty in regard to fencing it. *Louisville, N. A. & C. R. Co. v. Quade*, 19 *Am. & Eng. R. Cas.* 595, 91 *Ind.* 295.

**477. Presumption that the road was operated by defendant.†**—Where it appears that stock were injured by a train on defendant's road, plaintiff is not bound to prove affirmatively that the train was operated or controlled by defendant. If there be no evidence to the contrary, the jury is authorized to find that it was operated by defendant. *South & N. Ala. R. R. Co. v. Piggreen*, 62 *Ala.* 305.

**478. Presumption as to animal going off track.**—When an adult person is seen on the track in front of a moving train it may be presumed that, as an intelligent being, he will step off in time to avoid injury; but this presumption does not apply to animals on the track. *Dennis v. Louisville, N. A. & C. R. Co.*, 35 *Am. & Eng. R. Cas.* 141, 116 *Ind.* 42, 15 *West. Rep.* 547, 18 *N. E. Rep.* 179, 1 *L. R. A.* 448.—DISTINGUISHING *Chicago & E. I. R. Co. v. Hedges*, 105 *Ind.* 398.

**479. Presumption as to existence of similar stock-killing laws in two states.**—In an action in Colorado for stock killed in New Mexico, a Colorado statute concerning the liability of railroads for stock killed does not apply; and in the absence of proof of a New Mexico statute, the existence of such a law there will not be presumed. But if the stock were killed by the gross negligence of the company it is liable under common-law principles without regard to the statutes of New Mexico. *Atchison, T. & S. F. R. Co. v. Betts*, 31 *Am. & Eng. R. Cas.* 563, 10 *Colo.* 431, 15 *Pac. Rep.* 821.

\* See ante, 114-121.

† See ante, 339.

**480. Presumption of negligence arising from mere proof of killing.\***

—(1) *At common law.*—At common law proof of injury to, or killing of, stock on the track raises no presumption of negligence. Such presumption exists only under the statutes. *Eddy v. Lafayette*, 49 *Fed. Rep.* 798, 4 *U. S. App.* 243, 1 *C. C. A.* 432.—FOLLOWED IN *Eddy v. Dulaney*, 49 *Fed. Rep.* 800, 4 *U. S. App.* 246, 1 *C. C. A.* 435.

Where the cattle-owner pursues the common-law remedy instead of his statutory remedy, mere proof of killing or injury by the company does not raise a presumption of negligence. *Denver & R. G. R. Co. v. Henderson*, 31 *Am. & Eng. R. Cas.* 559, 10 *Colo.* 1, 13 *Pac. Rep.* 910. *Atchison, T. & S. F. R. Co. v. Walton*, 3 *N. Mex.* 319, 9 *Pac. Rep.* 351. *Indianapolis & C. R. Co. v. Means*, 14 *Ind.* 30.—APPROVED IN *Atchison, T. & S. F. R. Co. v. Walton*, 3 *N. Mex.* 319.—*Mobile & O. R. Co. v. Hudson*, 50 *Miss.* 572.

In an action by an owner of live stock for killing or injuring the stock by its train, proof of the killing or injury is not of itself *prima facie* evidence of negligence upon the part of the company or its agents. To make out a *prima facie* case of negligence there must at least be evidence of circumstances from which a presumption arises that the stock would not have been run upon by the train but for want of care on the part of those operating it. *Savannah, F. & W. R. Co. v. Geiger*, 29 *Am. & Eng. R. Cas.* 274, 21 *Fla.* 669, 58 *Am. Rep.* 697.

Where no duty is imposed on the company to fence in its track, mere proof of killing or injury does not raise a presumption of negligence. *Illinois C. R. Co. v. Reedy*, 17 *Ill.* 580. *Schneir v. Chicago, R. I. & P. R. Co.*, 40 *Iowa* 337.—APPROVED IN *Atchison, T. & S. F. R. Co. v. Walton*, 3 *N. Mex.* 319.

(2) *The South Carolina rule.*—Where a company is sued for killing cattle, proof by plaintiff that his cattle were killed by a passenger train belonging to the company while pasturing on his own land, and of the value of the cattle, makes out a *prima facie* case which will entitle him to recover, unless the company rebuts the presumption of negligence by proof of the particular circumstances or manner of the killing. *Danner v. South Carolina R. Co.*, 4

\* See ante, 6, 29-33, 126, 359, 448. Killing of stock by train raises a presumption of negligence, see note, 1. *L. R. A.* 448.



*Rich. (So. Car.)* 329.—APPLIED IN *Joyner v. South Carolina R. Co.*, 29 Am. & Eng. R. Cas. 258, 26 So. Car. 49, 1 S. E. Rep. 52. APPROVED IN *Gorman v. Pacific R. Co.*, 26 Mo. 441; *Walker v. Columbia & G. R. Co.*, 25 So. Car. 141; *Bethje v. Houston & C. T. R. Co.*, 26 Tex. 604. DISAPPROVED IN *Savannah, F. & W. R. Co. v. Gelger*, 29 Am. & Eng. R. Cas. 274, 21 Fla. 669, 58 Am. Rep. 697. DISTINGUISHED IN *Wilson v. Wilmington & M. R. Co.*, 10 Rich. (So. Car.) 52. EXPLAINED IN *Jones v. Columbia & G. R. Co.*, 19 Am. & Eng. R. Cas. 459, 20 So. Car. 249; *Zeigler v. Northeastern R. Co.*, 5 So. Car. 221. FOLLOWED IN *Roof v. Charlotte, C. & A. R. Co.*, 4 So. Car. 61; *Galpin v. Chicago & N. W. R. Co.*, 19 Wis. 604. REVIEWED BUT NOT FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Walton*, 3 N. Mex. 319. REVIEWED IN *Northeastern R. Co. v. Sineath*, 8 Rich. (So. Car.) 185; *Fuller v. Port Royal & A. R. Co.*, 24 So. Car. 132.

Proof of ownership of stock by plaintiff, and of the killing by defendant, makes out a *prima facie* case, and where the company produces no evidence in defense a nonsuit should be denied. *Joyner v. South Carolina R. Co.*, 29 Am. & Eng. R. Cas. 258, 26 So. Car. 49, 1 S. E. Rep. 52. *Roof v. Charlotte, C. & A. R. Co.*, 4 So. Car. 61.—APPLYING *Murray v. South Carolina R. Co.*, 10 Rich. (So. Car.) 227; *Wilson v. Wilmington & M. R. Co.*, 10 Rich. (So. Car.) 52. FOLLOWING *Danner v. South Carolina R. Co.*, 4 Rich. (So. Car.) 329. REVIEWING *New York & E. R. Co. v. Skinner*, 19 Pa. St. 298. Compare *Nashville & C. R. Co. v. Fugett*, 3 Coldw. (Tenn.) 402.

And this presumption of negligence is not confined to cases where the company introduces no testimony whatever, but continues until rebutted by affirmative evidence that the company exercised due care, or that the accident was unavoidable. *Joyner v. South Carolina R. Co.*, 29 Am. & Eng. R. Cas. 258, 26 So. Car. 49, 1 S. E. Rep. 52.—APPLYING *Danner v. South Carolina R. Co.*, 4 Rich. (So. Car.) 330. QUOTING *Zemp v. Wilmington & M. R. Co.*, 9 Rich. (So. Car.) 84; *Jones v. Columbia & G. R. Co.*, 20 So. Car. 258; *Fuller v. Port Royal & A. R. Co.*, 24 So. Car. 132.

This rule in *Danner's Case*, that proof of killing stock raises a presumption of negligence and, unexplained, entitles the owner to recover, is not changed by the subsequent South Carolina laws requiring stock

to be inclosed. *Simkins v. Columbia & G. R. Co.*, 19 Am. & Eng. R. Cas. 467, 20 So. Car. 258.—APPLIED IN *Harley v. Eutawville R. Co.*, 31 So. Car. 151. FOLLOWED IN *Joyner v. South Carolina R. Co.*, 29 Am. & Eng. R. Cas. 258, 26 So. Car. 49, 1 S. E. Rep. 52. QUOTED IN *Molair v. Port Royal & A. R. Co.*, 29 So. Car. 152, 7 S. E. Rep. 60.—*Jones v. Columbia & G. R. Co.*, 19 Am. & Eng. R. Cas. 459, 20 So. Car. 249.—EXPLAINING *Danner v. South Carolina R. Co.*, 4 Rich. (So. Car.) 329.—APPLIED IN *Harley v. Eutawville R. Co.*, 31 So. Car. 151. QUOTED AND FOLLOWED IN *Joyner v. South Carolina R. Co.*, 29 Am. & Eng. R. Cas. 258, 26 So. Car. 49, 1 S. E. Rep. 52.

(3) *Alabama statute*.—Proof that stock were injured by a passing train makes out a *prima facie* case under the Alabama statutes, and casts the burden on the company to show that there was no negligence, or that the statute had been complied with. *East Tenn., V. & G. R. Co. v. Bayliss*, 19 Am. & Eng. R. Cas. 480, 74 Ala. 150.—FOLLOWING *Mobile & O. R. Co. v. Williams*, 53 Ala. 595; *South & N. Ala. R. Co. v. Thompson*, 65 Ala. 74.—*Alabama G. S. R. Co. v. McAlpine*, 22 Am. & Eng. R. Cas. 602, 75 Ala. 113.—DISAPPROVED IN *Georgia Pac. R. Co. v. Hughes*, 39 Am. & Eng. R. Cas. 674, 87 Ala. 610, 6 So. Rep. 413.—*Nashville, C. & St. L. R. Co. v. Hembree*, 38 Am. & Eng. R. Cas. 300, 85 Ala. 481, 5 So. Rep. 173. *Mobile & G. R. Co. v. Caldwell*, 83 Ala. 196, 3 So. Rep. 445.—DISAPPROVED IN *Georgia Pac. R. Co. v. Hughes*, 39 Am. & Eng. R. Cas. 674, 87 Ala. 610, 6 So. Rep. 413.

(4) *Arkansas statute*.—Under the Arkansas act of Feb. 3, 1875, proof that stock were killed on the track raises a presumption of negligence and that the killing was done by the company's train, but this presumption is not conclusive. *Little Rock & Ft. S. R. Co. v. Payne*, 33 Ark. 816.—QUOTING *Macon & Augusta R. Co. v. Vaughn*, 48 Ga. 464. REVIEWING *Cairo & F. R. Co. v. Parks*, 32 Ark. 131.—*Little Rock & Ft. S. R. Co. v. Finley*, 11 Am. & Eng. R. Cas. 469; 37 Ark. 562. *Little Rock & Ft. S. R. Co. v. Jones*, 19 Am. & Eng. R. Cas. 443, 41 Ark. 157. *St. Louis, I. M. & S. R. Co. v. Hagan*, 19 Am. & Eng. R. Cas. 446, 42 Ark. 122. *St. Louis, I. M. & S. R. Co. v. Taylor*, 57 Ark. 136.

The fact that stock are found near a railroad, wounded, creates no presumption that the injury was done by the railroad train, as



in cases of killing or mortally wounding stock; but when it is proved that the injury was done by the train, then the same presumption of negligence arises against the company as in cases of killing. *St. Louis, I. M. & S. R. Co. v. Hagan*, 19 *Am. & Eng. R. Cas.* 446, 42 *Ark.* 122.

But this presumption may be repelled by proof of due diligence. *St. Louis & S. F. R. Co. v. Basham*, 47 *Ark.* 321, 1 *S. W. Rep.* 555.—FOLLOWING *Little Rock & Ft. S. R. Co. v. Turner*, 41 *Ark.* 161.

A *prima facie* case of negligence is made under the Arkansas statute by proving the killing, and that the animals were attracted by cotton-seed which was allowed to accumulate upon the track.\* *Little Rock & Ft. S. R. Co. v. Dick*, 42 *Am. & Eng. R. Cas.* 591, 52 *Ark.* 402, 12 *S. W. Rep.* 785.

(5) *Florida statute*.—Under the act of 1887, chapter 3740, laws of Florida, the killing of live stock by a railway engine, cars, or train is *prima facie* evidence of negligence on the part of the company operating the engine or train, and where the testimony shows that live stock were killed by a train of cars on a railroad, and there is nothing in the evidence to relieve the killing from the statutory presumption that it was negligently done, it is sufficient to sustain a judgment against the company. *Jacksonville, T. & K. W. R. Co. v. Garrison*, 30 *Fla.* 567, 11 *So. Rep.* 926.—QUOTING *Kentucky C. R. Co. v. Talbot*, 7 *Am. & Eng. R. Cas.* 585, 78 *Ky.* 621.

(6) *Georgia statute*.—The mere fact that animals were killed by a train, especially where the law makes it the duty of all persons to maintain a fence, and there was none in this case, is sufficient to raise a presumption of negligence on the part of the railroad's employes. *Georgia R. & B. Co. v. Willis*, 28 *Ga.* 317.

Under the Georgia Code, § 3033, the killing of an animal by a running train raises the presumption that the accident occurred through the negligence of the railroad or its employes. *Georgia R. & B. Co. v. Monroe*, 49 *Ga.* 373.

But this presumption is subject to be rebutted and overcome by evidence; and where this has been done by the uncontradicted testimony of the employes of the company, a verdict finding against it is contrary to law and evidence. *Georgia R. &*

*B. Co. v. Wall*, 80 *Ga.* 202, 7 *S. E. Rep.* 639.

And where this presumption was fully rebutted by the testimony on behalf of the company, to the effect that the injury was not the result of negligence on the part of the defendant or its agents, but that it used all ordinary and reasonable care and diligence to prevent the injury, and where this was not contradicted by any other evidence, a new trial should have been granted on the ground that the verdict was without evidence to support it. *Macon & A. R. Co. v. Newell*, 74 *Ga.* 809.

(7) *Illinois statute*.—Where the plaintiff declares upon the statutory liability growing out of a neglect to fence the road within six months after it is opened, it is sufficient to prove the killing of the cattle by the trains of the company and the company's neglect to fence. Such proof makes a *prima facie* case of liability. *Rockford, R. I. & St. L. R. Co. v. Lynch*, 67 *Ill.* 149.

The law infers negligence where animals are killed at a point where it is the duty of the company to fence under the Illinois statute and it has failed to do so; but where a fence has once been built then negligence must be proven, as in failing to keep it in repair, etc. *Illinois C. R. Co. v. Whalen*, 42 *Ill.* 396.

(8) *Iowa statute*.—Under the Iowa Code, § 1289, the fact of injury or killing of an animal by a railroad train being shown raises a presumption of negligence against the railroad company. *Small v. Chicago, R. I. & P. R. Co.*, 50 *Iowa* 338. *Brentner v. Chicago, M. & St. P. R. Co.*, 19 *Am. & Eng. R. Cas.* 448, 68 *Iowa* 530, 23 *N. W. Rep.* 245, 27 *N. W. Rep.* 605.

(9) *Kentucky statute*.—Under the Kentucky statute the killing of live stock raises the presumption of negligence against the railroad company whose train causes the injury. *Louisville & N. R. Co. v. Simmons*, 85 *Ky.* 151, 3 *S. W. Rep.* 10.

(10) *Maryland statute*.—Upon proof of injury to the stock of the plaintiff by a railroad company, a *prima facie* case is made, and the plaintiff is entitled under the statute (Art. 77, § 1, of the Maryland Code) to recover, unless the defendant can prove, to the satisfaction of the jury, "that the injury complained of was committed without any negligence on the part of the company or its agents." *Western Md. R. Co. v. Carter*, 13 *Am. & Eng. R. Cas.* 573, 59 *Md.* 306.

\* See ante, 40.

*Keesh v. Baltimore & W. R. Co.*, 17 Md. 32.—APPROVED IN *State v. Baltimore & O. R. Co.*, 24 Md. 84.—*Northern C. R. Co. v. Ward*, 63 Md. 362.

(11) *Mississippi statute*.—Proof of the killing of stock and of its value makes a *prima facie* case for plaintiff under the Mississippi statute (Code of 1880, § 1059), thus casting the burden on the company to show circumstances of excuse or justification of the killing. *Kansas City, M. & B. R. Co. v. Doggett*, 67 Miss. 250, 7 So. Rep. 278. *Vicksburg & M. R. Co. v. Hamilton*, 62 Miss. 503. *Mobile & O. R. Co. v. Dale*, 61 Miss. 206.

(12) *Missouri statute*.—The usual presumption of negligence that arises on proof that stock were killed on the track, under the Missouri statute, does not apply where the killing is within the corporate limits of a village or city. *Pryor v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 215.—FOLLOWING *Wier v. St. Louis & I. M. R. Co.*, 48 Mo. 558; *Lloyd v. Pacific R. Co.*, 49 Mo. 199.

Especially when the accident happened at a crossing long used as a public highway. *Wier v. St. Louis & I. M. R. Co.*, 48 Mo. 558.—REVIEWING *Meyer v. North Mo. R. Co.*, 35 Mo. 352; *Iba v. Hannibal & St. J. R. Co.*, 45 Mo. 473.—FOLLOWED IN *Pryor v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 215. NOT FOLLOWED IN *Wymore v. Hannibal & St. J. R. Co.*, 79 Mo. 247.

(13) *New Hampshire statute*.—Proof of killing by the engines of a railroad company establishes a *prima facie* case where the animals were upon a railroad crossing (New Hampshire Comp. St., ch. 150, § 45). *White v. Concord R. Co.*, 30 N. H. 188.

The destruction of cattle while upon the track of a railroad, without the fault of their owner, is competent *prima facie* evidence of negligence on the part of the railroad corporation running the train causing the mischief (New Hampshire Comp. St. 350). *Smith v. Eastern R. Co.*, 35 N. H. 356.—REVIEWING *Ellis v. Portsmouth & R. R. Co.*, 2 Ired. (N. Car.) 138; *Suydam v. Moore*, 8 Barb. (N. Y.) 358; *Danner v. South Carolina R. Co.*, 4 Rich. (So. Car.) 329.

(14) *North Carolina statute*.—Where it was proven or admitted that cattle had been killed by the train within six months before the action was brought, there is a presumption that the killing was caused by the negligence of such company, and this presumption arises from the fact of killing

(under § 2326 of the North Carolina Code), where the animal is hitched to a wagon or cart, as well as where it is straying at large when killed. *Randall v. Richmond & D. R. Co.*, 45 Am. & Eng. R. Cas. 507, 107 N. Car. 748, 12 S. E. Rep. 605.

Where an action for killing plaintiff's mule is brought within six months after the accident, the fact of such killing (nothing further appearing) is *prima facie* evidence of defendant's negligence; and the burden of repelling the presumption is upon the company. *Wilson v. Norfolk & S. R. Co.*, 19 Am. & Eng. R. Cas. 453, 90 N. Car. 69.—DISTINGUISHED IN *Snowden v. Norfolk S. R. Co.*, 95 N. Car. 93. QUOTED IN *Rigler v. Charlotte, C. & A. R. Co.*, 26 Am. & Eng. R. Cas. 386, 94 N. Car. 604.

The North Carolina act of 1857 (Bat. Rev. ch. 16, § 11), which makes the act of killing stock by the engines or cars of a railroad company *prima facie* evidence of negligence, applies only when the facts attending the killing are unknown and uncertain; but when those facts are fully disclosed in evidence, and it is shown that the defendant company adopted every precaution in its power to avert the injury, the court should instruct the jury that the defendant is not chargeable with negligence. *Durham v. Wilmington & W. R. Co.*, 82 N. Car. 352.—QUOTING *Proctor v. Wilmington & W. R. Co.*, 72 N. Car. 579.—APPROVED IN *Volkman v. Chicago, St. P., M. & O. R. Co.*, 35 Am. & Eng. R. Cas. 204, 5 Dak. 69, 37 N. W. Rep. 731. EXPLAINED IN *Aycock v. Raleigh & A. A. L. R. Co.*, 89 N. Car. 321.

**481. Presumption upon proof of prohibited rate of speed.\***—The running of a train through a city, village, or town at a greater rate of speed than that allowed by the city ordinance raises a presumption of negligence against the company. *Toledo, P. & W. R. Co. v. Deacon*, 63 Ill. 91, 7 Am. Ry. Rep. 150. *Cleveland, C. C. & St. L. R. Co. v. Ahrens*, 42 Ill. App. 434. *Chicago & N. W. R. Co. v. Carpenter*, 45 Ill. App. 294.

A jury may presume negligence on the part of a railroad where stock is killed in an incorporated town by a train running at a greater rate of speed than allowed by an ordinance. *Chicago, B. & Q. R. Co. v. Haggerty*, 67 Ill. 113.

But the mere fact that the train was

\* See ante. 71, 211, 345, 400, 457.

moving at a speed greater than was customary, though not in excess of the speed allowed by statute and the rules of the company, is not evidence of negligence. *Louisville & N. R. Co. v. Marriott* (Ky.), 19 Am. & Eng. R. Cas. 509.—DISTINGUISHING *McLeod v. Ginther*, 80 Ky. 408.

**482. Presumption of gross negligence.\***—Proof that a train was moving at a usual speed when a horse was seen on the track, and that the speed of the train was not slackened, is not sufficient to raise a presumption of wanton mismanagement of the train. *Darling v. Boston & A. R. Co.*, 121 Mass. 118.

**483. Presumption of contributory negligence.†**—An inference of contributory negligence on the part of the plaintiff does not arise as a legal conclusion from the averment that the animal was negligently killed at a railroad crossing, when accompanied by the averment that the plaintiff was without fault. *Chicago, St. L. & P. R. Co. v. Nash*, 1 Ind. App. 298, 27 N. E. Rep. 564.

In an action to recover for stock killed proof that the stock were running at large in violation of law raises a presumption that they were at large by permission of the owner. *Atchison, T. & S. F. R. Co. v. Hegwir*, 21 Kan. 622.

**484. Prima facie proof of negligence, generally.‡**—In an action for injuries done to live stock on a railroad track by the negligence of the defendant, the burden of proving the negligence is upon the plaintiff; but this does not require him to prove that he did not contribute to the negligence which occasioned the injury. The plaintiff will have shown a *prima facie* right to recover when he has proven that the injury has in fact been done, and, in addition thereto, facts and circumstances from which a jury may fairly conclude that such injury was caused by the negligence of the defendant, leaving out of consideration any question of contributory negligence. *Johnson v. Baltimore & O. R. Co.*, 25 W. Va. 570.

The presumption of negligence which prevails in case of an injury to a passenger

does not obtain where the horse of a traveller upon a highway is injured while attempting to cross the track. *Terre Haute & I. R. Co. v. Clem*, 42 Am. & Eng. R. Cas. 229, 123 Ind. 15, 23 N. E. Rep. 565, 7 L. R. A. 588.

**485. Showing no effort to stop train.**—Where cattle are killed by an ordinary freight train, and no circumstances are shown why it could not be stopped in a distance that ordinary trains can be, proof that cattle ran some two hundred and seventy-five yards on the track after the whistle was blown before being struck, and that no effort was made to stop the train, is *prima facie* evidence of negligence, and will warrant submitting the case to the jury. *Timm v. Northern Pac. R. Co.*, 3 Wash. T. 299, 13 Pac. Rep. 415.

**486. Prima facie case shown by circumstantial evidence.\***—Proof of marks of an animal on the track and of the position of a dead body near the track, indicating that the animal had been killed by a train, is sufficient to meet the requirements of the Mississippi Code 1880, § 1059, making proof of an injury to stock *prima facie* evidence of negligence. *Chicago, St. L. & N. O. R. Co. v. Packwood*, 7 Am. & Eng. R. Cas. 584, 59 Miss. 280.

The facts that the crossing of a highway is out of repair and that a horse is injured thereon raise the presumption of negligence against the company. *France v. Erie R. Co.*, 2 Hun (N. Y.) 513, 5 T. & C. 12.

The mere fact that a horse is found in a broken cattle-guard does not raise such a presumption that it was struck by a train as to warrant a verdict for the owner, who does not give further proof of collision with the engine, which the engineer and fireman positively deny. *Meade v. Kansas City, St. J. & C. B. R. Co.*, 45 Iowa 699.—FOLLOWED IN *Moore v. Burlington & W. R. Co.*, 31 Am. & Eng. R. Cas. 572, 72 Iowa 75, 33 N. W. Rep. 371. REVIEWED IN *Brockert v. Central Iowa R. Co.*, 82 Iowa 369.

**487. Showing killing where track should have been fenced.†**—Whenever it is shown that a railroad has not been fenced, and that an animal has passed upon the track and been killed or injured, a *prima facie* case has been made out against the company. *Missouri Pac. R. Co. v. Baxter*, 45

\* See ante, 37, 50, 60, 187, 200, 217, 218; 284, 343.

† See ante, 126, 148, 213-288, 306, 307.

‡ Presumption of negligence in actions for killing stock, see note, 35 AM. & ENG. R. CAS. 206; 19 Id. 458; 13 Id. 577.

\* See ante, 405, 452.

† See ante, 95-108.

*Am. & Eng. R. Cas.* 471, 45 *Kan.* 520, 26 *Pac. Rep.* 49.

Where an animal is shown to have been killed by cars at a point where the road is required to be, but is not, fenced, it will be presumed, in the absence of evidence to the contrary, that the loss was occasioned by the failure of the company to fence its track. And evidence that the injury occurred where the road ran through woods establishes *prima facie*, at least, an obligation of the company to fence its road at that point. *Wood v. Kansas City, Ft. S. & M. R. Co.*, 43 *Mo. App.* 294.—FOLLOWING *Kinion v. Kansas City, Ft. S. & M. R. Co.*, 39 *Mo. App.* 382; *Walther v. Pacific R. Co.*, 55 *Mo.* 271.

A *prima facie* case is made out, under Missouri Rev. St., § 2124, by proof that the animal got upon the track and was injured where the track was not inclosed. *Radcliffe v. St. Louis, I. M. & S. R. Co.*, 90 *Mo.* 127, 2 *S. W. Rep.* 277.

In an action brought under § 43 of the Missouri act, touching railroad corporations for killing of stock (Wagn. Stat. 310-311), wherever it is shown that stock have been killed on the track where it is the duty of the company to fence in the road, and the company has failed to fence in the manner required by law, a *prima facie* case is made for plaintiff. It is not requisite that the plaintiff should show further by affirmative evidence that the stock were caused to go upon the road by the failure of the company to fence it. *Walther v. Pacific R. Co.*, 55 *Mo.* 271.—FOLLOWING *Fickle v. St. Louis, K. C. & N. R. Co.*, 54 *Mo.* 219. NOT FOLLOWING *Cecil v. Pacific R. Co.*, 47 *Mo.*, 246.—FOLLOWED IN *Kinion v. Kansas City, Ft. S. & M. R. Co.*, 39 *Mo. App.* 382. *Wood v. Kansas City, Ft. S. & M. R. Co.*, 43 *Mo. App.* 294. QUOTED IN *Walton v. Wabash W. R. Co.*, 32 *Mo. App.* 634.

In an action under § 43, page 311, of Wagner's Statutes, for damages to stock, where it is shown that plaintiff's stock have been killed at a point where it is the duty of the corporation to fence, and where it has not been fenced, a *prima facie* case is made for the plaintiff; but where plaintiff's testimony further shows that the defect in the fence, for which the corporation was responsible, had nothing whatever to do with the killing of the stock, the corporation is not liable. *Higginbottom v. St. Louis, K. C. & N. R. Co.*, 4 *Mo. App.* 596.

In an action for double damages for killing stock, proof that the animal was killed at a point a quarter of a mile from the depot, beyond the switch limits, where the road was fenced on one side but not on the other, is, *prima facie*, sufficient to show that the killing did not occur within the limits of an incorporated town or at a public crossing. *Lepp v. St. Louis, I. M. & S. R. Co.*, 29 *Am. & Eng. R. Cas.* 242, 87 *Mo.* 139.—FOLLOWED IN *Johnson v. Chicago, B. & K. C. R. Co.*, 27 *Mo. App.* 379.

When it is shown in evidence that cattle were killed by a company where their track passed through uninclosed prairie-land, where the track was not fenced, and where there was no road crossing, the law presumes negligence on the part of the company. *Lantz v. St. Louis, K. C. & N. R. Co.*, 54 *Mo.* 228.—FOLLOWED IN *Kinion v. Kansas City, Ft. S. & M. R. Co.*, 39 *Mo. App.* 382.

If a person's cattle are killed on a railroad track, where the track passes through his inclosed field, at a point which was not a public crossing and where there was no fence, the presumption is, unless the circumstances of the case rebut it, that the cattle strayed on the track on account of the absence of the fence. *Fickle v. St. Louis, K. C. & N. R. Co.*, 54 *Mo.* 219, 12 *Am. Ry. Rep.* 376.—FOLLOWING *Aubuchon v. St. Louis & I. M. R. Co.*, 52 *Mo.* 522. NOT FOLLOWING *Cecil v. Pacific R. Co.*, 47 *Mo.* 246.—FOLLOWED IN *Gilmore v. St. Louis, K. C. & N. R. Co.*, 54 *Mo.* 227; *Walther v. Pacific R. Co.*, 55 *Mo.* 271; *Sparr v. St. Louis, K. C. & N. R. Co.*, 57 *Mo.* 152. QUOTED IN *Walton v. Wabash W. R. Co.*, 32 *Mo. App.* 634.

Where an unfenced railroad passes through a farm where live stock are running, which stray upon the track and are killed by the train, these facts make a *prima facie* case against the railroad company. *Johnson v. Baltimore & O. R. Co.*, 25 *W. Va.* 570.—FOLLOWING *McCoy v. California Pac. R. Co.*, 40 *Cal.* 532; *Huyett v. Philadelphia & R. R. Co.*, 23 *Pa. St.* 373.

Proof that the killing occurred within the station grounds will not raise a presumption of negligence. *Plaster v. Illinois C. R. Co.*, 35 *Iowa* 449, 5 *Am. Ry. Rep.* 528.

**488. Showing defective fence or gate.\***—In an action under the Missouri

\* See ante, 103-113, 394; post, 506.

double damage act, proof that plaintiff's mule was injured on the track by reason of passing from his adjoining field over a fence which the company was bound to maintain, but which was not such as the law requires, makes out a *prima facie* case, and a demurrer to such evidence is properly overruled. *Williams v. Missouri Pac. R. Co.*, 74 Mo. 453.—FOLLOWED IN *Campbell v. Missouri Pac. R. Co.*, 78 Mo. 639.

In an action for killing stock under the Missouri double damage act, evidence by plaintiff as to the defective condition of the company's fence, and proof of such circumstances as would raise an inference that the cattle entered the track at such place, make out a *prima facie* case justifying its submission to the jury. *Walthers v. Missouri Pac. R. Co.*, 19 Am. & Eng. R. Cas. 662, 78 Mo. 617.—FOLLOWED IN *Marrett v. Hannibal & St. J. R. Co.*, 84 Mo. 413.

Proof that a farm-crossing gate was constructed defectively and was out of repair will not raise the presumption that an animal was injured by reason of such defects. *Johnson v. Chicago, R. I. & P. R. Co.*, 55 Iowa 707, 8 N. W. Rep. 664.

**489. Showing failure to give signals.**—Under Georgia Code, § 3033, proof that a cow was killed by a locomotive whose whistle was not blown, as required by § 708, raises a presumption of negligence of the engineer. *Western & A. R. Co. v. Steadly*, 65 Ga. 263.

In an action for killing stock, the death of the animal and the failure to sound the whistle and ring the bell, as required by Mo. Rev. St., § 806, make out a *prima facie* case. *Persinger v. Wabash, St. L. & P. R. Co.*, 82 Mo. 196.—APPROVED IN *Keim v. Union R. & T. Co.*, 90 Mo. 314.

While proof that a failure to ring a bell or sound a whistle is *prima facie* evidence of negligence, still the law does not presume that an injury to stock was caused by such failure. *Chicago & A. R. Co. v. Hanley*, 26 Ill. App. 351.

**490. What will rebut the presumption of negligence, generally.**—To rebut successfully the presumption of negligence against a railroad company, arising upon proof of killing of stock, it is better that the agents of the company who were on the engine at the time be called.

*East Tenn. V. & G. R. Co. v. Culler*, 75 Ga. 704.

And when the servants of the railroad company are called to rebut the statutory presumption of negligence, they must, under the peculiar circumstances of this case, be presumed to have known the facts. *Louisville & N. R. Co. v. Marriott*, (Ky.) 19 Am. & Eng. R. Cas. 509.

The law presumes negligence when the action is brought within six months of the killing, but this presumption may be rebutted by showing there was none in fact. *Bethea v. Raleigh & A. R. Co.*, 106 N. Car. 279, 10 S. E. Rep. 1045.

**491. Showing that animal was trespassing upon the track.**—Under the Arkansas statute, proof that stock are killed or injured by passing trains raises a presumption of a lack of due care and skill or diligence on the part of the company; but this presumption may be rebutted. If the stock injured or killed be trespassing on the track, the company is only required to use ordinary or reasonable care to avoid injuring them. *Little Rock & Ft. S. R. Co. v. Henson*, 19 Am. & Eng. R. Cas. 440, 39 Ark. 413.—APPROVED IN *Atchison, T. & S. F. R. Co. v. Walton*, 3 N. Mex. 319.

**492. Showing actual absence of negligence on company's part.**—Under the Kentucky statute declaring that the killing or damaging of stock by the cars of a railroad company shall be *prima facie* evidence of negligence, the uncontradicted and unimpeached testimony of such employees of the company as are presumed to know the facts, to the effect that there was no negligence, overcomes the *prima facie* case of the plaintiff, and he cannot recover. *Kentucky C. R. Co. v. Talbot*, 7 Am. & Eng. R. Cas. 585, 78 Ky. 621.—APPROVED IN *Volkman v. Chicago, St. P., M. & O. R. Co.*, 35 Am. & Eng. R. Cas. 204, 5 Dak. 69, 37 N. W. Rep. 731; *Huber v. Chicago, M. & St. P. R. Co.*, 6 Dak. 392. QUOTED IN *Little Rock & Ft. S. R. Co. v. Turner*, 41 Ark. 161; *Jacksonville, T. & K. W. R. Co. v. Garrison*, 30 Fla. 567.

The statutory presumption arising from the killing of stock by a train, under the Mississippi statute, is rebutted by the company when it is shown that the whistle was sounded at the time of the accident. *Mobile & O. R. Co. v. Dale*, 61 Miss. 206.

Where an action is brought against a

\* See ante, 35, 65, 192-194, 209, 449.

company for the negligent killing of a domestic animal, the plaintiff can, if he sees fit to do so, make out a *prima facie* case under North Dakota statute, without showing actual negligence, by proving the value of the animal, and the fact that it was killed by defendant's train of cars; but in such case, if the defendant, to overcome the statutory presumption of negligence arising from the killing, shows conclusively, by undisputed evidence, that the train in question was at the time of the accident in good repair and condition, and was equipped with the best modern appliances and improvements in use, and was operated skilfully and with due care; then the statutory presumption of negligence arising from the killing is rebutted and entirely overcome; and where, in such case, at the close of the testimony defendant requested the trial court to direct a verdict for the defendant, and the court refused to do so, such refusal was reversible error. *Hodgins v. Minneapolis, St. P. & S. St. M. R. Co., (N. Dak.)* 56 Am. & Eng. R. Cas. 137, 56 N. W. Rep. 139.

**493. Showing that the accident was unavoidable.\***—If the evidence shows, without any conflict, that the engineer of the train, on seeing several cattle on the track, sounded the cattle-alarm and frightened them off, checking the speed of the train until they got down the embankment, where there was a wire fence thirty or forty feet distant; and that as the train again got under headway one of the animals ran up the embankment, fifty feet in front of the engine, and was run over and killed before the train could be checked, the presumption of negligence is rebutted, and the court may give the general charge in favor of the defendant. *Alabama G. S. R. Co. v. Moody*, 45 Am. & Eng. R. Cas. 524, 90 Ala. 46, 8 So. Rep. 57.

If the engineer is keeping a proper look-out, and an animal that is killed, when discovered on the track, is so near to the engine that the accident could not be prevented by the use of all proper appliances, the presumption of negligence against the company is overcome; neither can it be said to be negligence *per se* for an engineer to signal the brakeman first, which prevented him signaling at the same time. *Mobile & G. R. Co. v. Caldwell*, 83 Ala. 196, 3 So. Rep. 445.

The uncontradicted testimony of defendant's witnesses that the killing was unavoidable is sufficient to rebut the statutory presumption of negligence. *Memphis & L. R. Co. v. Shoecraft*, 53 Ark. 96, 13 S. W. Rep. 422.

The presumption of negligence on the part of a railroad arising from proof that stock were killed is sufficiently rebutted by evidence showing that the train and its appliances were in perfect condition; that the engineer was keeping a look-out; that as soon as the stock were seen the air-brakes were applied, the cattle-alarm was sounded, and everything possible was done to prevent the killing; but that by reason of the fog and the rails being wet it was impossible to stop the train in the distance that the cattle could be seen in time to avoid a collision. *Georgia M. & G. R. Co. v. Harris*, 83 Ga. 393, 9 S. E. Rep. 786.—FOLLOWING *Georgia R. & B. Co. v. Wall*, 80 Ga. 202.

Where there was no conflict in the evidence, and it showed that a railroad train killed a mule; that the night was a clear, starlight night, but that at the place where the casualty occurred the track was enveloped by a smoke or fog, so that the engineer and fireman, who were on the look-out, were unable in consequence thereof to discover the mule on the track until they were within fifty or sixty yards of it, when it was impossible to have stopped the train so as to avoid killing the mule; and that the whistle was blown, the presumption was rebutted, and a verdict finding damages against the company on account of the killing of the mule was contrary to the evidence and without evidence to support it. *Georgia R. & B. Co. v. Wilhoit*, 78 Ga. 714, 3 S. E. Rep. 698.

A company sufficiently rebuts a presumption of negligence raised by the Kentucky statute making the killing of stock *prima facie* evidence of negligence, when it shows that the stock were killed early in the morning when very foggy, near a curve in the road, and where from the speed of the train and the facts in the case it was plain that the killing could not have been avoided after the stock could have been seen. *Grundy v. Louisville & N. R. Co., (Ky.)* 2 S. W. Rep. 899.

In an action against a company for killing plaintiff's mules, where negligence is established by force of the North Carolina statute (Bat. Rev. ch. 16, § 11), it can only be rebutted by showing that by the exercise

\* See ante, 52, 53, 406; post, 515, 550.



of due diligence the stock could not have been seen in time to save them. *Pippen v. Wilmington, C. & A. R. Co.*, 75 N. Car. 54.—REVIEWED IN *Doggett v. Richmond & D. R. Co.*, 81 N. Car. 459.

**494. What will not rebut the presumption of negligence.**—Where the proof shows that negligence in killing stock could be imputed to a company from the acts or omissions of either its engineer or its fireman, the *prima facie* case of negligence established by proof that the animal was killed by a moving train is not overcome by proof that the engineer only exercised due diligence. *Little Rock & M. R. Co. v. Chriscoe*, 57 Ark. 192, 21 S. W. Rep. 431.

The statutory presumption of negligence from a killing of stock on defendant's track is not rebutted where defendant's engineer testified that the killing was unavoidable, if his testimony was improbable or inconsistent. *St. Louis, I. M. & S. R. Co. v. Chambliss*, 54 Ark. 214, 15 S. W. Rep. 469.

Evidence that all possible efforts were used to avoid a collision of a running train with stock upon the track, without specifying the usual appliances resorted to in such cases, is not sufficient to rebut the presumption of negligence in striking the animal. *Kansas City, S. & M. R. Co. v. Summers*, 45 Ark. 295.

Where it appears that an animal is killed by a locomotive and no whistle was sounded, in order to rebut the presumption of negligence, under Georgia Code, § 3033, the company must show that its agents exercised "all ordinary and reasonable care and diligence," and merely showing that an animal was killed at a curve, and was hobbled, is not sufficient. *Georgia R. Co. v. Fisk*, 65 Ga. 714.

The statutory presumption of negligence for killing live stock, when the action is brought within six months (North Carolina Code, § 2326), is not rebutted by showing that the live stock were under the control of a person at the time. *Randall v. Richmond & D. R. Co.*, 42 Am. & Eng. R. Cas. 603, 104 N. Car. 410, 10 S. E. Rep. 691.

The *prima facie* evidence of negligence on the part of a company in a suit for damages for killing stock is not impaired by a local act requiring stock to be fenced in, but the defendant must repel the presumption by satisfactory proof to the jury. *Roberts v. Richmond & D. R. Co.*, 20 Am. & Eng. R. Cas. 473, 88 N. Car. 560.

It is enacted by the North Carolina act of 1856-57, ch. 7, "that when any cattle or other live stock shall be killed or injured by the engines or cars running upon any railroad, it shall be *prima facie* evidence of negligence;" this rule can only be rebutted by showing that the agents of such railroad company used all proper precautions to guard against damage. It is not sufficient to prove that there was probably no negligence. *Battle v. Wilmington & W. R. Co.*, 66 N. Car. 343.—REVIEWED IN *Doggett v. Richmond & D. R. Co.*, 81 N. Car. 459; *Edgars v. Richmond & D. R. Co.*, 25 Am. & Eng. R. Cas. 451, 94 N. Car. 654.

The *prima facie* case under such act is not rebutted where the testimony of the plaintiff showed that his horse had been injured on the defendant's road by the running of a train against it, and the evidence on the part of the defense left it doubtful whether the brakes had been applied after the animal was discovered to be on the track. *Clark v. Western N. C. R. Co.*, 1 Winst. (N. Car.) 109.—REVIEWED IN *Doggett v. Richmond & D. R. Co.*, 81 N. Car. 459.

#### d. Burden of Proof.\*

**495. On plaintiff to show defendant's negligence, generally.**† — The burden of proof in a suit in damages for the killing of animals by a railway company rests on the plaintiff to show negligence. *Day v. New Orleans Pac. R. Co.*, 36 La. Ann. 244. *Waldron v. Portland, S. & P. R. Co.*, 35 Me. 422.—REVIEWING *Quimby v. Vermont C. R. Co.*, 23 Vt. 393.—*Bethje v. Houston & C. T. R. Co.*, 26 Tex. 604.—APPROVING *Danner v. South Carolina R. Co.*, 4 Rich. (So. Car.) 329.

Where plaintiff sues for stock killed, the burden is on him to show negligence, or such facts as create a liability under the statute. *Calvert v. Hannibal & St. J. R. Co.*, 34 Mo. 242.—FOLLOWED IN *Calvert v. Hannibal & St. J. R. Co.*, 38 Mo. 467. QUOTED IN *Hill v. Missouri Pac. R. Co.*, 49 Mo. App. 520. REVIEWED IN *Iba v. Hannibal & St. J. R. Co.*, 45 Mo. 469.

Mere proof of killing stock does not raise a presumption of negligence, so as to make the company liable, but the burden of

\* See ante, 285, 286.

† Burden of proof, where it is claimed that statutory signals were not given to prevent injuries to stock because such would have been unavailing, see note, 21 L. R. A. 724.



showing negligence is on the plaintiff. *Illinois C. R. Co. v. Reedy*, 17 Ill. 580.—QUOTED IN *Galena & C. U. R. Co. v. Jacobs*, 20 Ill. 478. DISTINGUISHED IN *Toledo, W. & W. R. Co. v. Fergusson*, 42 Ill. 449; *Illinois C. R. Co. v. Phillips*, 55 Ill. 194. OVERRULED IN *Illinois C. R. Co. v. Middlesworth*, 46 Ill. 494.—*Mobile & O. R. Co. v. Hudson*, 50 Miss. 572. *Schneir v. Chicago, R. I. & P. R. Co.*, 40 Iowa 337.—APPROVED IN *Atchison, T. & S. F. R. Co. v. Walton*, 3 N. Mex. 319.

In an action to recover for stock killed or injured, the burden is on plaintiff to show either negligence on the part of the company, or that it was its duty to fence at the place of the accident, which it had failed to do. *Comstock v. Des Moines Valley R. Co.*, 32 Iowa 376, 10 Am. Ry. Rep. 23.—FOLLOWED IN *Kyser v. Kansas City, St. J. & C. B. R. Co.*, 56 Iowa 207. QUOTED IN *Smith v. Chicago, M. & St. P. R. Co.*, 13 Am. & Eng. R. Cas., 534, 60 Iowa 512.

Proof of killing cattle on station grounds does not raise a presumption of negligence, and the burden of proving it is upon the plaintiff, when such proof is necessary to entitle him to recover. *Plaster v. Illinois C. R. Co.*, 35 Iowa 449, 5 Am. Ry. Rep. 528.

Proof that an animal was killed on the track raises no presumption of negligence in a common-law action for damages, but the burden of proving negligence is on plaintiff. *Atchison, T. & S. F. R. Co. v. Walton*, 3 N. Mex. 319, 9 Pac. Rep. 351.—REVIEWING *New Jersey R. & T. Co. v. Pollard*, 22 Wall. (U. S.) 341; *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181; *Danner v. South Carolina R. Co.*, 4 Rich. (So. Car.) 329. QUOTING *McCoy v. California Pac. R. Co.*, 40 Cal. 532. APPROVING *Lyndsay v. Connecticut & P. R. R. Co.*, 27 Vt. 643; *Chicago & M. R. Co. v. Patchin*, 16 Ill. 198; *Great Western R. Co. v. Morthland*, 30 Ill. 451; *Schneir v. Chicago, R. I. & P. R. Co.*, 40 Iowa 337; *Indianapolis & C. R. Co. v. Means*, 14 Ind. 30; *New Orleans, J. & G. N. R. Co. v. Enochs*, 42 Miss. 603; *Mobile & O. R. Co. v. Hudson*, 50 Miss. 572; *Grand Rapids & I. R. Co. v. Judson*, 34 Mich. 507; *Brown v. Hannibal & St. J. R. Co.*, 33 Mo. 309; *Scott v. Wilmington & R. R. Co.*, 4 Jones (N. Car.) 432; *Walsh v. Virginia & T. R. Co.*, 8 Nev. 111; *Flattes v. Chicago, R. I. & P. R. Co.*, 35 Iowa 191; *Kentucky R. Co. v. Talbot*, 78 Ky. 621; *Whittier v. Chicago, M. & St. P. R. Co.*, 26 Minn. 484; *Little*

*Rock & Ft. S. R. Co. v. Henson*, 39 Ark. 413; *Little Rock & Ft. S. R. Co. v. Holland*, 40 Ark. 336.

The burden of showing negligence in the manner of running and operating a train is upon plaintiff. *Pittsburgh, C. & St. L. R. Co. v. Heiskell*, 13 Am. & Eng. R. Cas. 555, 38 Ohio St. 666.

In an action to recover damages for killing live stock, the plaintiff must prove affirmatively that want of ordinary care on the part of the company or its employes caused the injury. Such inference does not arise from the mere fact that the animal was killed; and evidence showing that a horse escaped from pasture during the night and galloped upon a railroad track for about forty rods, where it was killed by the engine, is not sufficient to fix liability upon the company. *Pittsburgh, C. & St. L. R. Co. v. McMillan*, 7 Am. & Eng. R. Cas. 588, 37 Ohio St. 554.—REVIEWING *Ruffner v. Cincinnati, H. & D. R. Co.*, 34 Ohio St. 96; *Central Ohio R. Co. v. Lawrence*, 13 Ohio St. 66.—DISTINGUISHED IN *Cleveland, C., C. & I. R. Co. v. Walrath*, 8 Am. & Eng. R. Cas. 371, 38 Ohio St. 461, 43 Am. Rep. 433.

Where suit is brought to recover for cattle killed at a public road crossing, unless it appears that the cattle were lawfully upon the road, the burden is on plaintiff to prove negligence on the part of the company. *Galpin v. Chicago & N. W. R. Co.*, 19 Wis. 604.—FOLLOWED IN *Spaulding v. Chicago & N. W. R. Co.*, 30 Wis. 110.

Where the owner pursues his common-law remedy he has the burden of proof, and he does not make out a *prima facie* case of negligence by showing that the injury was occasioned by defendant's locomotive striking the plaintiff's stock, and that the damages were a sum certain, railroad companies not being required in Colorado to fence their track, and stock being permitted to run at large. *Denver & R. G. R. Co. v. Henderson*, 31 Am. & Eng. R. Cas. 559, 13 Pac. Rep. 910, 10 Colo. 1. See also *Denver & R. G. R. Co. v. Henderson*, 10 Colo. 4, 13 Pac. Rep. 912.

Before the adoption of the Texas statute requiring railroads to fence, the burden was always on the plaintiff to show negligence on the part of the company where stock was killed; but under the statute requiring companies to fence, proof of killing raises a presumption of negligence and casts the

burden on the company to show that the track was fenced. *Texas & P. R. Co. v. Miller*, 1 *Tex. App. (Civ. Cas.)* 104.

By the common law, in order to maintain an action against a company for injury to stock, it was incumbent on the plaintiff to prove that the damage resulted from the fault or negligence of the defendant or its agents; this has been changed by the Maryland statute, which casts the onus of proof on the defendant. *Keech v. Baltimore & W. R. Co.*, 17 *Md.* 32.—APPLYING *Baltimore & O. R. Co. v. Lamborn*, 12 *Md.* 257.

**496. To show gross or wilful negligence.**—If the railway has erected and maintained sufficient fences and cattle-guards, and stock are killed or injured, the burden of proof is upon the owner to show that the injury resulted from the negligence or wilful act of the servants of the company. But if it has failed to comply with the statute, the owner has only to show the injury and the omission. *Galena & C. U. R. Co. v. Crawford*, 25 *Ill.* 529.

**497. To show that killing was done by company's train.\***—Where suit is brought to recover of a company for cattle found dead along the track, it is incumbent on plaintiff to show that they were killed by trains, but this may be done by circumstantial evidence.† *Gulf, C. & S. F. R. Co. v. Washington*, 49 *Fed. Rep.* 347, 4 *U. S. App.* 121, 1 *C. C. A.* 286.

**498. To show company's negligence after discovering animal.**‡—The onus is on plaintiff to show want of such care after the cow was discovered by those in charge of the train. *Locke v. First Div. St. P. & P. R. Co.*, 15 *Minn.* 350 (*Gill*, 283).

A company is not liable for an injury to a horse which becomes frightened and runs into a trestle, unless it appears that there was negligence after the dangerous condition of the animal was discovered, the burden to prove which is on the plaintiff. *Illinois C. R. Co. v. Weathersly*, 63 *Miss.* 581.

**499. To show killing within county where suit is brought.**—The burden of proving that the killing was done within the county where suit is brought, is upon plaintiff. *Indianapolis & C. R. Co. v. Renner*, 17 *Ind.* 135.—CRITICISED IN *Indian-*

*apolis & M. R. Co. v. Solomon*, 23 *Ind.* 534.

**500. To show company's failure to post statutory notice of injury.**—Where a plaintiff claims double damages under the Arkansas statutes, on the ground that the company failed to post notice of the injury as required by statute, the burden is on him to prove such failure. *Kansas City, S. & M. R. R. Co. v. Summers*, 45 *Ark.* 295.

**501. To show ownership of animal.\***—It is incumbent on one suing for damages for injury to stock to establish his ownership of the stock before he is entitled to recover. *Welsh v. Chicago, B. & Q. R. Co.* 53 *Iowa* 632, 6 *N. W. Rep.* 13, 21 *Am. Ry. Rep.* 181.

**502. To show violation of ordinance as to speed.**—In an action to recover the value of a horse killed on defendant's track, plaintiff alleged a violation of an ordinance which prohibited the running of trains, where the accident occurred, at a greater rate of speed than six miles an hour. *Held*, the burden of proving this averment was upon plaintiff, and the mere proof that the animal was killed on defendant's track within such portion of the town did not raise the presumption that the train was running at the prohibited rate of speed. *Chicago & A. R. Co. v. Engle*, 58 *Ill.* 381.

**503. To show animal was not trespassing on adjacent lands.**—Where an owner of live stock seeks to recover damages from a railroad for injuries thereto, and it appears that the stock went upon the track from the lands of a third party, by reason of an insufficient fence on the side bordering the railroad, but which were properly fenced upon the other three sides, the burden is on the owner to show that his cattle were on such lands by license from the owner. *Carpenter v. St. Louis, I. M. & S. R. Co.*, 25 *Mo. App.* 110.—FOLLOWED IN *Smith v. St. Louis, I. M. & S. R. Co.*, 25 *Mo. App.* 113.

**504. To show defective gate caused accident.**—Where plaintiff's horses were injured on defendant's track, having entered thereon in the night through a gateway in defendant's fence, which was closed the evening previous—*held*, that the fact that the gate was defectively constructed and out of repair would not raise a presumption that the injury occurred by reason of such defects, so as to cast upon defend-

\* Burden of proving that a train killed animals, see 56 *AM. & ENG. R. CAS.* 142, *abstr.*

† See *ante*, 405, 452, 486.

‡ See *ante*, 49-52, 63, 64, 115.

\* See *ante*, 313, 445, 471.

ant the burden of disproving such fact to defeat a recovery. *Johnson v. Chicago, R. I. & P. R. Co.*, 55 Iowa 707, 8 N. W. Rep. 664.

**505. To show that road was not fenced.**—In an action for killing stock upon the track of its road, at a place where the road was not fenced, the burden of proof that the road was not fenced at the place of the killing, or at the place of the entry of the animals upon the track, is on the plaintiff; but that it was not the company's duty to fence at such place is matter of defense. *Indianapolis, P. & C. R. Co. v. Lindley*, 11 Am. & Eng. R. Cas. 495, 75 Ind. 425. *Indianapolis, B. & W. R. Co. v. Penry*, 48 Ind. 128.

Where plaintiff sues under the Missouri double damage act, Rev. St. 1889, § 2611, to recover for stock killed, he must show whether the track was fenced or not at the point where the animals came on it. *Goodwin v. Kansas City, Ft. S. & M. R. Co.*, 43 Mo. App. 359.—FOLLOWING *Kinion v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 382.

**506. To show that the fence was defective.**—In actions to recover for cattle killed by moving trains, the burden is on the plaintiff to show that the track was not sufficiently fenced at the place where the cattle entered the track. *Lake Erie & W. R. Co. v. Kneadle*, 19 Am. & Eng. R. Cas. 568, 94 Ind. 454.

When, however, in such a case the railroad company asserts that the place was one which it was not bound to fence, then the burden is on it to establish that fact. *Evansville & T. H. R. Co. v. Mosier*, 22 Am. & Eng. R. Cas. 569, 101 Ind. 597.

**507. To show place of injury to be where company should fence.**—Where suit is brought under the Illinois statute to recover for stock killed, the burden is on plaintiff to show that it was the duty of the company to fence at the place. *Cleveland, C. & St. L. R. Co. v. Myers*, 43 Ill. App. 251.

In an action for killing cattle by a railroad, plaintiff should negative, by proof, that there was a public crossing where the killing occurred, and should show that the company was bound to fence at that point; and the proof should show that the injury was done by the road of the company sued. *Ohio & M. R. Co. v. Taylor*, 27 Ill. 207.—DISTINGUISHED IN *Toledo, P. & W. R. Co. v. Eastburn*, 54 Ill. 381.

The burden of proof under the Indiana statute is upon the plaintiff to show that the animal came upon the track at a place where the company was bound to fence and that there was no fence. *Louisville, N. A. & C. R. Co. v. Goodbar*, 102 Ind. 596, 2 N. E. Rep. 337, 3 N. E. Rep. 162.

In an action under the Iowa statute for injuring stock, where the issues are made, whether the stock was running at large, and as to the place of the injury, and whether the company was bound to fence at such place, the burden is on plaintiff to maintain these issues. *Taylor v. Chicago, St. P. & K. C. R. Co.*, 76 Iowa 753, 40 N. W. Rep. 84.

Where stock are killed, the burden is on plaintiff to show that the injury was done where the company is required to fence its track, which does not include station grounds. *Kyser v. Kansas City, St. J. & C. B. R. Co.*, 56 Iowa 207, 9 N. W. Rep. 133.—FOLLOWING *Comstock v. Des Moines Valley R. Co.*, 32 Iowa 376.

**508. To bring himself within the benefit of the fence law.\***—The obligation imposed upon railroad companies to fence, under Missouri Rev. St. § 809, is for the benefit of adjoining proprietors only, and not for the benefit of strangers, and the benefit extends to lessees, occupiers, and licensees of the owner of the land; and where plaintiff sues for stock killed, the burden is on him to bring himself within the terms and meaning of the statute. *Summers v. Hannibal & St. J. R. Co.*, 29 Mo. App. 41.

**509. To show company's knowledge of defective fence.†**—Where a company has once erected a fence along its track as required by law, which has since been broken down, the burden is upon the plaintiff, in an action for damages for injury to cattle, to show that the company knew of the damage to the fence, or that it had been down for such a length of time as to have enabled it, by the exercise of due care, to have had knowledge of the defect. *Young v. Hannibal & St. J. R. Co.*, 82 Mo. 427.—QUOTING *Clardy v. St. Louis, I. M. & S. R. Co.*, 73 Mo. 576.—FOLLOWED IN *Foster v. St. Louis, I. M. & S. R. Co.*, 44 Mo. App. 11.

The burden of proving facts which will raise a presumption of negligence against the company for allowing bars to remain down a long period of time is upon the

\* See ante, 92-94.

† See ante, 142-144.

plaintiff. *Perry v. Dubuque S. R. Co.*, 36 Iowa 102.

**510. Where suit is not brought within six months after injury.\***—Where a company is sued for damages by its train to stock after six months from the time of the injury, not only is the burden of proving negligence on the plaintiff, but he must show facts inconsistent with the probability of care: e.g., that the whistle was not blown. *Jones v. North Carolina R. Co.*, 67 N. Car. 122.

**511. When action is brought within six months after opening of road.**—Where stock were killed by the engine of a railroad, and the road was not open for use six months prior to the killing, it was incumbent on the owner to show negligence on the part of the company before a recovery could be had. *Rockford, R. I. & St. L. R. Co. v. Connell*, 67 Ill. 216.—QUOTING *Chicago & N. W. R. Co. v. Barrie*, 55 Ill. 226.—QUOTED IN *Peoria, D. & E. R. Co. v. Aten*, 43 Ill. App. 68.

**512. Upon defendant, generally.**—Under statutory provisions now in force (Alabama Code, § 1147; Sess. Acts 1886-7, p. 146, in footnote to said section) the burden of disproving negligence is not on the railroad company, when the action is brought to recover damages for killing or injuring a cow, and it appears that the injury was caused by a freight car which, having been left standing on a side-track with its wheels scotched, broke loose and ran down on the cow. *Montgomery & E. R. Co. v. Perryman*, 91 Ala. 413, 8 So. Rep. 699.

**513. To rebut statutory presumption of negligence, generally.**—Proof that stock were injured by a running train establishes a *prima facie* case of negligence, and casts the burden on the company to overthrow this by proof of proper diligence. *Alabama G. S. R. Co. v. McAlpine*, 22 Am. & Eng. R. Cas. 602, 75 Ala. 113.—DISAPPROVED IN *Georgia Pac. R. Co. v. Hughes*, 39 Am. & Eng. R. Cas. 674, 87 Ala. 610, 6 So. Rep. 413.—*Birmingham Mineral R. Co. v. Harris*, 98 Ala. 326.—FOLLOWING *South & N. Ala. R. Co. v. Bees*, 82 Ala. 340. OVERRULING *Georgia Pac. R. Co. v. Hughes*, 87 Ala. 610; *Montgomery & E. R. Co. v. Perryman*, 91 Ala. 413.

It being shown that the animal, for the negligent killing of which the action was

brought, was on the railroad track when it was struck and killed (Alabama Code, § 1147), the onus is on the defendant to acquit itself of the charge of negligence. *Louisville & N. R. Co. v. Kelsey*, 42 Am. & Eng. R. Cas. 584, 89 Ala. 287, 7 So. Rep. 648.

In an action for the killing of plaintiff's sheep by the defendant's train, the burden of negating negligence is upon the defendant. *Louisville & N. R. Co. v. Barker*, 96 Ala. 435, 11 So. Rep. 453.—APPLYING *Georgia Pac. R. Co. v. Hughes*, 87 Ala. 610; *Alabama G. S. R. Co. v. Moody*, 90 Ala. 46; *Alabama G. S. R. Co. v. Moody*, 92 Ala. 279. DISTINGUISHING *Montgomery & E. R. Co. v. Perryman*, 91 Ala. 413.

The presumption of negligence is against the railroad company, and the burden of proof upon it to show the contrary, even where the animal killed was in a pasture inclosed on both sides of the railroad. *Woolfolk v. Macon & A. R. Co.*, 56 Ga. 457.—FOLLOWING *Macon & A. R. Co. v. Vaughn*, 48 Ga. 464.

Where it was proved that a cow was killed by a train, this imposed on the company the burden of showing that it was in the exercise of all ordinary and reasonable care and diligence, or that the damage was caused solely by the negligence of the owner of the cow, or, to diminish damages, that both were at fault. Negligence is a question for the jury, and the issues thus presented necessarily depend upon facts. Therefore, where the plaintiff obtained a verdict on the appeal trial in a justice's court, and the defendant carried the case to the superior court by *certiorari*, if the judge sustained the *certiorari*, it was proper to order a new trial and not to finally dispose of the case. *Georgia R. Co. v. Bird*, 76 Ga. 13.

The burden of proof under the Illinois statute is upon the company to disprove negligence upon its part where the evidence shows that the stock were killed within the limits of a city, town, or village, while the train was running at a rate of speed prohibited by the city ordinance. *Toledo, P. & W. R. Co. v. Deacon*, 63 Ill. 91, 7 Am. Ry. Rep. 150.

In an action under § 1, of article 77, of the Maryland Code, negligence is imputed to the railroad company, and the burden of proof is on the company to negative this imputation, and to establish affirmatively that the injury complained of resulted from a disaster which could have been avoided by the

\* See ante, 123-125, 358, 467.

use o. proper care and diligence on the part of its agents, and that such proper care and diligence were observed by them. *North-ern C. R. Co. v. Ward*, 63 Md. 362.

Where suit is under the Mississippi Code, § 1059, to recover for stock killed, proof of killing casts the burden on the defendant to disprove negligence. *Louisville, N. O. & T. R. Co. v. Smith*, 67 Miss. 15, 7 So. Rep. 212.

The rule in Danner's Case, that mere proof that cattle were killed upon a railroad track by the train of the company is sufficient to throw the onus of showing that there was no negligence on the company, held applicable to a case of the killing of a horse at night. *Murray v. South Carolina R. Co.*, 10 Rich. (So. Car.) 227.—APPLIED IN *Roof v. Charlotte, C. & A. R. Co.*, 4 So. Car. 61.

**514. To show due care on company's part.**—When the plaintiff has proved that his mare was killed by a train, the burden is then cast upon the company to show that it has employed that measure of diligence which the law exacts of railroad companies, and that the injury was not caused by its failure to do so; or it must show that the injury could not have been averted by the employment of such diligence. *South & N. Ala. R. Co. v. Bees*, 82 Ala. 340, 2 So. Rep. 752.—DISAPPROVED IN *Georgia Pac. R. Co. v. Hughes*, 39 Am. & Eng. R. Cas. 674, 87 Ala. 610, 6 So. Rep. 413.

Under the Arkansas statute, the burden is on defendant railroad company to show reasonable care and diligence in the management of its trains, where it appears that stock have been killed. *St. Louis, I. M. & S. R. Co. v. Vincent*, 36 Ark. 451. *Kansas City, S. & M. R. Co. v. Summers*, 45 Ark. 295. *Memphis & L. R. R. Co. v. Jones*, 36 Ark. 87.

Where cattle are attracted by cotton-seed which has been permitted to accumulate near a railroad track, a *prima facie* case of negligence is made by proof of the killing under the Arkansas statute, the burden of overcoming which, by showing that the company's servants used reasonable care to avert the injury, is upon the company.\* *Little Rock & Ft. S. R. Co. v. Dick*, 42 Am. & Eng. R. Cas. 591, 52 Ark. 402, 12 S. W. Rep. 785.

Where the driver of a team of mules was using the right of way of a railroad company between its main and side-tracks for the purpose of unloading freight from one of its cars, having gone there upon invitation of the company, and one of the mules was struck and killed by a passing engine, the court properly instructed the jury that the fact of the killing made a *prima facie* case of negligence under the Arkansas statute, which cast upon the company the burden of showing that it had used due care. *St. Louis, I. M. & S. R. Co. v. Taylor*, 57 Ark. 136.

Where a railroad company is sued, under the Georgia Code, § 3033, for killing stock, which is admitted, the burden of proof is on it to show that it exercised reasonable and ordinary care. *Atlantic & G. R. Co. v. Griffin*, 61 Ga. 11.

The burden of proof was on the defendant, in an action against a railroad company for damages for killing a mare, the killing being admitted by the defendant. The admission of killing by the defendant being made *prima facie* evidence of carelessness and negligence of the company by § 5, ch. 57, Gen. St. Ky., the burden was on the defendant to show that the killing was done without actionable fault on the part of the company. *Louisville & N. R. Co. v. Brown*, 13 Bush (Ky.) 475.

If the cattle of a landowner, being rightfully on a railroad crossing, are killed by the engines of the corporation, their destruction is *prima facie* evidence of negligence, and the burden is thrown upon the corporation to show that the injury was occasioned without any fault on its part. Gross negligence need not be shown in order to sustain an action for the injury. *White v. Concord R. Co.*, 30 N. H. 188.

Where plaintiff sues to recover for stock killed on the track, the burden of showing due care is not cast upon the defendant until plaintiff has produced some evidence tending to show a want of due care. *Jones v. North Carolina R. Co.*, 67 N. Car. 122.

**515. To show unavoidable accident.\***—In an action for damages for the killing of plaintiff's live stock by one of defendant's trains, when it is proved that the stock were so killed, the statute (Alabama Code, footnote to § 1147) casts upon the defendant the duty of acquitting itself of

\* See ante, 40.

\* See ante, 52, 53, 466; post, 550.

any negligence by showing that the requirements of § 1144 of the Code were complied with, or by proving to the satisfaction of the jury that an attempt to comply with them was rendered futile by the circumstances, without any fault on the part of the defendant's employes. *Louisville & N. R. Co. v. Posey*, 96 Ala. 262, 11 So. Rep. 423.—QUOTING *Savannah & W. R. Co. v. Jarvis*, 95 Ala. 149; *Louisville & N. R. v. Kelsey*, 89 Ala. 287; *Nashville, C. & St. L. R. Co. v. Hembree*, 85 Ala. 481.

Under the Kentucky Gen. St. ch. 57, § 5, making the fact of stock being killed by a railroad *prima facie* evidence of negligence on the part of the company, it devolves upon the road to show that the killing was unavoidable. *Grundy v. Louisville & N. R. Co.*, (Ky.) 2 S. W. Rep. 899. *Louisville & N. R. Co. v. Simmons*, 85 Ky. 151, 3 S. W. Rep. 10.

Where it is shown that a horse ran for two hundred yards in front of a moving engine before being struck, the burden is on the company to show that the train could not be safely stopped in that distance, as it is a matter of common knowledge that trains can ordinarily be stopped in that distance or less. *Gulf, C. & S. F. R. Co. v. Ellis*, 54 Fed. Rep. 481, 10 U. S. App. 640, 4 C. C. A. 454.

Proof that stock were killed on the track by the company's train raises a presumption of negligence, and casts the burden on it to show proper care, or that the killing was unavoidable. *Nashville & C. R. Co. v. Fuggett*, 3 Coldw. (Tenn.) 402. *Lapine v. New Orleans, O. & G. W. R. Co.*, 20 La. Ann. 158.

**516. To show observance of statutory precautions.**—Alabama Code, § 1699, providing that an engineer on perceiving any obstruction on the track must use all means within his power to stop the train; and § 1700, providing that railroad companies shall be liable for all damages to persons or property resulting from a failure to comply with the preceding section, or from any negligence on the part of the company or its agents; and that when stock are killed or injured the burden of proof is on the company to show a compliance with the preceding section: construed to mean that in any suit for injuries to property the burden of proof is on the company to show that these regulations were observed, if the injury occurred at any of the places mentioned in

the statute. *South & N. Ala. R. Co. v. Williams*, 65 Ala. 74.—FOLLOWED IN East Tenn., V. & G. R. Co. v. Bayliss, 19 Am. & Eng. R. Cas. 480, 74 Ala. 150.

Where suit is brought in Alabama to recover for cattle killed, if it be shown that they were killed on or near a public road crossing, the burden is then upon the company to disprove negligence by showing a compliance with all the statutory requirements, or reasons why they were not complied with. *Alabama G. S. R. Co. v. McAlpine*, 80 Ala. 73.—LIMITING *Mobile & O. R. Co. v. Williams*, 53 Ala. 595; *Clements v. East Tenn., V. & G. R. Co.*, 77 Ala. 533.

If live stock are injured by a railroad company by reason of an obstruction which could or ought to have been perceived, when within the corporate limits of a city or town at or near a depot or a public crossing, in order to excuse the company from liability, all the requirements of the statute as to signals, etc., must have been complied with; and under all circumstances railroad companies are liable for injuries which result from the negligence of its servants or agents; and in either case, where the plaintiff's evidence shows the injury, the burden is on the company to show a compliance with the statute, or to show that it was not negligent. *Mobile & O. R. Co. v. Williams*, 53 Ala. 595, 13 Am. Ry. Rep. 153.—EXPLAINED IN *Clements v. East Tenn., V. & G. R. Co.*, 77 Ala. 533. FOLLOWED IN East Tenn., V. & G. R. Co. v. Bayliss, 19 Am. & Eng. R. Cas. 480, 74 Ala. 150. LIMITED IN Alabama G. S. R. Co. v. McAlpine & Co., 80 Ala. 73.

After it is shown that plaintiff's mules were killed on defendant's railroad by a moving train, the burden of proof is on defendant to show that it was not negligent in respect to a look-out. *Birmingham Mineral R. Co. v. Harris*, 98 Ala. 326, 13 So. Rep. 337.

In an action for damages for killing a cow, the killing by the defendant's train being proved, it is not only incumbent on the defendant to prove that it did all in its power to avert the accident after the cow was discovered on the track, but it must also show that it was maintaining a careful and prudent look-out, and that, in the maintenance of such look-out, the cow could not have been sooner discovered. *Central R. & B. Co. v. Lee*, 96 Ala. 444, 11 So. Rep. 424.—



QUOTING *Louisville & N. R. Co. v. Posey*, 96 Ala. 262.

Under the Mississippi statute, after proof of the killing of stock, the burden is on the company to show that it exercised proper care, and this burden is not shifted by simply proving that the whistle was blown at the time of the accident. *Mobile & O. R. Co. v. Dale*, 61 Miss. 206.

**517. To show sufficiency of fence.**

—While a company is not required to fence its track or to maintain cattle-pits at points where to do so would interfere with the safety of its employes in operating trains, or where fences or cattle-pits would interfere with its rights or with the rights of the public in travelling or doing business with the company, yet the burden is upon the company to show that, in constructing and maintaining a bridge abutting upon a highway, it had adopted all reasonable and practicable precautions to keep animals from entering upon the bridge from the highway; and it does not alter the case that the bridge may have been partially in the highway, or that the animal may have been struck while upon that part of the bridge extending into the highway, on ground appropriated by the company. *Cincinnati, H. & I. R. Co. v. Jones*, 31 Am. & Eng. R. Cas. 491, 111 Ind. 259, 9 West. Rep. 602, 12 N. E. Rep. 113.

Iowa Code, § 1289, provides that proof that stock were killed by a train shall be *prima facie* evidence of negligence on the part of the company; therefore the burden is on the company to show that it had a sufficient fence under the statute. *Brentner v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 448, 68 Iowa 530, 23 N. W. Rep. 245, 27 N. W. Rep. 605.—FOLLOWING *Small v. Chicago, R. I. & P. R. Co.*, 50 Iowa 338.

**518. To show no duty to fence, generally.**—In a suit for killing an animal on account of the want of a sufficient fence, if the company relies upon the fact that its road could not be fenced at the place in question, it has the burden of proof as to that matter. *Louisville, N. A. & C. R. Co. v. Clark*, 19 Am. & Eng. R. Cas. 623, 94 Ind. 111.

In an action, under Missouri Rev. St. § 809, for double damages for killing stock, the burden is on the company to show any circumstances exempting it from its duty to fence its right of way, as enjoined by the

statute. *Hamilton v. Missouri Pac. R. Co.*, 87 Mo. 85.

**519. To show no duty to fence at place of entry.**—The burden is upon the defendant to show affirmatively that the place where the animals entered was one that it could not fence without endangering the safety of its employes. *Chicago & E. I. R. Co. v. Modesitt*, 124 Ind. 212, 24 N. E. Rep. 986. *Cincinnati, I., St. L. & C. R. Co. v. Parker*, 109 Ind. 235, 9 N. E. Rep. 787. *Chicago & E. R. Co. v. Brannegan*, 5 Ind. App. 540, 32 N. E. Rep. 790. *Jeffersonville, M. & I. R. Co. v. Peters*, 1 Ind. App. 69, 27 N. E. Rep. 299. *Toledo, St. L. & K. C. R. Co. v. Jackson*, 5 Ind. App. 547, 32 N. E. Rep. 793. *Pennsylvania R. Co. v. Lindley*, 2 Ind. App. 111, 28 N. E. Rep. 106.

In an action to recover damages for the killing of animals which entered upon the track at a point where it was not fenced, the burden of proof is upon the defendant, when seeking to defeat a recovery upon the ground that the company was not bound to maintain a fence at that point, as it would have endangered the lives of its employes engaged in switching; and a verdict in favor of the plaintiff will not be disturbed where it does not clearly appear from the evidence that the maintenance of a fence and cattle-guards at the point where the cattle entered upon the track would have endangered the safety of the employes of the company. *Indianapolis, D. & W. R. Co. v. Clay*, 4 Ind. App. 282, 28 N. E. Rep. 567, 30 N. E. Rep. 916.

In a suit for killing plaintiff's cow, if the company claims that the animal entered its premises within its station or depot grounds, which are not required to be fenced, it has the burden of proof of such defense. *Wilder v. Chicago & W. M. R. Co.*, 35 Am. & Eng. R. Cas. 162, 70 Mich. 382, 14 West. Rep. 627, 38 N. W. Rep. 289.—FOLLOWED IN *Rinear v. Grand Rapids & I. R. Co.*, 70 Mich. 620.

**520. To show no duty to fence at place of injury.**—To relieve a company from liability for killing or injuring animals by locomotives or cars at a place not securely fenced, it is necessary that the company show that it was not legally bound to fence at that place. *Banister v. Pennsylvania R. Co.*, 19 Am. & Eng. R. Cas. 570, 98 Ind. 220.—QUOTING *Evansville & T. H. R. Co. v. Willis*, 93 Ind. 507; *Baltimore, O. & C. R. Co. v. Kreiger*, 90 Ind. 380. — *Fl.*



*Wayne, C. & L. R. Co. v. Herbold*, 23 *Am. & Eng. R. Cas.* 221, 99 *Ind.* 91. *Cincinnati, H. & I. R. Co. v. Ford*, 13 *Am. & Eng. R. Cas.* 571, 89 *Ind.* 92. *Jeffersonville, M. & I. R. Co. v. O'Connor*, 37 *Ind.* 95, 5 *Am. Ry. Rep.* 566.

In an action under the Kansas statute to recover of a railroad company for stock killed, if it appears from the plaintiff's testimony that the road was unfenced at the place of injury, the burden of proof is on the company to show that it was under no obligation to fence at such place, or that the night herd law was in operation, and that the animals were killed in the night-time. *Union Pac. R. Co. v. Dyche*, 28 *Kan.* 200.

Where domestic animals are killed or injured on a railway track not protected by fences or cattle-guards, the burden rests upon the railway company to show that it is not bound to fence at that place, on the ground that it is necessary to be kept open for the accommodation of the public. *Cor v. Minneapolis, S. St. M. & A. R. Co.*, 38 *Am. & Eng. R. Cas.* 287, 41 *Minn.* 101, 42 *N. W. Rep.* 924.

Where it is shown that a mare was killed at a point on the track which is not fenced, the burden is on the company to show that it could not lawfully have placed a fence there, and proof that the killing was within an incorporated city is not sufficient unless it appear that it was within grounds that were laid out into streets and squares, and occupied. *Texas & P. R. Co. v. Mitchell*, 2 *Tex. App. (Civ. Cas.)* 324.

**521. To show that animal could not be kept out by lawful fence.**—Where the company claims that the animal is such that a good and lawful fence would be no protection, the burden of showing it is on the company. *Missouri Pac. R. Co. v. Bradshaw*, 33 *Kan.* 533, 6 *Pac. Rep.* 917.—RECONCILED IN *Leebrick v. Republican V. & S. W. R. Co.*, 41 *Kan.* 756, 21 *Pac. Rep.* 796.

**522. To show that injuries received did not cause animal's death.**—Where a company is sued for injuries to stock which caused their death, and it sets up the defense that some of the injured stock would not have died if they had received proper care by plaintiff, the burden of proving such defense is on the company. *Gulf, C. & S. F. R. Co. v. Hudson*, 77 *Tex.* 494, 14 *S. W. Rep.* 158.

**523. To show owner's duty and failure to fence.**—In a suit for killing stock on the ground of a neglect to fence its track, if the landowner had received a sum for fencing, or had agreed to build and maintain a fence, or had received compensation for so doing by way of damages in the condemnation of the land, the burden rests upon the company to show such fact in defense. *Toledo, P. & W. R. Co. v. Pence*, 68 *Ill.* 524.—FOLLOWED IN *Toledo, P. & W. R. Co. v. Pence*, 71 *Ill.* 174.

#### 7. Matters Relating to Trial.

##### a. In General.

**524. Right to a jury trial.\***—Upon the hearing of a motion for the writ provided for in 3 *Ind. Stat.* 415, § 5, to require an agent, conductor, etc., of a railroad company, against which a judgment for the value of an animal killed has been rendered under such statute, to appear and answer as to the amount of money in his hands, etc., the defendant is not entitled to a jury trial. *Logansport, C. & S. W. R. Co. v. Patton*, 51 *Ind.* 487.

Under the constitutional provision that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate" (Constitution, art. 2, § 23), the company is entitled to a jury in assessing the value of the attorney's services, and of this right the statute cannot deprive it. *Briggs v. St. Louis & S. F. R. Co.*, 111 *Mo.* 168, 20 *S. W. Rep.* 32.

**525. Effect of counsel reading statutes to the jury.**—The only question involved, in an action to recover for stock killed which went on the track through a gate, was as to the sufficiency of the fastenings of the gate. At the trial plaintiff's counsel read to the jury Iowa Code, § 1507, describing a lawful fence: that is, the material, height, and construction of fences. but containing nothing as to the fastening of gates. *Held*, that the statute had no application to the case, but as it could have had no influence on the jury its reading constituted no error for which a judgment should be reversed. *McKinley v. Chicago, R. I. & P. R. Co.*, 47 *Iowa* 76.

**526. Submitting a section of Code to the jury as the law of the case.**—Georgia Code, § 708, requiring a post to be set on each side of a railroad track 400

\* See ante, 8.

yards from road crossings, and requiring engineer to blow a whistle from such post to the crossing, and to check the speed of his train so as to be able to stop if any obstruction is seen on the track, may be submitted to the jury as the law of the case, where stock are killed between such posts and the crossing; and said section and § 710, prescribing a penalty for failing to comply with the former section, and providing specially for signals in municipal corporations, should be construed together. *Port Royal & W. C. R. Co. v. Phinizy*, 40 Am. & Eng. R. Cas. 212, 83 Ga. 192, 9 S. E. Rep. 609.—FOLLOWING *Western & A. R. Co. v. Jones*, 65 Ga. 631.

**527. Admitting evidence—Order of proof.**—Proof of killing or damaging stock by railroad cars, under Kentucky Gen. St. ch. 57, § 5, is made *prima facie* evidence of negligence; and the burden of proof is on the plaintiff to show the killing, and on the defendant to disprove carelessness and negligence, and in establishing the fact of killing, plaintiff has no right to introduce any evidence tending to show carelessness or negligence of the defendant, but he may introduce such evidence in rebuttal. *Kentucky C. R. Co. v. Lebus*, 14 Bush (Ky.) 518.

After the plaintiff, in an action against a company for killing stock, had established his *prima facie* case, and the railroad company had closed its exculpatory evidence, it was not error to permit the plaintiff to introduce witnesses again, to show the nature of the accident and that the necessary precautions had not been observed. *Louisville & N. R. Co. v. Parker*, 12 Heisk. (Tenn.) 49.

An error in admitting improper evidence as to the limit of the depot grounds, in an action against a railroad company for an injury to cattle on its unfenced track, will be deemed immaterial where the other evidence clearly shows that they did not extend to the place where the cattle entered upon the track. *Plunkett v. Minneapolis, S. St. M. & A. R. Co.*, 79 Wis. 222, 48 N. W. Rep. 519.

**528. Discretion of court in admitting or excluding evidence.**—In an action for double damages for killing stock, proof of the condition of the fencing at a particular point may, in the discretion of the court, be properly admitted before proof, or an offer to prove, that such stock

entered upon the railroad at that point. *Walters v. Missouri Pac. R. Co.*, 19 Am. & Eng. R. Cas. 662, 78 Mo. 617.

Plaintiff's horse escaped from his lands and went on the track through a gate which the company was bound to maintain. Plaintiff testified that the gate had been so out of repair as to make it difficult to open or close, and had been permitted to stand open for some years; and was then asked on cross-examination whether he had ever requested the company to repair the gate, which was excluded by the court. *Held*, that the exclusion was within the discretion of the trial court. *Taft v. New York, P. & B. R. Co.*, 157 Mass. 297, 32 N. E. Rep. 168.

**529. Withdrawing evidence from the jury.**—When a company is sued for negligently killing plaintiff's mules by running over them with its train, and seeks to defend by showing that the injury complained of was caused by a fog produced by the proximity of a creek, and, in furtherance of that theory, inquired as to the conditions as to fog at other creeks along the route, and thus elicited testimony unfavorable to the defense, it cannot, as a matter of right, have the evidence withdrawn from the jury. *Central R. & B. Co. v. Ingram*, 98 Ala. 395.—APPROVING *Memphis & C. R. Co. v. Lyon*, 62 Ala. 71; *Alabama G. S. R. Co. v. Jones*, 71 Ala. 487.

**530. View by jury.**—The gate in question being a subject of testimony upon trial, it was a matter within the discretion of the court whether to permit the jury to be taken to view the same. *Morrison v. Burlington, C. R. & N. R. Co.*, 84 Iowa 663, 51 N. W. Rep. 75.

**531. Dismissal and nonsuit.**—Where the court announced that a new trial should be allowed, and plaintiff then declared that he elected to stand by his case as made, and thereupon the court dismissed the action—*held*, that the circumstances showed that all parties intended to treat the case as though the court had dismissed the action or granted a nonsuit on the ground that plaintiff had failed to "prove a sufficient case for the jury." *Wadsworth v. Union Pac. R. Co.*, 56 Am. & Eng. R. Cas. 145, 18 Colo. 600.

In an action for the killing of an ox on a railroad, the evidence being conflicting as to the sufficiency of the gate or bars maintained by the company at a farm crossing where the animal got upon the track, and

there being no evidence that the plaintiff was negligent — *Held*, that a nonsuit was properly denied. *Welch v. Abbot*, 72 Wis. 512, 40 N. W. Rep. 223. Compare *McCandless v. Chicago & N. W. R. Co.*, 45 Wis. 365, 19 Am. Ry. Rep. 374. *Carey v. Chicago, M. & St. P. R. Co.*, 20 Am. & Eng. R. Cas. 469, 61 Wis. 71, 20 N. W. Rep. 648.

**532. What is a question of law for the court, generally.**—The record of a board of appraisers, appointed by a justice of the peace to fix the value of a mare killed by a train of cars on a railway, as provided in § 6, chapter 57, Kentucky Gen. St., is not competent to be read as evidence before the jury by the plaintiff in his action against the railroad company for killing the mare. The questions arising on the proceedings before the appraisers were for the court and not for the jury. *Louisville & N. R. Co. v. Brown*, 13 Bush (Ky.) 475.

**533. As to when statutory presumption of negligence is overcome.**—Dakota Code Civ. Proc. § 679, makes proof of killing of stock *prima facie* evidence of negligence on the part of the company. *Held*, that the question as to when this *prima facie* evidence is overcome by proof on behalf of the company is a question of law for the court. *Volkman v. Chicago, St. P., M. & O. R. Co.*, 35 Am. & Eng. R. Cas. 204, 5 Dak. 69, 37 N. W. Rep. 731.

**534. Sufficiency of service of notice.**—Where a statute provides for giving notice of stock killed by a railroad, sufficiency of service of notice is a question of law where proof of the service is uncontradicted or in writing; but such questions as the authority of the agent upon whom service is had are questions of fact for the jury. *Cole v. Chicago & N. W. R. Co.*, 38 Iowa 311.—**DISTINGUISHED IN** *Peyton v. Chicago, R. I. & P. R. Co.*, 70 Iowa 522.

**535. Negligence when there is no conflict as to the facts.**—If the facts are unambiguous and there is no room for two honest and apparently reasonable conclusions, the court should not be compelled to submit the question to the jury as one in dispute. *Hoge v. Ohio River R. Co.*, 35 W. Va. 562, 14 S. E. Rep. 152.

Where the testimony shows, without dispute and beyond question, that the station grounds of a company are not unreasonably extensive for the accommodation of the public and of the patrons of the road at that place, and that the animal killed entered

upon the premises of the company within their limits, the question of their extent should not be submitted to the jury, it being a question of law for the court. *Rinear v. Grand Rapids & I. R. Co.*, 35 Am. & Eng. R. Cas. 166, 70 Mich. 620, 14 West. Rep. 908, 38 N. W. Rep. 599.—**FOLLOWING** *McGrath v. Detroit, M. & M. R. Co.*, 57 Mich. 555, 24 N. W. Rep. 854.

Where an action is brought against a railroad company for killing a colt, and the engineer testifies that it came on the track less than fifty feet from the engine and was not seen until struck, though he was at his post and on the look-out, and there is nothing to contradict his evidence, the court should direct a verdict for the company. *Yasoo & M. V. R. Co. v. Smith*, 68 Miss. 359, 8 So. Rep. 508.—**DISTINGUISHED IN** *Mobile & O. R. Co. v. Gunn*, 68 Miss. 366.

In an action for injury to stock, if the owner, when called as a witness by the railway company, testifies that he knew his stock was running at large, his knowledge should be treated as a conceded fact, and should not be submitted to the jury as matter in issue. *Windsor v. Hannibal & St. J. R. Co.*, 45 Mo. App. 123.

In an action for killing or injuring live stock, the force of the presumption of negligence, under Bat. Rev. ch. 16, § 11, only applies when the facts are not known, or when from the testimony they are uncertain. When the facts are fully disclosed and there is no controversy as to them, the court must decide whether they make out a case of negligence; and when they fail to do so the defendant cannot be held liable. *Doggett v. Richmond & D. R. Co.*, 81 N. Car. 459. **REVIEWING** *Herring v. Wilmington & R. R. Co.*, 10 Ired. 402; *Scott v. Wilmington & R. R. Co.*, 4 Jones 432; *Aycock v. Wilmington & W. R. Co.*, 6 Jones 231; *Battle v. Wilmington & W. R. Co.*, 66 N. Car. 343; *Jones v. North Carolina R. Co.*, 70 N. Car. 626; *Clark v. Western N. C. R. Co.*, Winst. 109; *Pippen v. Wilmington, C. & A. R. Co.*, 75 N. Car. 54; *Proctor v. Wilmington & W. R. Co.*, 72 N. Car. 579.—**EXPLAINED IN** *Aycock v. Raleigh & A. A. L. R. Co.*, 89 N. Car. 321.

**536. Questions of fact—Negligence, generally.\***—(1) *Generally.*—The question of negligence in injuring stock is a question of fact for the jury, and when the

\* When company's negligence in killing stock is for the jury, see 40 AM. & ENG. R. CAS. 187, *abstr.*

case is submitted on proper instructions, the finding of a jury will not be disturbed unless clearly against the weight of evidence. *Boggs v. Chicago & N. W. R. Co.*, 29 Iowa 577.

Where suit was brought for killing an ox, and the only question was, whether the agents of the road, at the time of the casualty, exercised all ordinary and reasonable care and diligence, that issue was for the jury; and it having been fairly submitted, and there being conflicting accounts of the transaction, and the court below being satisfied with the finding, there was no abuse of discretion in refusing a new trial. *Savannah, F. & W. R. Co. v. Stewart*, 72 Ga. 207.

Mere proof that stock were killed at a public crossing, and that the engineer failed to give the usual signals, is not sufficient in itself to establish a negligent killing, but it is for the jury to determine from all the facts of the case whether the injury was the result of negligence. *Jackson v. Chicago & N. W. R. Co.*, 36 Iowa 451.—FOLLOWED IN *Gates v. Burlington, C. R. & M. R. Co.*, 39 Iowa 45.

In a suit at common law for an injury done to animals by the cars of a railway company, the question whether the injury was occasioned by negligence, misconduct, or unavoidable accident is for the jury. *Lafayette & I. R. Co. v. Shriner*, 6 Ind. 141.—FOLLOWED IN *Northern Ind. R. Co. v. Martin*, 10 Ind. 460.

The question as to whether employes in charge of a train were negligent or not in killing stock is for the jury, and evidence that no signals were given, and that the train was running at a high rate of speed, is proper for the jury to consider in determining the question of negligence. *Edson v. Central R. Co.*, 40 Iowa 47, 8 Am. Ry. Rep. 412.

But unless there is evidence of negligence on the part of a railroad sued for injuries done by its servants to cattle on the track, it is error to submit the question to the jury. *New York & E. R. Co. v. Skinner*, 19 Pa. St. 298.—QUOTED AND DISAPPROVED IN *Trout v. Virginia & T. R. Co.*, 23 Gratt. (Va.) 619. REVIEWED IN *Roof v. Charlotte, C. & A. R. Co.*, 4 So. Car. 61.

However, when there is any evidence fairly tending to prove the negligent act of the defendant, it is not proper for the court to withdraw the decision of the issue from the jury by excluding the plaintiff's evidence or

by directing the jury to find for the defendant. *Hoge v. Ohio River R. Co.*, 35 W. Va. 562, 14 S. E. Rep. 152.

And the fact that there was no evidence that the ringing of the bell, the sounding of the whistle, or other efforts to avoid the injury which might have been made, would probably have averted the accident, will not justify the court in taking the case from the jury. *White v. St. Louis & S. F. R. Co.*, 20 Mo. App. 564.

If the jury can, with reasonable certainty, infer from the surrounding circumstance, that the cattle in question were crippled by being struck by defendant's engines, the question will be submitted to them, and their verdict will not be disturbed. *Harned v. Missouri Pac. R. Co.*, 51 Mo. App. 482.—APPLYING *Gee v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 283; *Mayfield v. St. Louis & S. F. R. Co.*, 91 Mo. 296; *McBride v. Kansas City, St. J. & C. B. R. Co.*, 20 Mo. App. 216.

As soon as a company enters inclosed lands for the purpose of constructing its road, it is bound to use all reasonable and prudent means to prevent cattle from straying on the track and to prevent the cattle of others from going upon the owner's land, and the question whether such means have been adopted, when applied to matters arising before the company commences to run trains, depends upon the facts of each case, and must be left to the jury. *Holden v. Rutland & B. R. Co.*, 30 Vt. 297.—QUOTED IN *Comings v. Hannibal & C. M. R. Co.*, 48 Mo. 512.

(2) *Illustrations.*—Defendant's fence between its track and plaintiff's pasture was swept away by a flood, which was at its height about eight days before plaintiff's horses were injured on said track. During the three days immediately preceding the injury the water along the line of the fence had fallen at the rate of nearly eight inches each day, but at the time of the injury it had not subsided so as to leave the entire line of the fence at the place in question uncovered. The jury found that a new fence might have been properly and reasonably constructed two days before the injury. *Held*, that the court erred in submitting to them the question whether defendant was negligent in neglecting to rebuild the fence, for the evidence was insufficient to show negligence even if undisputed. *Goddard v. Chicago & N. W. R. Co.*, 54 Wis. 548.

In an action for negligently killing plain-

tiff's mare, he proved that on the night of October 13 the train was stopped while passing through or near his land, and that a passenger on the train saw the conductor and some of the other men employed on the train examining a mare which was lying at the foot of an embankment near the railway, and unable to rise without assistance; that early the next morning plaintiff's mare was found dead near the same place with several of her ribs broken; and that she had been grazing about there the previous evening and was then uninjured. *Held*, that there was ample evidence of the identity of the mare for the consideration of the jury. *New Brunswick R. Co. v. Armstrong*, 23 *New Brun.* 193.

*Evidence held sufficient to warrant submission of company's negligence to the jury in the following instances:*

In an action for killing a cow in passing a curve, where the proof showed that she could be seen from the engine at a distance of about 175 yards, and that had the engineer been looking from the right side of the cab he could have seen her in time to have stopped the train. *Denver & R. G. R. Co. v. Henderson*, 10 *Colo.* 1, 31 *Am. & Eng. R. Cas.* 559, 13 *Pac. Rep.* 910. See also *Denver & R. G. R. Co. v. Henderson*, 10 *Colo.* 4, 13 *Pac. Rep.* 912.

Where, under the statute exempting the inhabitants of ten counties in Dakota Territory from liability for all damages done by their animals while trespassing upon the lands of another, S.'s stock strayed upon the defendant's railroad track, and it appeared the engineer saw it a mile and a half distant but did not discover its presence on the track until he was about sixty rods from it; that he then whistled for brakes and they were applied, also air-brakes; that it was down-grade, and there was a train of thirteen loaded cars; that the stock, instead of leaving the track, ran ahead of the train, when one was caught and killed; that the others gathered around this one, and another train coming close behind, ran into them and injured two others; that the engineer of the second train did not see the stock till within five rods of it. *Sprague v. Fremont, E. & M. V. R. Co.*, 6 *Dak.* 86, 50 *N. W. Rep.* 617.

Where it appeared from the evidence that a hand-car was moving along the track at a high rate of speed; that a cow was

moving slowly towards the crossing and might have been seen by those on the car two or three hundred feet off; that no attempt, however, was made to put on the brake until within about thirty feet of the cow, which was then directly on the crossing; and that the brake being worn smooth did not operate, and the car ran over the cow, killing it. *Missouri Pac. R. Co. v. King*, 15 *Am. & Eng. R. Cas.* 529, 31 *Kan.* 500, 3 *Pac. Rep.* 371.—FOLLOWING *Missouri Pac. R. Co. v. Wilson*, 28 *Kan.* 637.

Where sheep were killed by a train near a cattle-guard at a highway crossing, and there was testimony that the fencing near by was, and had long been, insufficient, and that the cross-fence was two feet short of the cattle-guard, and the latter shallow. *Agnew v. Michigan C. R. Co.*, 20 *Am. & Eng. R. Cas.* 441, 56 *Mich.* 56, 22 *N. W. Rep.* 108.

In an action for killing a mule, where the engineer testified that the train was composed of twenty-two loaded cars and was running twenty miles an hour, and that every precaution was taken, but it was impossible to stop the train in time; but where there was other evidence, to the effect that the engineer saw the mule when some seventy-five to one hundred yards in advance of the engine, and that it ran three hundred yards before being struck. *Mobile & O. R. Co. v. Gunn*, 68 *Miss.* 366, 8 *So. Rep.* 648.—DISTINGUISHING *Yazoo & M. V. R. Co. v. Smith*, 68 *Miss.* 359; *Chicago, St. L. & N. O. R. Co. v. Packwood*, 59 *Miss.* 280.

Where, after plaintiff had proved the killing of his mule by the company and made out a *prima facie* case, the engineer, testifying for the company, stated that the mule was killed at night when very dark and foggy; that when first seen it was only about forty feet away and he was running rapidly on a down-grade, and that the locomotive struck the mule in less than two seconds; that he did not sound the alarm nor reverse the engine because he did not have time; and that there was a trestle just ahead which would have endangered the train if he had run on it with down brakes and reversed engine; and another witness for the defense stated that the alarm could have been sounded in two seconds, but that the train in that time would have moved sixty feet; but where in rebuttal there was evidence tending to show that the mule ran forty feet before it was struck, and that there was no such fog as claimed by the engineer. *Ross v.*

*Natchez, J. & C. R. Co., 23 Am. & Eng. R. Cas. 196, 62 Miss. 23.*—DISTINGUISHING *Chicago, St. L. & N. O. R. Co. v. Packwood, 59 Miss. 280.*

In an action for killing an animal, where it appeared that it was on a clear starlight night, and that the animal ran some three hundred yards on the track in front of the engine, though the engineer testified that he was on the look-out and only saw it when within some twenty to thirty yards away. *Kent v. New Orleans & T. R. Co., 67 Miss. 608, 7 So. Rep. 391.*

Where the railroad company allowed quantities of salt to be deposited on and near its track, at or near its station, where it would attract animals, and allowed the same to remain after it knew the salt was there, or, by reasonable care and diligence, might have known it.\* *Brown v. Hannibal & St. J. R. Co., 27 Mo. App. 394.*—FOLLOWED IN *Burger v. St. Louis, K. & N. W. R. Co., 52 Mo. App. 119.*

Where evidence showed that defendant's train was running at the rate of twenty miles an hour, that plaintiff's cow was in full view at a town crossing when the train was thirty yards away, and that no signal was given or effort made to stop the train until just before the cow was struck. *White v. St. Louis & S. F. R. Co., 20 Mo. App. 564.*—RECONCILING *Evans v. St. Louis, I. M. & S. R. Co., 16 Mo. App. 522.*

In an action for the killing of horses belonging to plaintiff, which had strayed upon the track through an open gate in the fence erected by the company, where the evidence showed that the train struck them in the night; that there was snow on the ground which had lain there some time, and was packed and solid; that a light snow had fallen on the night of the accident but previous thereto; that the train was running at a high rate of speed; and that from the tracks made in the recently-fallen snow it was apparent that the horses had run at a rapid rate of speed in front of the engine for some distance, but were finally caught, thrown from the track, and killed. *Missouri Pac. R. Co. v. Vandeventer, 28 Neb. 112.*

Where the evidence shows that the animals were killed at a place where there was no fence between the right of way and the owner's fields where the animals pastured; that at the time of the accident they were

feeding on the right of way on the opposite side from the owner's lands where there was a fence; that the animals could have been seen for some distance; that the train ran without signals or without slowing its speed until within two hundred and fifty feet of the animals. *Johnson v. Rio Grande W. R. Co., 7 Utah 346, 26 Pac. Rep. 926.*

In an action for killing a mule, where there was evidence to show that the fence at or near where it was killed was down in several places, that certain cattle-guards were so filled up as to allow stock to pass over them, that the mule was killed while running on the track in front of the train, there was high grass on the right of way, and that the fence was in good condition the day before. *Wines v. Rio Grande W. R. Co., 9 Utah 228, 33 Pac. Rep. 1042.*

In an action for killing two horses, where plaintiff produced a witness who testified that she saw them running on the track a short distance ahead of the engine; that the train was running about twenty-five miles an hour; that she watched the train, the trainmen, and the horses until they passed out of sight, and that as far as she could discover the engineer and fireman did nothing to check the speed of the train; and that no bell was rung until just after the train passed out of sight, when the train was only one or two telegraph poles behind the horses. There was other evidence that the horses were found soon after the train had passed near the track with their legs broken and otherwise cut and bruised. *Johnson v. Baltimore & O. R. Co., 25 W. Va. 570.*

Where the evidence showed that the plaintiff's steer was turned loose to graze on uninclosed lands beside the railway track, at a place where the defendant was required by law to fence but had failed to do so, and the animal was afterwards found near the track very badly injured, and blood and hair were found on the railway, indicating that the steer had been dragged or shoved along by a passing train. *Jackson v. St. Louis, I. M. & S. R. Co., 36 Mo. App. 170.*

Where a horse is alleged to have been killed by reason of the company's failing to maintain a proper fence, and there is any evidence that the fence was insufficient and defective, which was known to the company or its agents, and that the horse got upon the track by means of such defects. *Morrison v. New York & N. H. R. Co., 32 Barb. (N. Y.) 568.*—APPROVED IN *Cecil v. Pacific R. Co.,*

\* See ante, 40.



47 Mo. 246. **DISTINGUISHED IN** *Leyden v. New York C. & H. R. R. Co.*, 55 Hun. (N. Y.) 114, 28 N. Y. S. R. 72, 8 N. Y. Supp. 187.

*Evidence held insufficient to warrant submission of company's negligence to the jury in the following instances:*

Where, under an averment that the company caused the killing of the plaintiff's horse "where the defendant had a right to fence but did not fence," the evidence failed to support the statutory ground of recovery, namely, that the horse running at large was killed by reason of the want of a fence (the existence of which ground may possibly be inferred from the pleadings). *Gilman v. Sioux City & P. R. Co.*, 13 Am. & Eng. R. Cas. 538, 62 Iowa 299, 17 N. W. Rep. 520.—**FOLLOWED IN** *Youll v. Sioux City & P. R. Co.*, 21 Am. & Eng. R. Cas. 589, 66 Iowa 346.

In an action for killing stock, where plaintiff claimed that the negligence making the company liable was in running the train with the engine behind, and the evidence showed that the train was a short one with a man on the front car to keep a look-out, that the accident occurred while going round a curve at a slow rate of speed, that every precaution was exerted after the stock were discovered to avoid the injury, and that the train was stopped as soon as it could have been stopped if the engine had been in front. *Falconer v. European & N. A. R. Co.*, 14 New Brun. 179.

**537. Negligence where facts are in conflict.**—In an action for killing cattle, where the evidence is such that a verdict for either party could not be disturbed on appeal, the question of a conflict of evidence should have been submitted to the jury and not decided by the court. *Cage v. Louisville, N. O. & T. R. Co.*, (Miss.) 7 So. Rep. 509.

Where the evidence as to the situation and surroundings of an animal killed by a railroad train is conflicting, and is such that under some phase of it the jury might properly conclude that the place was such as required the company to fence, the question must be left to the jury under proper instructions. *Pennsylvania R. Co. v. Lindley*, 2 Ind. App. 111, 28 N. E. Rep. 106.

Where the evidence was conflicting as to the condition of the fence, which it was the duty of the railroad company to keep in repair, at or a short time before the time of the injury, the question as to the knowledge, care, and diligence of the defendant

should have been submitted to the jury. *Brentner v. Chicago. M. & St. P. R. Co.*, 7 Am. & Eng. R. Cas. 574, 58 Iowa 625, 12 N. W. Rep. 615.

Where there is a conflict of evidence as to the speed of the train which killed plaintiff's cow at a crossing, and as to the distance that she could have been seen by the engineer, and the evidence shows that there was a sharp curve in the track, and that the train was a wild one, the question as to whether the speed of the train was a dangerous one is for the jury. *Courson v. Chicago, M. & St. P. R. Co.*, 71 Iowa 28, 32 N. W. Rep. 8.

In an action for killing live stock at a crossing, the evidence showed that the stock were in plain view of the engineer for half a mile, that the train was running from forty to forty-five miles an hour and approached without signals, that those in charge of the stock knew the train was due, and that as soon as the animals were seen the brakes were applied. *Held*, that as the evidence was conflicting, the questions of negligence and of contributory negligence should have been left to the jury. *Wines v. Rio Grande W. R. Co.*, 9 Utah 228, 33 Pac. Rep. 1042.—**QUOTING** *Grand Trunk R. Co. v. Ives*, 144 U. S. 417, 12 Sup. Ct. Rep. 679.

**538. Negligence as to repairs in fence, etc.**—Where a fence along a track was found to be burned in the evening, and a horse was killed the following night, the question of negligence in postponing the repairs is for the jury. *Crosby v. Detroit, G. H. & M. R. Co.*, 58 Mich. 458, 25 N. W. Rep. 463.—**DISTINGUISHING** *Stephenson v. Grand Trunk R. Co.*, 34 Mich. 323.

One issue being whether the cotton yard of a railway company was negligently out of repair, there was no error in allowing evidence of repairs which were made at the place where the injury to a mule occurred, although made after it happened. Whether they should have been made before, or were rendered necessary by the accident, was a question for the jury. *Central R. Co. v. Gleason*, 69 Ga. 200.

**539. Negligence in failing to stop train.**—The question of the negligence of an engineer in failing to stop his train when signalled by a man whose horse had fallen on the track is for the jury. *Memphis & L. R. R. Co. v. Sanders*, 19 Am. & Eng. R. Cas. 497, 43 Ark. 225.

In an action for killing a cow it appeared



that the whistle was blown to frighten the cow off the track, and that the cow, after running along a fence parallel with the track for some distance, suddenly turned and attempted to cross the track and was struck by the train. *Held*, that the question of the company's negligence in not stopping the train or slackening its speed after the cow first went off the track is for the jury. *Mobile & O. R. R. Co. v. Holt*, 62 Miss. 170.

**540. Negligence in regard to look-out.**—The question as to whether an engineer was negligent in not seeing cattle on the track in time to have avoided injuries thereto is a question of fact for the jury. *Ohio & M. R. Co. v. Stribling*, 38 Ill. App. 17.

**541. Negligence in not properly manning train.**—It cannot be held as a matter of law that it does not tend to show reckless management of a train to send it out with so few brakemen that its speed cannot be checked on some grades of the road. As to whether the train was sufficiently manned is for the jury, and if the company shows special circumstances tending to excuse sending it out in that way they also are for the jury. *McDonald v. Chicago & N. W. R. Co.*, 13 Am. & Eng. R. Cas. 585, 51 Mich. 628, 17 N. W. Rep. 210.—**DISTINGUISHING** *Marquette, H. & O. R. Co. v. Marcott*, 41 Mich. 433.

**542. Negligence in leaving gate open.**—Where a railroad corporation had inclosed its line of road with a barbed-wire fence, except a gateway into plaintiff's field, which it had negligently left open, and through which plaintiff's horses escaped within its right of way, where they were suddenly frightened by an approaching car and were thereby caused to run violently against the adjoining railroad fence and were seriously injured thereby—*held*, that the question of defendant's liability was properly left to the jury upon the evidence, and that the negligence of the company in leaving open the fence might, under the circumstances, in connection with the act of its servants in operating the road, be deemed the proximate cause of the injury. *Savage v. Chicago, M. & St. P. R. Co.*, 13 Am. & Eng. R. Cas. 566, 31 Minn. 419, 18 N. W. Rep. 272.

A company had fenced its track on both sides, but afterward opened a gap on one side for its own convenience. Sheep that had strayed on the track were killed while

attempting to escape through the gap. *Held*, that it was a case which was proper to submit to the jury to pass upon the question as to whether the company had exercised proper care. *Tyler v. Illinois C. R. Co.*, 19 Am. & Eng. R. Cas. 519, 61 Miss. 445.—**LIMITING** *Chicago, St. L. & N. O. R. Co. v. Packwood*, 59 Miss. 280.—**EXPLAINED IN** *Illinois C. R. Co. v. Walker*, 63 Miss. 13.

**543. Defective gate.**—Where it is claimed that stock were killed by reason of escaping through a gate which the company was required to maintain, and which was not provided with proper fastenings, the question of the negligence of the company in the construction of the gate is properly submitted to the jury. *Hammond v. Chicago & N. W. R. Co.*, 43 Iowa 168, 14 Am. Ry. Rep. 412.

Whether or not a company has been negligent in allowing bars to remain down for such a length of time as to make it liable for injury to animals coming upon the track, is a question of fact for the jury. *Perry v. Dubuque S. W. R. Co.*, 36 Iowa 102.

**544. Defective public crossing.**—If the approaches to a railway at a highway crossing are not built exactly opposite each other, it is a question for the jury whether the defect is such as to render the company liable for stock killed at the crossing. *Meeker v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 477, 64 Iowa 641, 21 N. W. Rep. 120.

In crossing a railroad track at a crossing the horse which plaintiff was driving caught his foot in the space between the rail and the plank on the crossing and fell on the track. Plaintiff alighted and endeavored for about two minutes to extricate the foot, when a train came along and broke the horse's leg. In a suit for damages the court nonsuited plaintiff, invoking the rule that he should have "stopped, looked, and listened," before approaching the crossing. *Held*, that the rule was not applicable to the case; that the true question was whether the company was guilty of negligence in allowing the track at the crossing to be in an insecure condition; and that this question should have been submitted to the jury. *Baughman v. Shenango & A. R. Co.*, 6 Am. & Eng. R. Cas. 51, 92 Pa. St. 335, 37 Am. Rep. 690.—**DISTINGUISHING** *North Pa. R. Co. v. Heileman*, 49 Pa. St. 60; *Hanover R. Co. v. Coyle*, 55 Pa. St. 396; *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504.

Whether a company has been negligent in not keeping its cattle-guards clear of snow and ice is a question for the jury to determine from all the circumstances of the case; and the location of the road, position and condition of the cattle-guards, as well as the number of animals which might reasonably be supposed to be running at large, and the prevailing storms and the nature and character of the weather are among the facts which may be taken in consideration.\* *Wait v. Bennington & R. R. Co.*, 61 *Vt.* 268, 17 *Atl. Rep.* 284.

**545. Negligence with respect to speed.**—No rate of speed is negligence as a matter of law. *Potter v. Hannibal & St. J. R. Co.*, 18 *Mo. App.* 694.

It is a question for the jury to determine whether the injury was caused by the unlawful rate of speed of the train, or whether, under the circumstances, it could have been avoided if the train had been running at the rate of not more than six miles an hour. *Louisville, N. O. & T. R. Co. v. Caster*, (*Miss.*) 5 *So. Rep.* 388.

Where it is sought to show negligence in the rate of speed at which a train was running when cattle were killed, it is proper to inquire whether, under all the circumstances of the case, the defendants exercised reasonable and proper care in running their engine to avoid injury to plaintiff's cattle; but it is not proper to inquire whether the train at the particular time and place was running faster than usual, and if so, why. All facts going to show a want of proper care should be left to the consideration of the jury. *Central Ohio R. Co. v. Lawrence*, 13 *Ohio St.* 66.—FOLLOWING *Cleveland, C. & C. R. Co. v. Elliott*, 4 *Ohio St.* 474. QUOTING *Cincinnati, H. & D. R. Co. v. Waterson*, 4 *Ohio St.* 434.

In an action for killing a mule on the track the evidence showed that the mule was about the color of earth and was fastened in a culvert, but it did not appear how much of the mule was above the track; and that it was night-time, and there was no evidence to show how far the headlight would shine, which was shown to be of the best kind and in good order; but the evidence did show that by its light the engineer could not see more than thirty yards distant, and that he could not stop the train in less than forty rods. *Held*, that the question of negligence

in running a train at a rate of speed so that it could not be stopped after seeing the mule was for the jury. *Memphis & C. R. Co. v. Lyon*, 62 *Ala.* 71.—FOLLOWED IN *Alabama G. S. R. Co. v. Jones*, 15 *Am. & Eng. R. Cas.* 549, 71 *Ala.* 487. QUALIFIED IN *Alabama G. S. R. Co. v. Moody*, 92 *Ala.* 279.

**546. Wilful negligence.**—In an action for wilfully killing plaintiff's cow, a witness for the plaintiff testified that the train came almost to a stop about a thousand feet from the crossing where the cow was standing; that she could be seen by one upon the engine for a half-mile; that the train started up and increased its speed to thirty miles an hour until it struck the cow, and then ran much slower; that the engineer was looking out of the cab in the direction of the crossing, but gave no signal and made no attempt to frighten her from the track. The engineer testified that he did not see the cow in time to avoid striking her, that he tried to stop his engine, and that he did not intend to kill her. *Held*, that it was error to withdraw the case from the jury, as it was for them to say whether the killing was wilful. *Overton v. Indiana, B. & W. R. Co.*, 1 *Ind. App.* 436, 27 *N. E. Rep.* 651.

**547. Proximate cause.**—(1) *Generally.*—Whether the failure to ring a bell, sound a whistle, or the excessive rate of speed at which a train is running through the streets of a city was the proximate cause of an injury to an animal, is a question of fact for the jury. *Ohio & M. R. Co. v. Craycraft*, 5 *Ind. App.* 335, 32 *N. E. Rep.* 297. *Chicago, St. L. & P. R. Co. v. Fenn*, 3 *Ind. App.* 250, 29 *N. E. Rep.* 790.

It is a question for the jury to say whether a failure to blow a whistle to frighten stock away that are seen on the right of way, but not on the track, is negligence, as the duty to blow a whistle is not imperative in all cases. *Louisville, N. & G. S. R. Co. v. Reidmond*, 13 *Am. & Eng. R. Cas.* 515, 11 *Lea (Tenn.)* 205.—APPROVED IN *East Tenn., V. & G. R. Co. v. Bayliss*, 77 *Ala.* 429, 54 *Am. Rep.* 69.

Those in charge of a train have a right to sound a whistle, to give notice of its approach both to the people that may be about street crossings and to the station agent, when the train is nearing a station; but where such sounding of the whistle frightens horses at a street crossing and causes them to run on the track, the ques-

\* See *ante*, 169.

tion of whether the right to sound the whistle was abused is for the jury, and if an abuse of the right is found, as to whether the negligence caused the injury. *Mayer v. New York C. & H. R. R. Co.*, 8 N. Y. Supp. 461.

Where all the circumstances connected with the striking of an animal by a train, including the illegal rate of speed of the train, are in evidence, it is proper to submit to the jury whether the animal was struck by reason of such illegal rate of speed. *Backenstoe v. Wabash, St. L. & P. R. Co.*, 23 Mo. App. 148; affirmed 86 Mo. 492, 1 West. Rep. 743.

In an action for the value of a colt killed by a passing train in a cattle-guard which was filled with snow—held, that the question whether the condition of the cattle-guard in that respect was the proximate cause of the injury was, under the evidence, properly submitted to the jury. *Giger v. Chicago, & N. W. R. Co.*, 80 Iowa 492, 45 N. W. Rep. 906.

(2) *Illustrations.*—Plaintiff sued to recover for a horse killed on the track, which went thereon through a gate which the company was bound to maintain. Plaintiff and his servant testified that the gate had stood open most of the time for some two years by reason of its being so sagged that it would not close, and that they always kept it closed as long as it was in proper condition. The defendant introduced evidence tending to show that the sagging was caused by plaintiff leaving it open. Held, that it was proper to submit to the jury the question of plaintiff's care in using the gate, and also whether the company's negligence in not repairing it was the sole cause of the injury. *Taft v. New York, P. & B. R. Co.*, 157 Mass. 297, 32 N. E. Rep. 168.

Where stock go upon the track over a fence which has been erected by the company, and are killed, and the evidence does not conclusively show that a fence such as the law requires would not have turned the cattle, it is for the jury to determine whether the failure of the company to have such a fence was the cause of the injury. *Alexander v. Chicago, M. & St. P. R. Co.*, 41 Minn. 515, 43 N. W. Rep. 481.

Plaintiff was driving on a highway beside the railroad track, and his horses, becoming frightened by a passing train, got beyond his control, ran upon the track, and were

injured. Held, that it was proper to leave to the jury the question whether or not the failure to fence the road was the proximate cause of the injury. *Maher v. Winona & St. P. R. Co.*, 13 Am. & Eng. R. Cas. 572, 31 Minn. 401, 18 N. W. Rep. 105.—FOLLOWING *Nelson v. Chicago, M. & St. P. R. Co.*, 30 Minn. 74.

In an action against a railroad company, under Missouri Rev. St. § 806, for killing live stock at a public crossing, alleged to have been caused by failure to give the statutory signals, where there is no evidence to show anything to hinder the animal from escaping, it is proper to leave it to the jury to find whether the killing was due to such failure. *Kendrick v. Chicago & A. R. Co.*, 81 Mo. 521.—APPROVED IN *Keim v. Union R. & T. Co.*, 90 Mo. 314.

A township highway, unguarded by barriers, lay between two railroads, the fills of which crowded it somewhat on either side. The plaintiffs' cattle, driven thereon, were frightened by a train on one railroad and ran off upon the track of the other railroad, where they were struck by a locomotive and killed. In trespass against the township, the questions whether the defendant was negligent in not providing barriers, and whether the absence of the latter was the proximate cause of the injury, were properly submitted to the jury. *Ewing v. North Versailles Tp.*, 146 Pa. St. 309, 23 Atl. Rep. 338.—DISTINGUISHING *West Mahanoy Tp. v. Watson*, 112 Pa. St. 574.

**548. Place of entry.**—Where the evidence tends to show that plaintiff's animals went upon defendant's road at a point where it was the duty of defendant to fence, it is proper to overrule a demurrer to the whole evidence and submit the case to the jury. *Emmerson v. St. Louis & H. R. Co.*, 35 Mo. App. 621.

Where the evidence showed that there were two points in the fence at which the stock sued for could have entered upon the railroad tracks, but did not positively or in any direct manner show at which of these two places the entry had actually been made, it was held that it was for the jury to determine the point of actual entry. *Jones v. St. Louis, I. M. & S. R. Co.*, 44 Mo. App. 15.

In an action for killing stock, whether the place where the plaintiff's animals strayed upon the defendant's railway track was not only within the claimed station

grounds and switch limits, but also whether such grounds were necessary for the company in conveniently and safely transacting its business, and for the accommodation of the public transacting business at the station, is a question for the jury. *Straub v. Eddy*, 47 Mo. App. 189.

If the evidence shows that there was no fence on the side of the railroad track at a point on the same where by law a fence was required, and that at that point the animal was killed, that is sufficient evidence, nothing more appearing, upon which to submit to a jury the question whether or not the animal got upon the track at the point at which there was no fence, and direct proof of such fact is not necessary. *Ehret v. Kansas City, St. J. & C. B. R. Co.*, 20 Mo. App. 251.—APPLIED IN *Miller v. Wabash R. Co.*, 47 Mo. App. 630. FOLLOWED IN *Pearson v. Chicago, B. & K. C. R. Co.*, 33 Mo. App. 543. QUOTED IN *Walton v. Wabash W. R. Co.*, 32 Mo. App. 634.

Stock went from plaintiff's lands to adjoining lands, which were occupied by him and another person in common, and thence to a wood-yard which plaintiff had leased to the railroad company, and thence to the track and were injured. There was no express agreement between plaintiff and the railroad company as to who should fence the wood-yard, or as to whether the company's use should be exclusive. *Held*, under these circumstances the court should leave it to the jury to say whether the company was in the exclusive use of the wood-yard, and whether the stock escaped from adjoining lands to the wood-yard through a defective fence which the company was bound to repair. *Holden v. Rutland & B. R. Co.*, 30 Vt. 297.

In an action to recover for the killing of plaintiff's ox by reason of defendant's failure to fence its right of way, the testimony of plaintiff that there were ox tracks leading from the west across a ditch, up an embankment, and across the side-track of a railroad to the main track, where the ox was killed, and that he found no cattle tracks at any other place on the right of way, warranted the submission to the jury of the question whether the ox came upon the right of way at the point where such tracks were seen. *Dinwoodie v. Chicago, M. & St. P. R. Co.*, 70 Wis. 160, 35 N. W. Rep. 296.

**549. Place of killing.**—The question

whether the killing of an animal was on a public highway is simply one of fact, to be fairly submitted to the jury under proper instructions. *Chaney v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 661.

Where suit is under Wagn. Missouri St. 310, to recover for stock killed, it is error to refuse to leave to the jury the question whether the killing occurred at a place where the road passed through inclosed or uninclosed lands. *Mumpower v. Hannibal & St. J. R. Co.*, 59 Mo. 245.

**550. Whether accident was unavoidable.\***—In an action for killing a cow it was not error to refuse to charge: "If plaintiff's cow fell down a bank and rolled under the train after the engine passed her, or if the cow jumped on the track fifteen feet in front of the engine, then the accident was unavoidable, and the company is not liable. The question of the company's negligence is for the jury. *Selma R. & D. R. Co. v. Fleming*, 48 Ga. 514.

**551. Whether evidence rebuts presumption of negligence.†**—In an action to recover damages for killing stock proof of the killing makes out a *prima-facie* case for the plaintiff, and the sufficiency of the evidence to rebut the presumption of negligence is a question for the jury; hence, the general charge in favor of the defendant is properly refused. *Savannah & W. R. Co. v. Jarvis*, 95 Ala. 149.

**552. Whether land was necessary for depot purposes.**—Whether the defendant's right of way at a point sixty rods from the station building, where there was a side-track in addition to the main track, was necessary or convenient and actually used for loading or unloading freight, so as to make it a part of the depot grounds, and thus relieve the company from the duty of fencing, was a question for the jury. *Dinwoodie v. Chicago, M. & St. P. R. Co.*, 70 Wis. 160, 35 N. W. Rep. 296.—REVIEWING *Fowler v. Farmers' L. & T. Co.*, 21 Wis. 78.—DISTINGUISHED IN *Jaeger v. Chicago, M. & St. P. R. Co.*, 40 Am. & Eng. R. Cas. 194, 75 Wis. 130. REVIEWED IN *Anderson v. Stewart*, 76 Wis. 43.

**553. Whether it was possible to fence.**—Under evidence that a cow was killed by a train of cars outside of the corporate limits of a town, and adjacent to the

\* See ante, 52, 53, 466, 515.

† See ante, 490-494.

railroad station, at a place used by the railroad for switching purposes in connection with its station grounds, the court cannot declare, as a matter of law, that the railroad company was not bound to fence its tracks. The question whether the company could fence without great inconvenience is one of fact. *Bean v. St. Louis, I. M. & S. R. Co.*, 20 Mo. App. 641.—FOLLOWED IN *Brandenburg v. St. Louis & S. F. R. Co.*, 44 Mo. App. 224.

**554. Weight of evidence and credibility of witnesses.**—The Kentucky statute, making the fact of stock being killed by railroads *prima-facie* evidence of negligence, does not raise any presumption that persons in charge of the train who testified as to the cause and manner of the killing swore falsely. Their evidence should go to the jury, who are to determine whether such evidence is sufficient to rebut the *prima-facie* presumption of negligence created by the statute. *Grundy v. Louisville & N. R. Co.*, (Ky.) 2 S. W. Rep. 899.

Plaintiff's horse was found with a broken leg, and he sued the railroad company, and at the trial produced no witnesses who saw the animal injured, but proved marks tending to show that the horse had been struck and had dragged along the track for some distance. The company's fireman and engineer testified that the horse's leg was broken in a water-gap. *Held*, that the jury had a right to believe plaintiff's evidence and disbelieve the fireman and engineer, and to find a verdict for plaintiff. *New Orleans, M. & T. R. Co., v. Toulmé*, 59 Miss. 284.—DISTINGUISHING *Chicago, St. L. & N. O. R. Co. v. Packwood*, 59 Miss. 280.

The evidence of a witness who testified that the stock killed were worth \$140, but admitted on cross-examination that he appraised them at \$100 when he thought the claim would be paid without suit, should not, for that reason, have been excluded, but should have been allowed to go to the jury for what it was worth. *Maberry v. Missouri Pac. R. Co.*, 83 Mo. 664.

In an action to recover for injuries to a horse, the owner and another, the rider, testified to injuries that would have justified a verdict for a substantial sum, but it appeared that a veterinary surgeon, who was called on soon after the accident to treat the horse, did not discover any such injuries. The jury awarded the plaintiff a verdict, and fixed his damages at six cents. *Held*, that

the credit to be given the witnesses was for the jury, and that the verdict should not be disturbed. *O'Neill v. Brooklyn Heights R. Co.*, 71 Hun (N. Y.) 114.

In an action for killing stock trespassing upon defendant's right of way the jury is not obliged to accept as conclusive the positive evidence of the engineer that, although he was looking forward along the track, he did not see such stock until within twenty-five or thirty feet of them, if they believe from other evidence that at the time of the accident it was so light as to render such statement improbable. *Lighthouse v. Chicago, M. & St. P. R. Co.*, (S. Dak.) 54 N. W. Rep. 320.

**555. Verdict and findings—Interpretation and effect.**—Where there is a conflict of evidence as to whether an engineer had seen animals on the track in time to have stopped the train, a verdict for the plaintiff decides the question in his favor as to whether a failure to give the statutory signals was the proximate cause of the injury, though the stock may have been on the track through plaintiff's want of care. *Orcutt v. Pacific Coast R. Co.*, 85 Cal. 291, 24 Pac. Rep. 661.

Where it appears that plaintiff's land did not adjoin the railroad company's, and that the highway was uninclosed on either side, so that a want of gates could not have occasioned the death of plaintiff's ox, a verdict acquitting the company of negligence in not having gates will bar a recovery for killing the ox. *Jack v. Ontario, S. & H. R. Co.*, 14 U. C. Q. B. 328.

A finding that animals entered upon the railroad track "at a point where the railroad crosses a cartway or private way known as McQuiddy's crossing," is equivalent to a finding that the entrance was effected at a private farm crossing. *Louisville, N. A. & C. R. Co. v. Eisler*, 40 Am. & Eng. R. Cas. 205, 119 Ind. 39, 19 N. E. Rep. 615, 21 N. E. Rep. 466.

**556. Sufficiency of form of verdict.**—In an action for double damages for killing stock, an instruction that if the stock got upon the track at a place where defendant failed to maintain a lawful fence, or at a necessary farm crossing where defendant had failed to erect and maintain a gate four and one-half feet high, with a latch or hook, and were killed by defendant's cars, the verdict should be for plaintiff, is defective in not stating that the killing or damage

must have been caused by reason of the failure of defendant to so erect and maintain such fence or gate. *Montgomery v. Wabash, St. L. & P. R. Co.*, 90 Mo. 446, 2 S. W. Rep. 409.

**557. Special verdict.**—In an action against a railroad company for negligently killing an animal on a public crossing, because of its failure to blow the whistle or ring the bell, the special verdict must show that the animal was on or at the crossing when killed. *Lake Shore & M. S. R. Co. v. Van Auken*, 1 Ind. App. 492, 27 N. E. Rep. 119.

**558. Special finding.**—The evidence tended to show that when the animals came to the gateways in a fence they could freely pass in and along the right of way to where the fence was close to the track, so that they could not retreat into the open field upon the approach of a train. The gates were subject to the defendant's control, and after the killing of the stock the defendant made and enforced a rule to the effect that, if the said gates were not kept closed and locked by those who used them, the railroad company would nail them up. The conditions were favorable for the construction of cattle-guards which would obviate the necessity of any gates at all. It was shown to the jury that the fence with the said gates might be less safe than no fence at all, and that the defendant's employes knew that the gates were open. *Held*, that a special finding of the jury that the defendant was negligent in not keeping the said gates closed and locked was not unreasonable or groundless in its premises. *McMaster v. Montana Union R. Co.*, 56 Am. & Eng. R. Cas. 195, 12 Mont. 163, 30 Pac. Rep. 268.

**559. Motion for judgment non obstante veredicto.**—Where there was a verdict upon a complaint charging a wilful injuring, and were interrogatories submitted to the jury relating wholly to the diligence of the trainmen and the train's coming in contact with the colt, a motion for judgment *non obstante* was correctly overruled. *Fl. Wayne, C. & L. R. Co. v. O'Keefe*, 4 Ind. App. 249, 30 N. E. Rep. 916.

#### 6. Instructions.\*

**560. Interpretation.**—Where an instruction interpreted the jury that, in an action

\* Proper instruction on question of negligence, in action for killing stock, see 40 Am. & Eng. R. Cas. 188, *abstr.*

for killing stock, plaintiff's damage would be the "assessed value" of the cattle, and there was no proof of any assessment of their value—*held*, that these words must have been used and understood as the value proved or estimated by the jury from the evidence before them. *Ohio & M. R. Co. v. Clutter*, 82 Ill. 123.

In an action to recover double the value of stock killed, under the statute, after there was evidence showing that a tender had been made, the jury were instructed that if the stock were worth more than the amount tendered, then they should return a verdict for double their value. *Held*, that this was equivalent to saying that the plaintiff had the burden of proof to show that they were worth more than the amount tendered. *Scott v. Chicago, M. & St. P. R. Co.*, 78 Iowa 199, 42 N. W. Rep. 645.

A statute making railroad companies liable for injury to stock had a proviso that "this act shall not apply to any railroad company or corporation \* \* \* whose road is inclosed with a good and lawful fence, to prevent such animal from being on such road." The court, after quoting the statute, charged the jury that it "does not apply to any railway or corporation \* \* \* whose road is inclosed with a good and lawful fence which prevents such animals from being on such road." *Held*, that the words "which prevents," as used by the court, instead of the language "to prevent," did not mislead the jury. *Missouri Pac. R. Co. v. Eckel*, 56 Am. & Eng. R. Cas. 174, 49 Kan. 794, 31 Pac. Rep. 693.

**561. What instructions are proper, generally.**—In an action for killing stock it appeared that the train was running some twenty-five miles per hour on a starlight night, and could have been stopped by proper appliances in less than one hundred and twenty yards; that the headlight only enabled the engineer to see some sixty yards ahead; and that the stock killed could have been seen in time to have prevented the injury if a proper headlight had been provided. *Held*, that an instruction that if the jury believed this evidence they might find the company guilty of negligence, was proper. *Alabama G. S. R. Co. v. Jones*, 15 Am. & Eng. R. Cas. 549, 71 Ala. 487.

The company is liable for ordinary negligence towards stock on its track without default of the owner, and the omission of the word "gross" before the word "negli-



gence" in an instruction in such a case is not error. *Richmond & D. R. Co. v. Noell*, 86 Va. 19, 13 Va. L. J. 320, 9 S. E. Rep. 473.

Where there is evidence suggestive of such a theory, the court may instruct the jury that if a whistle was blown to frighten an animal, and not to keep it away from a railroad track, this could be considered. *Central R. & B. Co. v. Hollinshead*, 81 Ga. 208, 7 S. E. Rep. 172.

Where stock are killed through what is alleged to have been a want of ordinary care, it is proper to instruct the jury that, in determining whether there was a want of ordinary care, they may consider the fact that a crossing was in such a condition as to make it more than ordinarily dangerous. *Kuhn v. Chicago, R. I. & P. R. Co.*, 42 Iowa 420.

The Kansas act of 1870, § 1, providing "that railroads shall be liable for all damages done to persons or property when done in consequence of any neglect on the part of the railroad companies," changes the rule of law as to the liability of such companies, and a failure to use ordinary care will make it liable, and an instruction so stating the law is correct. *St. Joseph & D. C. R. Co. v. Grover*, 11 Kan. 302.

An instruction that the defendant was liable if its locomotive killed the plaintiff's heifer at a point on the track where there was no fence, but where the defendant was required by law to maintain a fence, while it does not literally follow the statutory condition that the animal came upon the track at such a point, is yet not open to fatal objection, since it does not materially affect the merits of the action when the natural and reasonable inference from all the testimony is that the animal got upon the track at an unfenced point where a fence was required by law. *Vaughan v. Kansas City, S. & M. R. Co.*, 34 Mo. App. 141.

**562. Instructions relating to duty to give signals.**—If an engineer sees a horse within a few feet of the track and running parallel with it, under such circumstances as indicate danger of his going on the track, it is the engineer's duty to use reasonable means to frighten him away, and an instruction so stating the law is correct. *Alabama G. S. R. Co. v. Powers*, 19 Am. & Eng. R. Cas. 502, 73 Ala. 244.

It is proper to instruct the jury that the law prescribes a different rule as to the

safety of animals seen on the track from that provided when intelligent human beings are seen. When the latter are seen it may be presumed that they will leave the track in time, but not so with dumb animals, and in addition to sounding a whistle the brakes should be applied and the train slowed or stopped, if necessary to prevent injury. *Alabama G. S. R. Co. v. Powers*, 19 Am. & Eng. R. Cas. 502, 73 Ala. 244.

An instruction to find for plaintiff if the jury believe that the cow was struck by defendant's engine at a crossing, and that a bell was not rung and a whistle was not sounded at least eighty rods from such crossing, is not objectionable as imposing upon the company the duty of ringing the bell and sounding the whistle eighty rods from the crossing. *Braddy v. Kansas City, Ft. S. & M. R. Co.*, 47 Mo. App. 519.—FOLLOWED IN *McCormick v. Kansas City, Ft. S. & M. R. Co.*, 50 Mo. App. 109.

**563. Instructions relating to duty to keep a lookout and stop trains.**—The general charge stating that if the company had used all reasonable and ordinary care and diligence to prevent the injury the plaintiff could not recover, an instruction to find out who was upon the train, what they did, what kind of lookout they kept, and whether the company's servants were doing all they could have done, was not erroneous. *Central R. & B. Co. v. Warren*, 84 Ga. 329, 10 S. E. Rep. 918.

In this case the jury found that the engineer of the appellant's train was negligent in that he made no effort to stop the train before striking the animals. The appellant claimed that the evidence showed that at the time and place of the killing of the animals the condition of the weather and the darkness were such that the employes could not, by the exercise of ordinary care, have seen the stock on the right of way in time to avoid the accident. The testimony as to the condition of the weather at the time of the accident was conflicting, but it was shown that if the weather was clear the exercise of ordinary care would have revealed the presence of the animals in time to avert their destruction. The court charged the jury that it was the "duty of the engineer to keep a lookout for obstructions on the track, and to use all appliances at his command to avoid accident; and if he fails to see an animal when he should, and thereby injures it, or if, seeing it, he

does not use the appliances at his command to avoid injuring it, then the company is liable, unless it appears from the circumstances surrounding the case that the use of these means to stop the train would injure the lives of the passengers." *Held*, that the verdict of the jury would not be disturbed and that the instruction to the jury was correct. *McMaster v. Montana Union R. Co.*, 56 Am. & Eng. R. Cas. 195, 12 Mont. 163, 30 Pac. Rep. 268.

An instruction given by the court "that if the jury believe the train which killed the plaintiff's cows could not have been stopped after the engineer saw the cows on the track and before they were struck, you will find for the defendant, provided the jury believe from the evidence the engineer in charge of said train used ordinary diligence, as herein explained"—*held*, not erroneous. *Kansas City, Ft. S. & G. R. Co. v. Lane*, 23 Am. & Eng. R. Cas. 237, 33 Kan. 702, 7 Pac. Rep. 587.

The court charged the jury upon the evidence in this case: (1) If the engineer saw, or could have seen by vigilance, the plaintiff's mule upon the track a quarter or half a mile ahead, and could have stopped the train in time to avoid the accident, the company is guilty of negligence; (2) if after thus discovering the mule, it left the track a quarter of a mile ahead of the train, and the engineer had reason to believe that it was no longer in danger, and afterward the mule ran upon the track a second time and was killed, then the company is not guilty of negligence unless the engineer could, by the use of the appliances at his command, have stopped the train in time to prevent the injury. *Held*, no error. *Wilson v. Norfolk & S. R. Co.*, 19 Am. & Eng. R. Cas. 453, 90 N. Car. 69.

**564. Instructions relating to duty to fence.**—In an action for killing stock, an instruction is not objectionable which fails to exclude all the places excepted by the statute from being fenced, where it is apparent from the testimony that the injury did not occur in one of the excepted places, witnesses having been permitted to testify without objection that the injury happened at a place where the defendant was bound to fence its road. *Toledo, P. & W. R. Co. v. Parker*, 49 Ill. 385.

In an action to recover the value of an animal killed by the cars of the defendant the following instruction given to the jury,

applicable to the evidence, was correct: "A railroad company is not bound to build and maintain a fence at a point in a town or village if by so doing it will obstruct or interfere with the free use of a public street in the town or village; and it is not bound or required to build and maintain a fence at a point that would obstruct a public highway, or where it will interfere in any way with the free use of such highway, whether such highway is in a town or village or in the country. Neither does the law require a railway company to build and maintain a fence at a point where by so doing it will interfere with the free use of a switch or side-track, constituting a part of the road; nor is such company bound to build or maintain a fence at a point on its road where it will interfere with the free use of a piece or parcel of ground kept and used by the company as a coal- or wood-yard, nor when it will interfere with the free use of a yard or lot kept for the purpose of loading or unloading staves, lumber, timber, wood, or other kinds of freight shipped or to be shipped on the cars of the company. And when there is a mill or hay-press on or near a railroad track, if the maintaining of a fence at or near the mill or press would interfere with the free use of the same, then the company is not required to build or maintain a fence so as to interfere with the free use of the mill or press. And if there is a lot or yard used in connection with the mill or press, the company is not bound to build or maintain a fence at any point where the same will interfere with the free use of such lot or yard. But whenever a company can build and maintain a fence without interfering with the rights of the public, or with the free use of property belonging to private individuals, or of its own property, then it is bound to maintain a fence, whether it will be in a town or village or in the country." *Ohio & M. R. Co. v. Rowland*, 50 Ind. 349.—*QUOTED IN Cincinnati, R. & F. W. R. Co. v. Wood*, 82 Ind. 593.

A charge to the jury that "if you should find by the preponderance of the testimony that the colt in controversy was injured by the defendant and killed by its servants at a point where it had a right to fence, then you should find for plaintiff, unless you further find that the defendant, at the point where said colt got upon its right of way, had a good and sufficient fence," cannot be complained of as erroneous in not excepting

the company from liability in case it should be found that at the time of the accident the colt was not running at large, within the meaning of § 1289 of the Code, where the petition did not allege that the colt was running at large when killed, and no objection to the omission was made by any pleading in the case, nor by a motion in arrest of judgment. *Daugherty v. Chicago, M. & St. P. R. Co.*, (Iowa) 54 N. W. Rep. 219.

Plaintiff was engaged with teams in constructing a side-track along defendant's road, which was fenced, and for the convenience of his work he made two gaps in the fence about four hundred feet apart, but between these two gaps there was another gap not made by him, and through this gap the mules in question, having escaped from plaintiff's control, went upon the track and were killed. *Held*, that the jury were justified in finding, so far as the mere character of the place was concerned, that the mules were killed by reason of the want of a fence, and that instructions given upon the theory that they might so find, provided defendant could be charged with knowledge of the gap, were not erroneous. *Accola v. Chicago, B. & Q. R. Co.*, 70 Iowa 185, 30 N. W. Rep. 503.

Where suit is brought to recover for a colt killed the company is not liable under the Missouri double damage act if it appears that a fence of a proper kind had been built by the company, but had been broken down by the colt or other animals, by reason of which it went upon the track; and an instruction that so states the law is free from objection. *Williams v. Hannibal & St. J. R. Co.*, 80 Mo. 597.

**565. Instructions relating to duty to construct and maintain cattle-guards.**—In a suit by the owner of an animal injured for the neglect of the defendant in not maintaining sufficient cattle-guards, it is not assignable error to instruct the jury that the duty of maintaining cattle-guards is laid upon railroad companies with reference both to the preventing of animals from straying onto the track and to the safety of passengers. *Watt v. Bennington & R. R. Co.*, 61 Vt. 268, 17 Atl. Rep. 284.

An instruction that, if an animal enters on the track from a highway because of insufficient cattle-guards the company is by statute made liable for injury received by the animal from its locomotive or cars, is not objectionable. *Whitewater R. Co. v.*

*Bridgett*, 20 Am. & Eng. R. Cas. 443, 94 Ind. 216.

In an action to recover damages for the killing of stock by a passing train, the court instructed the jury, first, that to enable a person to recover under said statute he must show that the place where the animal went upon the railroad was at a point where the company was bound to fence the road, and that the road was not fenced at that point, or that the company was bound to maintain a cattle guard at said place, and that such guard was not in proper condition to keep stock off the railroad; second, that said statute does not apply to the crossing of a public city or alley in a city, or a place within a city where, from the necessary use of the grounds, it would be unlawful or unreasonable to require the railroad company to maintain a fence; third, that a railroad company is not bound under said statute to erect and maintain cattle-guards at the crossings of public streets and alleys within the corporate limits of a city, or to fence the lots lying on either side of the railroad track between such crossings; but beyond such crossings the company is bound to maintain fences and guards, the same as outside the corporation. *Held*, that the defendant could not complain of these instructions. *Jeffersonville, M. & I. R. Co. v. Parkhurst*, 34 Ind. 501.

**566. Instructions relating to maintenance of gates at farm crossings.**—Where it is claimed that company is liable by reason of insufficiency of gate fastenings, it was proper to instruct the jury that the questions were whether or not the fastenings of the gate were safe and reasonably sufficient for their purpose, and if not, whether plaintiff's cattle got upon the track and were injured by reason of such insufficiency, and whether the fastenings were such, and put on in such a place and in such a way, as a man of usual and ordinary prudence would consider safe and sufficient for the purpose in that place. *Payne v. Kansas City, St. J. & C. B. R. Co.*, 35 Am. & Eng. R. Cas. 113, 72 Iowa 214, 33 N. W. Rep. 633.

**567. What instructions are improper, generally.**—An instruction that if the defendant, by its agent or servants, was guilty of negligence in killing the animal, a verdict must be returned for the plaintiff, is erroneous as subjecting the defendant to liability for negligence other

than that causing or contributing to the injury. *Nashville, C. & St. L. R. Co. v. Hembree*, 38 Am. & Eng. R. Cas. 300, 85 Ala. 481, 5 So. Rep. 173.

Where the evidence tends to show the use of a defective headlight on the engine at the time of the accident, a charge which instructs the jury that a headlight "such as are in use on the best equipped railroads" is the test of a proper headlight, is erroneous. *Alabama G. S. R. Co. v. Moody*, 92 Ala. 279, 9 So. Rep. 238.—*FOLLOWING* *Alabama G. S. R. Co. v. Jones*, 71 Ala. 487; *Alabama G. S. R. Co. v. McAlpine*, 75 Ala. 113.—*QUALIFYING* *Memphis & C. R. Co. v. Lyon*, 62 Ala. 71.

If there is evidence tending to show that the engineer was competent, was keeping a proper lookout, and did not and could not see the approaching animal until it was too late to give the cattle-alarm or check the train to prevent the injury, it is error to charge the jury that the defendant is liable unless its servants or agents in charge of the train did all in their power which they could reasonably do to avoid the killing, without qualifying the charge by requiring the jury to be satisfied that there was no fault in not sooner discovering the stock, and that, when discovered, it was possible, by the exercise of diligence, to prevent the accident. *Nashville, C. & St. L. R. Co. v. Hembree*, 38 Am. & Eng. R. Cas. 300, 85 Ala. 481, 5 So. Rep. 173.

A charge which instructs the jury that the plaintiff is entitled to recover if the animal could and ought to have been seen in time for the engineer to check the speed of the train and blow the whistle, though it might not and could not have been seen in time to stop the train, so as to avoid the injury, is erroneous, and the error is not cured by a subsequent charge, called an "explanatory charge," instructing the jury that they "must further believe that the accident could have been prevented if the engineer had seen the animal as soon as he could and ought to have seen him." *Alabama G. S. R. Co. v. Moody*, 92 Ala. 279, 9 So. Rep. 238.

Where the killing of plaintiff's mule by the train is admitted, but the evidence is conflicting as to the circumstances attending the killing, a charge which instructs the jury to find for the plaintiff "if the defendant's engineer was negligent in not seeing the mule on the track and not keeping a

proper lookout near the track," is a reversible error. *Kansas City, M. & B. R. Co. v. Watson*, 91 Ala. 483, 8 So. Rep. 793.

The fact that, after those in charge see animals on the track, it is impossible to stop a train in time to avoid a collision, will not relieve the company from liability if there was previous negligence in failing to see them or otherwise, and it is error to so instruct the jury. *Louisville, N. O. & T. R. Co. v. Suddoth*, 70 Miss. 265, 12 So. Rep. 205.

In an action for killing stock at a depot—*Held*, that it is the duty of those operating the train, if they discover the perilous condition of the stock in time to avert the injury, to use every reasonable effort at their command consistent with the safety of the train, and that if they fail to do so, and injury thereby results, plaintiff is entitled to recover, and that an instruction failing to advise the jury as to the constituent elements of negligence in such case is erroneous. *Senate v. Chicago, M. & St. P. R. Co.*, 41 Mo. App. 295.

Where cattle go upon a track near a trestle to seek shelter from a storm at night and are killed, it is error to instruct the jury that running a train at such a rate of speed that it could not be checked within one-half a mile was of itself such negligence as to entitle plaintiff to recover. *Doggett v. Richmond & D. R. Co.*, 81 N. Car. 459.

In an action for the negligent killing of stock, the court instructed the jury that, to constitute contributory negligence on the part of the plaintiff in allowing said stock to run at large, he must have knowingly suffered his stock to habitually run at large in the immediate vicinity of the place where it was killed, and that the plaintiff "cannot recover, although he may have been guilty of less negligence" than the employees of the defendant. *Held*, that the instruction was erroneous. *Jeffersonville, M. & I. R. Co. v. Foster*, 63 Ind. 423.

In an action for the killing of hogs in the operation of a railroad, where it is admitted that the railroad was not fenced where the injury occurred, which was in a township where hogs were prohibited from running at large; and that, even if the railroad had been inclosed with a fence constructed as designated by § 2 of the fence law, said fence would not have prevented said hogs from going upon the defendant's right of way—*held*, that under said admissions it was

error to instruct the jury to find for the plaintiff unless they found that he contributed negligently to the injury—*further held*, that under the admissions it was immaterial whether the said railroad was fenced or not. *Leavenworth, T. & S. W. R. Co. v. Forbes*, 31 *Am. & Eng. R. Cas.* 522, 37 *Kan.* 445, 15 *Pac. Rep.* 595.—FOLLOWED IN *St. Louis & S. F. R. Co. v. Sanders*, 40 *Kan.* 469.

Where a horse escapes from his keeper on a highway, runs some distance, and passes from the highway onto a railroad track, and is there injured, it is error to instruct the jury in a suit to recover for the injury that the horse was unlawfully on the highway. *Amstein v. Gardner*, 132 *Mass.* 28, 42 *Am. Rep.* 421.

**568. Instructions excluding essential matters from consideration of jury.**—A company whose road had not been in operation six months was sued for injuring plaintiff's hogs, and the court instructed the jury that if they believed from the evidence that the hogs were killed by defendant's engine, through a failure on the part of its employes to use ordinary care, then the company was liable. *Held*, that the instruction was erroneous as excluding the necessary elements that the injury might have been avoided by the exercise of ordinary care, and in making the liability dependent upon not attempting to prevent the injury, whether it would have availed or not. *Gilman, C. & S. R. Co. v. Spencer*, 76 *Ill.* 192.

Where a horse intrusted by the owner to a drunken servant runs away, enters upon a railroad track, and is killed, an instruction in an action for the death of the animal which excludes from the jury the negligent act of the drunken driver is erroneous. *Cleveland, C. & St. L. R. Co. v. Ducharme*, 49 *Ill. App.* 520.

Where a company sets up contributory negligence as a defense to an action for killing stock, an instruction allowing a finding for plaintiff if the jury find the defendant negligent in the management of its trains, without reference to such contributory negligence, is error. *St. Louis, A. & T. H. R. Co. v. Fullerton*, 45 *Ill. App.* 618.

So also where a company which is sued for killing a horse sets up in defense contributory negligence of plaintiff's son, who was in charge of the horse, an instruction which limits the consideration of the jury to the

contributory negligence of the plaintiff alone, excluding that of the son, is error. *St. Louis, A. & T. H. R. Co. v. Fullerton*, 45 *Ill. App.* 618.

An instruction to the effect that a company is not liable for killing animals if the engineer did not see them on the track until too near to stop his engine in time to avoid a collision is erroneous, as there may have been negligence in failing to see the stock sooner. *Ohio & M. R. Co. v. Stribling*, 38 *Ill. App.* 17.

Where the evidence does not show the character of the place at the point where the injury to a colt occurred, an instruction, excluding from the jury the consideration that, if the colt was injured where the defendant had no right to fence, it would not be liable, was erroneous. *Smith v. Kansas City, St. J. & C. B. R. Co.*, 58 *Iowa* 622, 12 *N. W. Rep.* 619.

**569. Instructions omitting to state essential facts.**—If an instruction for plaintiff, which undertakes to enumerate the facts upon which a recovery may be had, omits the essential fact that the road had been opened six months, a judgment for plaintiff will be reversed unless such omitted fact is shown by the evidence. *Chicago & N. W. R. Co. v. Diehl*, 53 *Ill.* 441.

It is error to leave it to the jury to say whether cattle were killed near enough to a road crossing to afford the owner that protection which the law gives to a crossing, without telling them what the law is. *Neely v. Charlotte, C. & A. R. Co.*, 33 *So. Car.* 136, 11 *S. E. Rep.* 636.

Plaintiff's horse escaped from his pasture at night onto a track over a fence which the company was bound to maintain, and was found in the morning in another pasture, some distance away, crippled. There was some evidence tending to show that it was crippled in the field where found. *Held*, that an instruction to the effect that if the jury were satisfied from the evidence that there was a clear connection between the escape of the horse and the injury received, plaintiff would be entitled to recover, was erroneous in not calling the attention of the jury to the difference between a direct and remote connection between the want of a suitable fence and the injury. *Holden v. Rutland & B. R. Co.*, 30 *Vt.* 297.

The trial court instructed the jury as to proximate and remote negligence, and added that "plaintiff, in suffering his animals to



run at large in the vicinity of the road, was only guilty of remote negligence," and that if they find the company guilty of gross negligence plaintiff might recover. *Held*, that the instruction was erroneous in not calling attention to the degree of negligence of plaintiff contributing to the injury, as well as to its time of happening. *Chicago & N. W. R. Co. v. Goss*, 17 Wis. 428.—DISTINGUISHED IN *Heller v. Abbot*, 79 Wis. 409.

#### 570. Instructions assuming facts.

—An instruction which assumes that a plaintiff's claim was presented to an agent of the company within six months, as required, is error where the evidence relating to the fact is oral and only tends to prove the fact of presentation. *Alabama G. S. R. Co. v. Roebuck*, 23 Am. & Eng. R. Cas. 176, 76 Ala. 277.

A company is not liable for double damages for animals killed for failing to maintain suitable fences, under the Missouri statute, unless it appears that the killing resulted from such failure; and an instruction which makes it liable, without reference to whether the killing resulted from the failure to fence, is erroneous. *Ridenore v. Wabash, St. L. & P. R. Co.*, 81 Mo. 227.—FOLLOWING *Harrington v. Chicago, R. I. & P. R. Co.*, 71 Mo. 384; *Fitterling v. Missouri Pac. R. Co.*, 79 Mo. 504.

In a statutory action for double damage for the killing of stock, an instruction which authorizes a recovery, without a finding that the stock came upon the track at a point where the statute required the company to fence its right of way, is erroneous; and the error is prejudicial when, under the evidence, it is uncertain whether the stock came upon the track at such a point. *Roberts v. Quincy, O. & K. C. R. Co.*, 49 Mo. App. 164.

Instructions that the stock reached the obstructed crossing without the negligence of the plaintiffs; that if the obstruction turned or caused the stock to turn up the track and they were killed by a passing train, then the jury should find for the plaintiffs, is erroneous, in assuming as a matter of inference that the injury was caused by the obstruction. *Richmond & D. R. Co. v. Noell*, 86 Va. 19, 13 Va. L. J. 320, 9 S. E. Rep. 473.

**571. Misleading instructions.**—The Alabama Code, § 1700, relating to the duty of engineers in approaching highway crossings or depots, applies exclusively to live stock. The next preceding section relates

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to the safety of human beings, and in a suit based on one section a charge as to the measure of duty under the other is misleading. *Mobile & M. R. Co. v. Blakely*, 59 Ala. 471.—FOLLOWED IN *Alabama G. S. R. Co. v. Powers*, 19 Am. & Eng. R. Cas. 502, 73 Ala. 244.

The fact that a horse is killed on the track is not in itself proof of negligence, but where the killing is at a place where the company is required to fence, may be taken as a circumstance to enable the jury to determine whether fences and cattle-guards were sufficient or not; and an instruction which the jury might understand to mean that the fact of killing was proof of negligence, is misleading. *Chicago & A. R. Co. v. Utley*, 38 Ill. 410.

Instructions are misleading which in effect tell the jury that if the stock while running at large went upon the road where it was unfenced, they were lawfully there, and that the company would be liable for killing the same if there was want of ordinary care and diligence; and that if the animals were killed by reason of the engineer not keeping a proper lookout, regardless of his other duties, then the company was liable. *Central M. T. R. Co. v. Rockafellow*, 17 Ill. 541.

The statute provides that the steam-whistle attached to an engine drawing a train of cars shall be sounded three times, at least, eighty rods from the place where the railroad shall cross any public road or street, except in cities and villages; and in an action to recover damages for killing a colt at the crossing of a public road outside of a city or village, caused by the alleged negligence of the railroad company, an instruction that, if the jury find from the evidence that the natural effect of sounding the whistle, as done by the engineer, was to drive the stock towards the track, then such whistling was negligence, is misleading. *Manhattan, A. & B. R. Co. v. Stewart*, 13 Am. & Eng. R. Cas. 503, 30 Kan. 226, 2 Pac. Rep. 151.

In an action brought by the plaintiff to recover the value of stock killed at a public crossing by the negligence of the railroad company, the bill of particulars alleged, among other things, "that the whistle of the engine was not sounded as prescribed by law; and that in consequence thereof the stock were not warned of the approach of the train until it was too late to prevent



them from being killed; and that if the whistle of the engine had been sounded, as prescribed by law, the person in charge of the stock could have prevented any injury." The bill of particulars further stated "that the company permitted a very high and dense growth of hedge to extend out on its right of way and nearly to the track," which "prevented persons travelling upon the public road from observing the approach of trains." *Held*, that under the allegations of the bill of particulars it was misleading to instruct the jury that "if the company permitted and suffered a hedge to stand upon its right of way, so as to obstruct the view of the track, and but for such obstruction the injury to the stock would not have happened, the company is liable for the injury to the stock;" and *held*, also, that where it appears from the instructions and findings of the jury, under the allegations of such a bill of particulars, that the liability for the injury to the stock was fixed by the jury for the negligence of the company in permitting the hedge to grow upon the right of way as alleged, the verdict and judgment must be set aside. *Atchison, T. & S. F. R. Co. v. Hawkins*, 40 *Am. & Eng. R. Cas.* 201, 42 *Kan.* 355, 22 *Pac. Rep.* 322.

#### 572. Instructions outside the issue.

—In a common-law action for killing stock, negligence must be averred and proved; and it is error to instruct the jury that if the company fail to fence its road as required by statute, by reason of which the cattle were killed, it is liable, whether the killing resulted from negligence or not. *Terre Haute, A. & St. L. R. Co. v. Augustus*, 21 *Ill.* 186.

Where a company is sued for common-law negligence in killing stock, it is error to instruct the jury that plaintiff may recover for statutory negligence, such as failing to ring a bell before reaching a crossing. *Chicago, B. & Q. R. Co. v. Wells*, 42 *Ill. App.* 26.

In an action at common law or under the Missouri damage act, § 5, for killing stock, it is error to instruct the jury as to the law laid down in the Missouri railroad act, § 43. *Turner v. St. Louis & S. F. R. Co.* 76 *Mo.* 261.

Where suit is brought under Missouri Rev. St. § 809, for the killing of stock, an instruction which makes the company liable if the killing was at a place where the track was not fenced, regardless of whether it came upon the track where it was fenced or not,

is error. *Henson v. St. Louis, I. M. & S. R. Co.*, 34 *Mo. App.* 636.—REVIEWING Muehlhausen v. St. Louis R. Co., 91 *Mo.* 332.

In a suit for damages for the killing of the plaintiff's cow by the defendant's railroad train, it is error to submit to the jury a question of the defendant's liability for common-law negligence when the evidence related only to the statutory negligence of failing to ring the bell or blow the whistle while approaching a public road crossing. *Barr v. Hannibal & St. J. R. Co.*, 30 *Mo. App.* 248. *Jeffersonville, M. & I. R. Co. v. Lyon*, 55 *Ind.* 477.

**573. Instructions not correctly stating the law.**—The cattle of the plaintiff below were killed on the railroad track of the defendant by a train running over them. *Held*, that it was error for the court below to charge the jury that the defendant was liable if the cattle were killed through the negligence or want of ordinary care of the defendant. *Union Pac. R. Co. v. Rollins*, 5 *Kan.* 167.—QUOTED IN *Hill v. Applegate*, 40 *Kan.* 31.

Proof of killing of stock, and of ownership by plaintiff, raises a presumption of negligence, and makes out a *prima-facie* case for plaintiff, which must be overthrown by proof by the defendant; therefore an instruction asked by the defendant company that when the defendant introduces evidence and explains the fact of killing, the plaintiff is required to prove by a preponderance of testimony that the company was negligent, does not correctly state the law. *Vicksburg & M. R. Co. v. Hart*, 19 *Am. & Eng. R. Cas.* 521, 61 *Miss.* 468.

Where the legislature has determined what signals ought to be given by moving trains to avoid injuries, it is error for a court to instruct a jury that they are at liberty to determine what signals should be adopted, and to regard their omission as negligence. *Hollender v. New York C. & H. R. R. Co.*, 14 *Daly (N. Y.)* 219, 6 *N. Y. S. R.* 352, 19 *Abb. (N. Cas.)* 18.

*The following instructions have been held erroneous as not correctly stating the law:*

An instruction which assumes that an engineer owes no duty to stock that are near the track, for, if they are seen near the track under circumstances that indicate danger, he is required to use necessary precautions to avoid injury. *Western R. Co. v. Sistrunk*, 85 *Ala.* 352, 5 *So. Rep.* 79.

An instruction which made the company

liable for killing stock, if it did not "do everything in its power to prevent the injury," is erroneous, as stating a higher degree of care than the law requires, for the company is bound only to use reasonable care in the running of its trains. *Cantrell v. Kansas City, M. & B. R. Co.*, 69 Miss. 435, 10 So. Rep. 580. *St. Louis, I. M. & S. R. Co. v. Vincent*, 36 Ark. 451.

An instruction to the effect that "when a railroad is properly fenced an engineer running a train thereon has a right to presume that he will find a clear track, except at highway crossings, and in villages, towns, and cities, and is not bound to keep a lookout for animals trespassing on the track or elsewhere." *Ohio & M. R. Co. v. Stribling*, 38 Ill. App. 17.

An instruction that submits the case on the old rule of contributory negligence and not of comparative negligence, as recognized in Illinois. *Chicago & E. I. R. Co. v. Boggress*, 21 Ill. App. 336.

An instruction which authorizes the jury to find for plaintiff, if they find defendant guilty of a greater degree of negligence than plaintiff, assuming to correctly state the law of comparative negligence as applied in Illinois. *Wabash R. Co. v. Jones*, 5 Ill. App. 607.

An instruction that "defendant is not liable for injury to plaintiff's animals unless it appears from the evidence that the employees in charge of defendant's engine wilfully and maliciously blew the whistle on said engine with the intent of frightening plaintiff's animals, and not for the purpose of getting them to leave the track and get out of the way of approaching trains." *Louisville & N. R. Co. v. Upton*, 18 Ill. App. 605.

An instruction that "the running of a train past or through the streets of a city at a speed of eighteen miles an hour would be gross negligence," there being no evidence as to the character of the particular locality distinguishing it as an inhabited or business portion of the city. *Burlington & M. R. Co. v. Wendt*, 12 Neb. 76.—REVIEWING *Brown v. Buffalo & S. L. R. Co.*, 22 N. Y. 191.

**574. Instructions invading the province of the jury.**—In an action to recover for horses killed, if the evidence simply shows that they were run over and killed, and that the engineer in charge of the train failed to comply with the require-

tions of Alabama act 1857-8, p. 15, as to the blowing of a whistle, ringing a bell, or reversing the engine, the court is not authorized to charge the jury that if they believe the evidence they must find for plaintiff. Such a charge is an invasion of the province of the jury, who alone can determine whether the injury was caused by the negligence of the engineer. *Memphis & C. R. Co. v. Bibb*, 37 Ala. 699, 1 Ala. Sel. Cas. 630.—REVIEWED IN *Copeland v. Memphis & C. R. Co.*, 3 Woods (U. S.) 651.

In an action for injury to a horse, plaintiff showed that the horse had fallen on defendant's track at a foot-crossing on account of getting his foot hung by a defectively-driven spike, and that before he could get him off he was struck by defendant's dump-car, in charge of its agents, who were called on to stop more than a hundred yards away, and the court charged the jury that though the plaintiff may have been negligent in entering defendant's track, said negligence was not the approximate cause of the injury complained of, and they should respond to the second issue, No. Held, to be error. *Lay v. Richmond & D. R. Co.*, 42 Am. & Eng. R. Cas. 110, 106 N. Car. 404, 11 S. E. Rep. 412.

**575. What requests for instructions should be granted.**—It is error to refuse to submit to the jury properly-framed inquiries upon controlling facts which are not covered by any other question. *Benton v. St. Louis & S. F. R. Co.*, 25 Mo. App. 155.

Where plaintiff sues for killing stock, and the evidence in support of his claim is very slight, the defendant company is entitled to an instruction that the jury is not to infer negligence from the mere fact that the train struck and killed the animal. *McKissock v. St. Louis, K. C. & N. R. Co.*, 7 Am. & Eng. R. Cas. 590, 73 Mo. 456.

The question of negligence is for the jury, but the finding thereon must be upon proof of acts done or omitted from which negligence is legally inferable. Where the question is whether the defendant could, by the exercise of proper care, have avoided injuring stock, the court's refusal to submit to the jury for a special finding the question of what did the defendant's negligence consist, is error. *Gourley v. St. Louis & S. F. R. Co.*, 25 Mo. App. 144.—FOLLOWING *Benton v. St. Louis & S. F. R. Co.*, 25 Mo. App. 155.

Though the employees of a company may be negligent in killing stock, still the com-

pany is not liable if the killing could not have been prevented by the exercise of due care, and it is error for the court to refuse to so charge. *Bellefontaine & I. R. Co. v. Bailey*, 11 *Ohio St.* 333.

In an action for injuries alleged to have been occasioned by the negligence of a company in failing to ring a bell or sound a whistle, as required by section 806, Missouri Rev. St., there was no evidence that the bell was rung or the whistle sounded, and all the testimony on the subject was that neither had been done. *Held*, that an instruction assuming that the negligence charged had been established would have been justifiable. *Keenig v. Missouri Pac. R. Co.*, 19 *Mo. App.* 327.—FOLLOWING *Johnson v. Chicago, R. I. & P. R. Co.*, 77 *Mo.* 546.

There being no statute requiring railroad tracks to be fenced in the Indian Territory, it is error not to so instruct the jury when requested. *Gulf, C. & S. F. R. Co. v. Ellidge*, 49 *Fed. Rep.* 356, 4 *U. S. App.* 136, 1 *C. C. A.* 295.

As there is no statute requiring railroad companies to fence their tracks in the Indian Territory, companies owe no duty to owners of stock in the operation of their trains except to use ordinary care to avoid injuring the same after they are seen on the track, or by the exercise of ordinary care might have seen, and a refusal so to charge is error. *Gulf, C. & S. F. R. Co. v. Ellidge*, 49 *Fed. Rep.* 356, 4 *U. S. App.* 136, 1 *C. C. A.* 295.—APPLYING *Gulf, C. & S. F. R. Co. v. Washington*, 49 *Fed. Rep.* 347.

**576. What requests for instructions should be refused.**—When the defendant's counsel requested the judge to charge the jury "that Mrs. B. turning out the cow in the vicinity of the railroad just before the coming of the train was negligence and carelessness to be considered by the jury, and that when said cow got upon the track it made B. a trespasser," which the judge refused; but charged the jury "that if it were shown that plaintiff's cow was injured by the defendant's servants, the law presumes negligence on their part and they must explain it; and the fact that Mrs. B. turned out the cow in the vicinity of the railroad before the train came, was no evidence of carelessness to be considered by the jury, and it was not true that if said cow so turned out got upon the track it made plaintiff a trespasser, unless it was

inclosed by a lawful fence—*held* that such refusal and the charge given by the court were not error, under the facts of the case, for the fact of contributory negligence cannot be presumed against the owner of such cattle as ordinarily are turned out, by turning such animals out, and the act of their going upon an uninclosed railroad track did not constitute her a trespasser. *Macon & W. R. Co. v. Baber*, 42 *Ga.* 300.—APPLYING *Buxton v. Northeastern R. Co.*, L. R. 3 Q. B. 549. DISTINGUISHING *Central R. & B. Co. v. Davis*, 19 *Ga.* 437.

In an action against a railroad company to recover the value of cattle, belonging to the plaintiff, alleged to have been injured by the negligence of the railroad company at a public crossing, the company, upon the trial, requested the court to direct the jury to find upon the following question: "If the jury should find that the defendant was negligent, state fully in what such negligence consisted." The court refused to submit the question to the jury, and thereby committed no error. Under sec. 286 of the Code, the court is not bound to submit such general questions of fact to the jury as will require them to find a special verdict upon the issues in the case, or compel them to state at length or in detail new facts not particularly mentioned in the general question; but where in the nature of things the jury can point out the negligence imputable to the defendant, the court, if requested, may, in its discretion, direct the jury to fix the negligence or state in what the alleged negligence consists, and the jury should do so. If it is impossible for them to do this upon the evidence, the failure to fix the negligence will not defeat a recovery. *Missouri Pac. R. Co. v. Reynolds*, 13 *Am. & Eng. R. Cas.* 510, 31 *Kan.* 132, 1 *Pac. Rep.* 150.

Four horses belonging to plaintiff's intestate were killed on a siding of defendant's road under the following circumstances: Plaintiff's intestate was in the habit of hauling cars on that siding for the Blaisdell mill. The defendant daily used the siding, on the arrival of a certain train, for sending cars loaded with logs to the Bullis mills, situated on the same siding beyond the Blaisdell mill. This was done by means of a "flying switch," the loaded cars being cut out of the train while in motion, and propelled by their own momentum down the siding. The plaintiff's intestate was familiar with this use of the siding, and knew the

time at which the log train was accustomed to arrive, and it was his duty to keep the siding clear at such time. At the time of the accident his teams were employed in moving a string of empty cars on the siding. When the log-train arrived and the flying switch was made, the empty cars had been drawn onto a branch siding near the Blaisdell mill, but the loaded cars came down the main siding and followed the empty cars, by means of the open switch, onto the branch, and the collision occurred which resulted in the loss of the horses. It was the duty of the plaintiff's intestate and his men to close the switch behind them, but the loaded cars followed so closely as not to give time to do so. There was some evidence that the men in charge of the train were warned by Dunn of the presence of the empty cars on the siding before the flying switch was made. The weight of the evidence showed that the train did not arrive ahead of the schedule time, but a little after. *Held*, that it was not error in the trial court to refuse to instruct the jury that the omission of the engineer to observe the warning given by Dunn did not constitute negligence on the part of the defendant. *Held*, also, that as the train was in advance of its schedule time when the flying switch was made, that was a fact the jury might consider. They might well have found it negligence on the part of the defendant's servants to throw the loaded cars on the siding before the usual time for so using it, when men and teams might be there engaged in moving empty cars. *Good v. New York, L. E. & W. R. Co.*, 18 N. Y. S. R. 773, 50 Hun 601, 2 N. Y. Supp. 419.

Where the complaint, asking damages against a railway company for injury to stock, charges negligence and carelessness generally, it is not error to refuse to give in the charge to the jury a request limiting the cause of injury to the negligence of a single one of defendant's servants. *Pittsburgh, C. & St. L. R. Co. v. Fleming*, 30 Ohio St. 480.

Where the killing of cattle by a railroad train was proved, and the company offered no testimony in defense, the circuit judge committed no error in refusing to charge that the company were not liable unless shown to have been guilty of gross negligence or wilful injury. *Jones v. Columbia & G. R. Co.*, 19 Am. & Eng. R. Cas. 459, 20 So. Car. 249.

Handing to a trial judge the syllabus of

a former case and asking him to read it to the jury, in an action for killing stock, where no more formal request is made, which is refused, such refusal is not ground for reversing a judgment, where the same proposition of law had been fully stated in the hearing of the jury. [MCIVER, J., dissenting.] *Molair v. Port Royal & A. R. Co.*, 31 So. Car. 510, 10 S. E. Rep. 243.—DISTINGUISHING *Harley v. Eutawville R. Co.*, 31 So. Car. 151.

*The following requests for instructions were properly refused by the court:*

An instruction that if the jury believed that none of the mules was seen in time to stop the trains by the use of all possible means, or that, at their rate of speed, they could not have been stopped within the distance within which the headlights would reveal objects on the track, and that the headlights were such as were used on well-regulated roads, they must find for defendant, since such instruction ignored the duty of the engineers to keep a lookout, and not to run their trains at a negligent rate of speed. *Birmingham Mineral R. Co. v. Harris*, 98 Ala. 326, 13 So. Rep. 377.

Instructions which required plaintiff to show by what train the mules were killed, and that defendant was negligent. *Birmingham Mineral R. Co. v. Harris*, 98 Ala. 326, 13 So. Rep. 377.

An instruction that if the jury believed the evidence they could not allow damages for the mules killed by either train was properly refused, since both engineers testified that it was impossible, at the rate of speed at which they were running at the time of the accident, to stop their trains in time to save the mules. If so, it was negligence for which the company was liable. *Birmingham Mineral R. Co. v. Harris*, 98 Ala. 326, 13 So. Rep. 377.

An instruction which claims a verdict for the company, in an action for damages for killing a mule, "if the engineer was on the lookout for obstructions when he discovered the animal on the track, and then used all the means in his power to prevent the injury," ignoring the question whether the animal might not have been sooner discovered if a proper lookout had been kept, is properly refused. *East Tenn., V. & G. R. Co. v. Baker*, 94 Ala. 632, 10 So. Rep. 211.

An instruction "that if the engineer, on perceiving the animal on the track, used

all the means within his power known to skillful engineers in order to stop the train, then plaintiff cannot recover," because misleading, since the accident may have been proximately caused by his failure to keep a diligent lookout for obstructions. *East Tenn., V. & G. R. Co. v. Watson*, 90 Ala. 41, 7 So. Rep. 813.

An instruction, in an action for killing a cow, that the failure of the company to keep its right of way clear of bushes is negligence, the question of negligence being exclusively for the jury. *Woolfolk v. Macon & A. R. Co.*, 56 Ga. 457.

A request to charge in general terms that a less degree of diligence is required in a county where the stock law prevails than in a county where it does not. Also a request to charge that a less degree of diligence in looking out for stock is required while running through a field than while running through lands uninclosed. *Central R. Co. v. Summerford*, 87 Ga. 626, 13 S. E. Rep. 588.

An instruction that, if the cattle were killed by the trains upon defendant's road it was incumbent upon plaintiff to show that the damages were caused by the negligence of defendant, as the jury might have inferred from it that it was necessary for plaintiff to prove wilful negligence, or some other negligence than the fact of the killing and the omission to fence. *Rockford, R. I. & St. L. R. Co. v. Lynch*, 67 Ill. 149.

Instructions, in effect, that if animals went on the railroad track at a crossing of the highway and were killed some distance from the highway, the railroad company would not be liable upon the ground of the want of a fence. *Evansville & C. R. Co. v. Barbee*, 74 Ind. 169.

An instruction that "if the plaintiff knowingly and consentingly permitted his mule to habitually run at large in the immediate vicinity of the place where he was killed," he himself was not free from negligence and not entitled to recover, where the evidence clearly showed that the animal was not running at large with the plaintiff's knowledge at the time it was killed, but that, on the contrary, the plaintiff had taken every precaution that a man of ordinary prudence would take to securely fasten the animal in his stable, and that it escaped without his knowledge or fault, and wandered along the street to the place on the track where it was killed. *Ohio & M. R. Co.*

*v. Craycraft*, 5 Ind. App. 335, 32 N. E. Rep. 297.

An instruction that the burden of proof of negligence is on plaintiff, or that plaintiff's son should have notified the company of the defective condition of the fence, when an instruction had already been given directing the jury that defendant is not liable unless there was negligence in failing to repair the fences within a reasonable time after notice of their defective condition was had, and that defendant should have received notice of the want of repair. *Dunn v. Chicago & N. W. R. Co.*, 7 Am. & Eng. R. Cas. 573, 58 Iowa 674, 12 N. W. Rep. 734.

An instruction that, "if the jury finds from the testimony in the case that the cow was struck in the highway by the defendant's engine and killed, the plaintiff cannot recover," the plaintiff claiming that if the animal was upon the highway crossing when injured it was because of the neglect of the defendant to properly fence its track, as such instruction excludes all idea that the defendant's negligence might have occasioned the cow's being upon the highway. *Jebb v. Chicago & G. T. R. Co.*, 31 Am. & Eng. R. Cas. 532, 67 Mich. 160, 10 West. Rep. 905, 34 N. W. Rep. 538.

An instruction that "the mere fact that the gate in question was not hung or provided with latches or hooks, and that plaintiff's animal escaped through such gate and was killed, does not of itself make this defendant liable," when the same matter is made a distinct condition of recovery in other instructions. *Cooper v. Atchison, T. & S. F. R. Co.*, 39 Mo. App. 489.

An instruction as to the condition of the fence at a point other than that at which it was shown the animal got upon the track. *Coryell v. Hannibal & St. J. R. Co.*, 82 Mo. 441.

Instructions that if an employé of the company made an examination of the fence the day before the accident and discovered no defect, and if he made such examination as in his judgment was deemed proper under the circumstances, then the company is not liable—as such examination might have been made and still the whole duty of the company not discharged. *McGuire v. Ogdensburg & L. C. R. Co.*, 44 N. Y. S. R. 348, 63 Hun 632, 18 N. Y. Supp. 313.

An instruction asked for by defendant, in an action for killing a horse, "that when the plaintiff proves the ownership and the



fact of the killing he makes out a *prima-facie* case, and negligence is presumed; but that when the defendant introduces evidence and explains the fact of the killing, the plaintiff is required to prove by a preponderance of testimony that the defendant was negligent." *Fuller v. Port Royal & A. R. Co.*, 24 So. Car. 132.—REVIEWING *Danner v. South Carolina R. Co.*, 4 Rich. (S. Car.) 329.—QUOTED IN *Joyner v. South Carolina R. Co.*, 29 Am. & Eng. R. Cas. 258, 26 So. Car. 49, 1 S. E. Rep. 52.

**577. Directing verdict.**—*The court properly directed a verdict for defendant in the following cases:*

Where there is no evidence tending to prove plaintiff's case. *Hoge v. Ohio River R. Co.*, 35 W. Va. 562, 14 S. E. Rep. 152.

Where an engineer is the only witness who testifies as to the circumstances attending the killing of a horse, and his evidence disproves all negligence, and he is not impeached or contradicted. *Alabama G. S. R. Co. v. Roebuck*, 23 Am. & Eng. R. Cas. 176, 76 Ala. 277.

Where proof of killing stock has made out a *prima-facie* case under the Dakota statute, but defendant's evidence shows beyond a doubt that the killing was without fault on the part of the employés of the company. *Volkman v. Chicago, St. P., M. & O. R. Co.*, 35 Am. & Eng. R. Cas. 204, 5 Dak. 69, 37 N. W. Rep. 731.—APPROVING *Louisville & N. R. Co. v. Wainscott*, 3 Bush. (Ky.) 149; *Chicago, St. L. & N. O. R. Co. v. Packwood*, 7 Am. & Eng. R. Cas. 584, 59 Miss. 280; *Kentucky C. R. Co. v. Talbot*, 78 Ky. 621; *Durham v. Wilmington & W. R. Co.*, 82 N. Car. 352.—FOLLOWED IN *Huber v. Chicago, M. & St. P. R. Co.*, 6 Dak. 392.

Where the evidence vindicates a railway company from all blame for an accident which resulted in the rashness of a mule in walking across the track in front of a rapidly moving train. *Kansas City, M. & B. R. Co. v. Myers*, (Miss.) 7 So. Rep. 321.

In an action to recover damages for injuries to several mules, which were run over by a freight train before daybreak one frosty morning as the train was crossing a trestle over a small creek, when the engineer of the train testifies that he did not see the animals until he was within ten feet of them, and could not see them sooner because of a dense fog about one hundred yards wide, which covered the track at that

point, extending up and down the creek; there being no evidence in conflict with his testimony, and none which authorized an inference inconsistent with it. *Central R. & B. Co. v. Ingram*, 95 Ala. 152.

Where in an action for killing a horse the undisputed evidence showed that the accident occurred at a place where there was a down-grade; that the train was running from eighteen to twenty miles an hour; that the horse came upon the track from five to ten rods ahead of the engine; that the engineer immediately upon seeing the horse whistled and reversed the engine; that the brakes were applied and everything was done possible to avert the accident; that the engine and cars were provided with the necessary appliances for stopping them; that the employés in charge of the train were experienced and competent; and that the horse was hobbled at the time of the accident. *Huber v. Chicago, M. & St. P. R. Co.*, 40 Am. & Eng. R. Cas. 188, 6 Dak. 392, 43 N. W. Rep. 819.—APPROVING *Grundy v. Louisville & N. R. Co.*, (Ky.) 2 S. W. Rep. 899; *Spaulding v. Chicago & N. W. R. Co.*, 33 Wis. 582; *Kentucky C. R. Co. v. Talbot*, 7 Am. & Eng. R. Cas. 585, 78 Ky. 621. FOLLOWING *Volkman v. Chicago, St. P. M. A. R. Co.*, 5 Dak. 69.

Where in an action for killing a mule plaintiff testified that the animal's tracks showed that it had run some forty yards on the track before it was struck, and the engineer testified for the company that the animal was killed at night, and when first seen by the use of the headlight was standing on the track about fifty yards ahead of the engine, and then it was impossible, at the rate of speed he was running, to stop the train in time to avoid the accident, as the evidence was easily reconcilable, and that of the engineer was probable. *Louisville, N. O. & T. R. Co. v. Tate*, 70 Miss. 348, 12 So. Rep. 333.

But where there is no direct evidence in an action for killing stock, but there are circumstances tending to show the killing, the jury must determine whether the circumstantial evidence is sufficient or not, and it is error to give a peremptory instruction to find for the defendant. *South & N. Ala. R. Co. v. Small*, 70 Ala. 499.

**578. Erroneous yet harmless instructions.**—(1) *Generally.*—A Connecticut statute provides that railroad companies shall construct cattle-guards at



highway crossings, unless the railroad commissioners are of the opinion that they are not necessary. When sued for killing stock through the alleged failure to construct such cattle-guards, the company introduced evidence that the commissioners had frequently passed over that portion of the road on official business and had never directed a cattle-guard; but it appeared that their attention had never been specially called to it. The court instructed the jury that such evidence was not conclusive as to the opinion of the commissioners. *Held*, that as the evidence was scarcely admissible, the company could not complain of such instruction, it being more favorable than it was entitled to. *Bulkley v. New York & N. H. R. Co.*, 27 Conn. 479.

In a suit for killing a cow, where no negligence was imputable to plaintiff, and consequently the doctrine of comparative negligence was not involved, an instruction which states the rule in such case incorrectly will not be such an error as to reverse a just judgment; nor will evidence that there was much trouble in the vicinity with the company. *Rockford, R. I. & St. L. R. Co. v. Rafferty*, 73 Ill. 58.

(2) *Relating to measure of damages.\**—Where suit is brought to recover both for animals killed and injured, an objection that the instructions given as to the value of the animals injured does not state the measure of damages correctly is not ground for the reversal of a judgment for plaintiff for a total of \$436, where the value of the cattle killed was alleged to be \$425 and of those injured \$40. *Lainiger v. Kansas City, St. J. & C. B. R. Co.*, 41 Mo. App. 165.

An error in instructing the jury in an action under the 43d section of the Missouri railroad act that they may allow interest on the value of animals killed is not ground for reversing a judgment where it appears that no interest was allowed. *Wade v. Missouri Pac. R. Co.*, 19 Am. & Eng. R. Cas. 586, 78 Mo. 362.

(3) *Relating to degree of care.†*—The owner of cattle which stray upon a track by reason of the insufficiency of a fence which the railroad company is under obligation to maintain, who brings an action upon the case against the company for

killing the cattle by means of a locomotive engine, is entitled to have the degree of care which the company is bound to exercise defined in a more strict manner than by instructing the jury that the company is bound to the exercise of such care as a man of ordinary prudence would use, who was the owner of both the railroad and the cattle; but if such instruction is given to the jury the defendant cannot complain. *Quimby v. Vermont C. R. Co.*, 23 Vt. 387.—FOLLOWED IN *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 657.

Where plaintiff produces several witnesses who testify that his mules were killed by a train, in daylight, with nothing to obstruct the view; that no effort was made to stop the train, but that, on the other hand, the engineer seemed to be trying to run them down; and that the mules ran a considerable distance ahead of the train on the track, which evidence is undisputed, as it goes to show a liability of the company in any event, it is harmless error to instruct the jury that the engineer was bound to use the "utmost care." *St. Louis & S. F. R. Co. v. O'Loughlin*, 49 Fed. Rep. 440, 4 U. S. App. 283, 1 C. C. A. 311.

(4) *Relating to company's failure to fence.\**—Where a company is sued for killing stock by reason of a failure to fence its track within six months, as required by statute, a failure to instruct the jury that the company was not liable for a failure to fence until the lapse of six months after the road was opened is harmless error, where the evidence clearly shows that the road had been used for much longer than six months. *Chicago & N. W. R. Co. v. Dement*, 44 Ill. 74.

An instruction to the effect that where cattle get on the track of a railroad on account of the want of a fence where the right to fence exists, and are killed by the cars, the company is liable, whether the cattle were running at large at the time or not, was erroneous; but, since it was clearly shown on the trial that the cattle in question were running at large, the error could not have prejudiced defendant, and was no ground for reversal. *Brentner v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 448, 68 Iowa 530, 23 N. W. Rep. 245, 27 N. W. Rep. 605.

The error in charging the jury that to entitle the stock-owner to recover it is only

\* See post, 586-589.

† See ante, 48, 58, 62, 116, 141, 186.

\* See ante, 122-130.

necessary for him to prove the injury to or destruction of his property, is cured by subsequent instructions that the plaintiff must prove the allegations of his complaint by a preponderance of evidence, and could only recover in case it appeared that the colt while running at large passed onto defendant's track by reason of its omission or neglect to inclose its right of way with a sufficient fence, and while so upon the track at a point where defendant had a right to fence was struck and injured by an engine. *Karr v. Chicago, R. I. & P. R. Co., (Iowa) 54 N. W. Rep. 144.*—REVIEWING *Manwell v. Burlington, C. R. & N. R. Co., 80 Iowa 666, 45 N. W. Rep. 568.*

In an action for injury to cattle under Missouri Rev. St. § 809, if the complaint is sufficient and the facts warrant a judgment for the plaintiff, the judgment will not be set aside because the instructions do not require the jury to find that the injury was occasioned by the company's failure to fence. *Terry v. Missouri Pac. R. Co., 77 Mo. 254.*—FOLLOWING *Moore v. Missouri Pac. R. Co., 73 Mo. 438*; *Williams v. Missouri Pac. R. Co., 74 Mo. 453.*—APPROVED IN *Phillips v. Missouri Pac. R. Co., 24 Am. & Eng. R. Cas. 368, 86 Mo. 540.*

#### 8. Amount of Recovery.

**579. Generally.\***—A jury need not fix the value of stock killed at the exact sum testified to by any one witness or by any two, but may find an intermediate sum. *Jeffersonville, M. & I. R. Co. v. Tull, 37 Ind. 341.*

The Indiana statute requiring company to fence, and awarding damages to the owners of animals killed or injured by the rolling stock of any company, applies to animals killed by freight as well as passenger trains. *Indianapolis & C. R. Co. v. Snelling, 16 Ind. 435.*

**580. Compensatory damages.**—The damages for stock killed by a railway through negligence merely, as a neglect to fence its track, are compensatory only. To authorize more, circumstances of aggravation must be shown. *Toledo, P. & W. R. Co. v. Johnston, 74 Ill. 83.*

Consequential damages resulting from

\* Damages for killing or injuring animals, see note, 49 AM. & ENG. R. CAS. 563.

Damages for stock liable to be killed, see note, 44 AM. & ENG. R. CAS. 113.

fright to animals injured by falling through a bridge, not caused by actual collision, or any negligence or wilful misconduct on the part of the servants of the company, are not embraced in Nebraska Comp. St. ch. 72, §§ 1, 2. *Burlington & M. R. R. Co. v. Shoemaker, 22 Am. & Eng. R. Cas. 565, 18 Neb. 369.*

And the rule is the same under the Illinois act of 1874, as amended by act of 1879. *Schertz v. Indianapolis, B. & W. R. Co., 15 Am. & Eng. R. Cas. 523, 107 Ill. 577.*—DISTINGUISHED IN *Chicago & E. I. R. Co. v. People, 120 Ill. 667, 12 N. E. Rep. 207, 9 West. Rep. 740.*

**581. Proximate and remote damages.**—The plaintiff, whose horses were injured through defendant's negligence, may legally recover for the reduced market value of the horses, but cannot recover the amount that he could have earned with them during several weeks that they could not be used. He could, however, if he had shown it, have recovered what would have been the value of their use if they had not been injured. *Fritts v. New York & N. E. R. Co., 62 Conn. 503, 26 Atl. Rep. 347.*

When a railroad is sued for frightening a horse and causing him to run against a barbed-wire fence, the compensation should be for a sum to cover the reasonable hire of the horse while disabled, and, in addition, enough to make good any diminution in his market value. *Atlanta & W. P. R. Co. v. Hudson, 62 Ga. 679.*

In an action for injuries to a span of horses by coming against a barbed-wire fence, which rendered them unfit for use for a time, the owner may recover for the permanent diminution in the market value of the horses, and, in addition thereto, such expenses as he incurred in reasonable attempts to effect a cure, together with reasonable compensation for the loss of the use of the horses while under treatment, provided the whole damages do not exceed the original value of the property. *Keyes v. Minneapolis & St. L. R. Co., 36 Minn. 290, 30 N. W. Rep. 888.*

**582. Trouble and expense in attempting to cure injured animal.**—Where live stock are wrongfully injured by a railway company, the owner may recover such reasonable expenses as were necessarily incurred in taking care of and curing the injured stock. *International & G. N. R. Co. v. Cooke, 23 Am. & Eng. R. Cas. 226, 64*

*Tex.* 151.—QUOTED IN *Dallas City R. Co. v. Beeman*, 74 *Tex.* 291.

Where stock are negligently injured by a company but not killed, it is the duty of the company to take proper care of them, and if it fails to do so the owner may give the animals necessary attention and care and recover from the company reasonable compensation therefor. *Finch v. Central R. Co. of Iowa*, 42 *Iowa* 304.

Where a horse is injured, the measure of the owner's damages is the diminution of the market value of the horse at the time that action is commenced, and, in addition, such sum as he had paid out in reasonable attempts to effect a cure, with such further reasonable sums as will compensate the owner for the loss of the use of the horse while disabled, and for his own services in attempting to cure; but in no case can the whole damages allowed exceed the market value of the horse. *Gillett v. Western R. Co.*, 8 *Allen (Mass.)* 560.—APPROVED IN *Keyes v. Minneapolis & St. L. R. Co.*, 36 *Minn.* 290, 30 *N. W. Rep.* 888.

And whether there is a reasonable belief that the horse can be cured, and whether the expenditure was made in good faith, are questions for the jury. *Ellis v. Hilton*, 78 *Mich.* 150, 6 *L. R. A.* 454, 43 *N. W. Rep.* 1048.—FOLLOWING *Watson v. Lisbon Bridge*, 14 *Me.* 201.

Where, through the negligence of a railway company, an animal is so injured as to entirely destroy its usefulness, the owner may recover its full value, with compensation for reasonable expense and care in attempting to effect a cure. *Gulf, C. & S. F. R. Co. v. Keith*, 74 *Tex.* 287, 11 *S. W. Rep.* 1117.

In an action for damages for killing one mule and injuring another, it was not error to allow the plaintiff to testify as to the expense of feeding and doctoring the crippled mule during the time it could not work, as a measure of damages touching that animal. *Central R. & B. Co. v. Warren*, 84 *Ga.* 329, 10 *S. E. Rep.* 918.

In an action for an injury to plaintiff's mare from which she died, and which is alleged to have been caused by a defective highway, it was error to admit evidence of the value of the use of the animal during the period which intervened between the injury and the death, "including plaintiff's service in taking care of her." *Page v. Sumpter*, 53 *Wis.* 652, 11 *N. W. Rep.* 60.

**583. Exemplary damages.**—The jury may allow exemplary damages against a railroad company if it appear that stock are killed or injured by the gross negligence or wilful and wanton mischief of its agents. *Vicksburg & J. R. Co. v. Patton*, 31 *Miss.* 156.—DISTINGUISHED IN *Cox v. Keahey*, 36 *Ala.* 340. QUOTED IN *South & N. Ala. R. Co. v. McLendon*, 63 *Ala.* 266; *New Orleans, J. & G. N. R. Co. v. Bailey*, 40 *Miss.* 395.

Where cattle are killed on the track through ordinary negligence the measure of damages is limited to their value, and nothing can be allowed as smart-money. *Toledo, P. & W. R. Co. v. Arnold*, 43 *Ill.* 418.

Where it appears that cattle are killed through ordinary carelessness by the employees of a company, it is error to instruct the jury that if they believed from the evidence "that said stock was killed through the wilful and wanton negligence or misconduct of the company's agents and employees," they may award exemplary damages. *Chicago, St. L. & N. O. R. Co. v. Jarrett*, 11 *Am. & Eng. R. Cas.* 455, 59 *Miss.* 470.

In an action for killing mules in a field through which the railroad ran, it was error to charge the jury that if the train could have been easily stopped after the mules were in sight from the train, or near the track, the jury should award as damages the value of the mules, and also such additional sum as to the jury should seem proper and just, as punitive damages; it appearing that those in charge of the train did all they could to avoid a collision after the danger to the stock was apparent. *Yazoo & M. V. R. Co. v. Brumfield*, (Miss.) 4 *So. Rep.* 341.

**584. Attorney's fee.**—*Illinois*.—The attorney's fee is allowable only where the company has failed to comply with the requirements of the statute, and such failure must appear from evidence in the record. *Wabash, St. L. & P. R. Co. v. Lavieux*, 14 *Ill. App.* 469.—FOLLOWED IN *Wabash, St. L. & P. R. Co. v. Murphy*, 14 *Ill. App.* 472.

Where a company is sued for killing stock plaintiff is not entitled to recover attorney's fees if no negligence, except what is known as common-law negligence, is shown. Such fees are only recoverable where the loss is

\* See *ante*, §.

Recovery of attorney's fees in actions against railroads under various statutes, see note, 49 *AM. & ENG. R. CAS.* 515; 20 *Id.* 49.

attributable to statutory negligence, such as a failure to fence. *Chicago, M. & St. P. R. Co. v. Phillips*, 14 Ill. App. 265.

A reasonable attorney's fee is allowable under the statute only where a railroad company is sued to recover damages caused by its failure to erect a fence on each side of its track. *Wabash, St. L. & P. R. Co. v. Neikirk*, 13 Ill. App. 387. *Chicago, M. & St. P. R. Co. v. Phillips*, 14 Ill. App. 265.

The owner of stock cannot recover their value and an attorney's fee, as provided by statute, unless it appears that the road was opened to use for at least six months before the injury complained of. *Peoria, D. & E. R. Co. v. Purviance*, 15 Ill. App. 112.

Under a statute allowing a plaintiff in an action for stock killed to recover reasonable attorney's fees, where there is a second trial he is entitled to such fees at both trials, though the second trial was granted by consent of his counsel. *Indianapolis, B. & W. R. Co. v. Buckles*, 21 Ill. App. 181.

The statute making a railway corporation liable to the owner of animals injured or killed on its track when it has failed to make and keep in repair fences, etc., and also for reasonable attorney's fees, is notice to such corporation, when sued for such an injury, that such attorney's fees will be claimed, and it is not necessary it should have any other notice. *Peoria, D. & E. R. Co. v. Duggan*, 20 Am. & Eng. R. Cas. 489, 109 Ill. 537, 50 Am. Rep. 619.

The liability of a company for attorney's fees in an action to recover for an injury to animals, growing out of its neglect to fence its track, etc., under the Illinois act of 1879, arises at the same instant with its liability for damages; and such fees may be assessed in the same suit with the damages, the law not favoring a multiplicity of actions. *Peoria, D. & E. R. Co. v. Duggan*, 20 Am. & Eng. R. Cas. 489, 109 Ill. 537, 50 Am. Rep. 619.

(2) *Kansas—Missouri*.—Where the findings show that an animal was injured on a railroad track through the failure of the company to fence the track and the negligence of the company in running and operating the cars on its road, attorney's fees are recoverable under the statute of 1874. *Central Branch U. P. R. Co. v. Nichols*, 24 Kan. 242. See also *Missouri Pac. R. Co. v. Abney*, 30 Kan. 41, 1 Pac. Rep. 385.

No attorney's fees can be allowed for defending in this court a proceeding in error

to review a judgment rendered under the Kansas railroad stock law of 1874. *Kansas Pac. R. Co. v. Wood*, 24 Kan. 619.

Under § 2613, Rev. St. Missouri, 1889, a reasonable attorney's fee may be taxed in favor of a plaintiff prevailing in an action founded on § 2612, for injury to live stock which entered upon the company's right of way at a place not inclosed by a fence as required by law, and received injuries in consequence of being frightened by passing cars. *Briggs v. St. Louis & S. F. R. Co.*, 111 Mo. 168, 20 S. W. Rep. 32.

**585. Expenses of litigious litigation.**—In an action for killing an animal, evidence that plaintiff offered to compromise, and that defendant offered a small sum which he would not accept, though weak, is still admissible to show special litigiousness on part of defendant, in order to the recovery of expenses of litigation under § 2891, Irwin's Rev. Code. *Selma, R. & D. R. Co. v. Fleming*, 48 Ga. 514.

**586. Measure of damages, generally.**\*—In an action for killing stock, their value is the measure of damages. *Galveston, H. & S. A. R. Co. v. Turner*, 1 Tex. App. (Civ. Cas.) 344. *Lapine v. New Orleans, O. & G. W. R. Co.*, 20 La. Ann. 158.

Under Texas Rev. St. art. 4245, the measure of damage for stock killed by a railroad is the value of the stock when killed. *Texas & P. R. Co. v. Lanham*, 1 Tex. App. (Civ. Cas.) 99.

The measure of damages for injury to a domestic animal or other perishable chattel is usually its reduced value at the time; it can hardly be fixed by the rules applicable in the case of injury to a human being. *Davidson v. Michigan C. R. Co.*, 49 Mich. 428, 13 N. W. Rep. 804.

Where a company obtains a right of way through a farm, and in consideration of the grant agrees to erect and maintain a secure fence, but fails to erect such fence, and animals enter upon the track by reason thereof and are killed, the measure of damages is the value of the animals killed, and not the cost of erecting and maintaining a fence. *Chicago & A. R. Co. v. Burnes*, 38 Am. & Eng. R. Cas. 297, 16 Ind. 126, 18 N. E. Rep. 459.

**587. — market value.**—Where a company is found to be liable for stock

\* See ante, 578.

Measure of damages for killing stock, see note, 35 AM. & ENG. R. CAS. 130; 13 Id. 592.

killed, its liability in damages is limited to the true market value of the animals killed. *Galveston, H. & S. A. R. Co. v. Buckley*, 1 *Tex. App. (Civ. Cas.)* 377.

The measure of damages is the market value of the animal killed. The market value at a given time and place may be proved by the evidence of cattle sales for like property, and evidence as to a single sale is relevant and admissible, but not sufficient alone to establish the market value. In the absence of evidence to establish the market value, it is competent to prove what price had been offered for the animal, as tending to show its market value. *Houston & T. C. R. Co. v. Loughbridge*, 1 *Tex. App. (Civ. Cas.)* 754.

Under Texas Rev. St. art 4245, declaring that railroad companies shall be liable to the owner for the value of all stock killed or injured, the "value" contemplated by the statute is the measure of damage, and this value is ordinarily to be ascertained by proof of the price at which such animals are bought and sold; if there is a market for such animals, the market price is the measure of value; if there is no market at the place, evidence may be admitted of the price at the nearest market. *St. Louis, A. & T. R. Co. v. Pickens*, 3 *Tex. App. (Civ. Cas.)* 471.

In an action for the recovery of damages, under the Kansas stock law of 1874, for the killing of a cow, the plaintiff is entitled to recover the market value of the animal. The jury, in estimating this value, may consider all the qualities of the animal which affect her market value, and are not limited in their inquiry to the value of the cow for beef or milking purposes. *Central Branch U. P. R. Co. v. Nichols*, 24 *Kan.* 242.

Upon an issue in respect to the value of a chattel, in an action to recover for the destruction thereof, the measure of damages is its market value. Evidence of its intrinsic qualities is not, as a rule, alone sufficient to establish such value. Additional evidence is required, and that which is commonly received is evidence of the opinions of witnesses shown to be competent to speak on the subject, and which is to be considered and weighed by the jury in connection with the evidence of the description of the property. *Harrow v. St. Paul & D. R. Co.*, 43 *Minn.* 71, 44 *N. W. Rep.* 881.

The measure of damages is the value of the stock when killed; that value is the

market value of such stock, not some peculiar or particular value attached to it by plaintiff. *Bullington v. Newport News & M. V. R. Co.*, 32 *W. Va.* 436, 9 *S. E. Rep.* 876.

**588. — where injured stock is retained by the owner.**—The owner of stock injured but not killed is not bound to surrender it to the company, but may retain it, in which case his recovery would be limited to the extent of the injury. *Jackson v. St. Louis, I. M. & S. R. Co.*, 74 *Mo.* 526.

**589. — value of live animal less the value of the hide or beef.\***—The measure of damages, when a railroad company negligently kills a cow, is the difference between the value of the cow alive and its value for beef. *Boing v. Raleigh & G. R. Co.*, 91 *N. Car.* 199.—FOLLOWING *Roberts v. Richmond & D. R. Co.*, 20 *Am. & Eng. R. Cas.* 473, 88 *N. Car.* 560.—*Roberts v. Richmond & D. R. Co.*, 20 *Am. & Eng. R. Cas.* 473, 88 *N. Car.* 560.—FOLLOWING IN *Boing v. Raleigh & G. R. Co.*, 91 *N. Car.* 199. RECONCILED IN *Godwin v. Wilmington & W. R. Co.*, 104 *N. Car.* 146, 10 *S. E. Rep.* 136.

In an action for an animal killed by negligence, in which there is no evidence of the value of the dead body, the measure of damages is the value of the animal less a price received by the owner for the hide. *Godwin v. Wilmington & W. R. Co.*, 104 *N. Car.* 146, 10 *S. E. Rep.* 136.—RECONCILING *Roberts v. Richmond & D. R. Co.*, 20 *Am. & Eng. R. Cas.* 473, 88 *N. Car.* 560.

Where a company is found liable for killing stock, if it appears that the owner has used the dead body or given it away, the company is entitled to have the value of the body deducted in estimating the damages. *Case v. St. Louis & S. F. R. Co.*, 13 *Am. & Eng. R. Cas.* 564, 75 *Mo.* 668.

If an ox is killed by a company, and the owner is informed of the accident in such time that he could by reasonable diligence have used the hide or the meat for beef, the value of the hide and of the meat should, in assessing damages against the railroad company, be deducted from the value of the ox when killed. *Memphis & C. R. Co. v. Hembree*, 35 *Am. & Eng. R. Cas.* 128, 84 *Ala.* 182, 4 *So. Rep.* 392.—FOLLOWING *Georgia Pac. R. Co. v. Fullerton*, 79 *Ala.* 298.

\* Value of animal after injury, see note, 35 *Am. & Eng. R. Cas.* 130.



In an action for killing plaintiff's heifer he joined a count for trover, and a verdict was rendered for the value of the heifer as beef, and not for her value before the injury. *Held*, error for which a new trial should be ordered. *Sampsell v. Chicago & G. T. R. Co.*, 13 *Am. & Eng. R. Cas.* 591, 51 *Mich.* 608, 17 *N. W. Rep.* 77.

**590. Duty of plaintiff to keep damages as low as possible.**—(1) *Generally*.—The owner of cattle negligently killed by a railroad train can only recover the difference between their value before the injury and immediately thereafter, and it is his duty to use reasonable effort to prevent loss after the injury, and reduce the damage as much as possible; and where such cattle are available after the injury, he cannot abandon them and then claim their full value. *Harrison v. Missouri Pac. R. Co.*, 88 *Mo.* 625.—*QUOTING* *Illinois C. R. Co. v. Finnigan*, 21 *Ill.* 649.

Where animals fit for food are killed the owner should dispose of them to the best advantage, and if he fails to do so without excuse he cannot recover full value. The proper measure of damages in such case is the difference between the value of the cattle living and dead. *Illinois C. R. Co. v. Finnigan*, 21 *Ill.* 646.—*QUOTED IN* *Harrison v. Missouri Pac. R. Co.*, 88 *Mo.* 625.

And in such a case the owner is entitled to a reasonable time after the killing within which to dispose of the animals. *Toledo, P. & W. R. Co. v. Parker*, 49 *Ill.* 385.

What is a reasonable time is a question for the jury; but taking charge of a dead animal by the company's employes on the evening of the same day that it was killed and burying it is not a reasonable time. *Toledo, P. & W. R. Co. v. Parker*, 49 *Ill.* 385.

The measure of damages for cattle killed is the difference between the value of the animals when living and when dead, and it is only where the body is worthless that the owner may abandon it and recover the full value. If by reasonable diligence he can dispose of it he should do so, and the amount realized should be deducted from the full value. *Georgia Pac. R. Co. v. Fullerton*, 79 *Ala.* 298.—*DISTINGUISHING* *Ohio & M. R. Co. v. Hays*, 35 *Ind.* 173.—*FOLLOWED IN* *Memphis & C. R. Co. v. Hem-bree*, 35 *Am. & Eng. R. Cas.* 128, 84 *Ala.* 182, 4 *So. Rep.* 392.

Where the value of a milch cow is destroyed as such, but she is still valuable for beef, the owner cannot abandon her and recover full value from the railroad company injuring her, though notice of the intention to abandon be given the company. *Harrison v. Missouri Pac. R. Co.*, 88 *Mo.* 625.

(2) *When owner may abandon animal*.—The owner of an animal killed by a locomotive at a point on a railroad where the road is not fenced may abandon the animal; and the company will be liable for the value of an animal when injured. *Ohio & M. R. Co. v. Hays*, 35 *Ind.* 173, 5 *Am. Ky. Rep.* 576.—*FOLLOWING* *Indianapolis, P. & C. R. Co. v. Mustard*, 34 *Ind.* 50.—*DISTINGUISHED IN* *Georgia Pac. R. Co. v. Fullerton*, 79 *Ala.* 298.

If a company or a private individual kill the animal of another, under circumstances that render the company or the individual liable therefor, the rule of damages will be the value of the animal, unless the case calls for vindictive or punitive damages; and these damages are not to be diminished by the value of the dead animal, unless the owner thereof in some way derives an actual benefit therefrom, or does some act evincing an election to appropriate the dead animal to himself. A man whose animal is wrongfully killed is not obliged to take the dead animal in part pay for the living one. *Indianapolis, P. & C. R. Co. v. Mustard*, 34 *Ind.* 50.—*FOLLOWED IN* *Ohio & M. R. Co. v. Hays*, 35 *Ind.* 173.

The damages of the owner of stock for the negligent killing thereof cannot be reduced by proof of the value of parts of the carcass, it not being the duty of the owner to make use of the carcass. *Burger v. St. Louis, K. & N. W. R. Co.*, 52 *Mo. App.* 119.

Where cattle are killed and become so far swollen and decomposed as to be unfit for food when discovered by the owner, he is entitled to recover their full value. *Toledo, P. & W. R. Co. v. Sweeney*, 41 *Ill.* 226, *Georgia Pac. R. Co. v. Fullerton*, 79 *Ala.* 298.

Where a railroad killed cattle which had strayed upon its unfenced track, and they were mangled, bruised, and swollen when discovered—*held*, that owner was not required to use diligence to dispose of their dead bodies to entitle him to recover their full value. *Rockford, R. I. & St. L. R. Co. v. Lynch*, 67 *Ill.* 149.—*QUOTED IN* *Illinois C. R. Co. v. Trowbridge*, 31 *Ill. App.* 190.



**591. Interest.\*—(1) When recoverable.**

—Interest is recoverable as part of the damages in an action against a railroad for killing cattle. *St. Louis, I. M. & S. R. Co. v. Biggs*, 50 Ark. 169, 6 S. W. Rep. 724.—QUOTING *Texas & P. R. Co. v. Tankersley*, 63 Tex. 57; *Varco v. Chicago, M. & St. P. R. Co.*, 11 Am. & Eng. R. Cas. 419, 30 Minn. 18.

Where cattle are killed through a failure of the company to maintain proper cattle-guards, it is liable for their value with interest. *Lackin v. Delaware & H. C. Co.*, 22 Hun (N. Y.) 309.—FOLLOWING *Crawford v. New York, C. & H. R. R. Co.*, 18 Hun 108.

Interest on the value of stock lost or destroyed through the negligence of a railway company may be included in damages. *Varco v. Chicago, M. & St. P. R. Co.*, 11 Am. & Eng. R. Cas. 419, 30 Minn. 18, 13 N. W. Rep. 921.—QUOTED IN *St. Louis, I. M. & S. R. Co. v. Biggs*, 50 Ark. 169, 6 S. W. Rep. 724.

In an action for the value of a horse killed by a railroad, interest may be recovered on the value of the animal from the time of the accident. *Baltimore & O. R. Co. v. Schultz*, 22 Am. & Eng. R. Cas. 579, 23 Am. & Eng. R. Cas. 211, 43 Ohio St. 270, 54 Am. Rep. 805, 1 N. E. Rep. 324.

In an action for killing stock, an instruction to the jury that if they found in favor of plaintiff they should return a verdict for the value of the stock which they might ascertain, with interest from the date of the loss to the time of the trial, correctly states the law. *Alabama G. S. R. Co. v. McAlpine*, 22 Am. & Eng. R. Cas. 602, 75 Ala. 113.

Where a horse is killed by the negligent operation of a railroad, the measure of damages is his value when killed, with interest to the time of recovery. *St. Louis, I. M. & S. R. Co. v. Biggs*, 50 Ark. 169, 6 S. W. Rep. 724.—QUOTING *Texas & P. R. Co. v. Tankersley*, 63 Tex. 57; *Varco v. Chicago, M. & St. P. R. Co.*, 11 Am. & Eng. R. Cas. 419, 30 Minn. 18.

Where plaintiff recovers from a railroad company the value of a horse killed by the train he is entitled to interest from the time the suit was instituted. *Woodland v. Union Pac. R. Co.*, (Utah) 26 Pac. Rep. 298.

An instruction that if the plaintiff's cow escaped from the plaintiff's field through a defect in the fence which it was the duty of the defendant to erect and maintain, and

such defect was an open, visible one, existing for some time before the killing of the cow, the plaintiff was entitled to recover for the killing; and interest on the value of the animal was proper. *Jebb v. Chicago & G. T. R. Co.*, 31 Am. & Eng. R. Cas. 532, 67 Mich. 160, 10 West. Rep. 905, 34 N. W. Rep. 538.

(2) *When not recoverable.*—In fixing the amount of damages under a suit for killing live stock, interest is not recoverable *eo nomine*, but the jury may consider the length of time damages have been withheld, the character of the tort, the conduct of the defendant, and all the circumstances of the transaction, and may, in their discretion, increase the amount of the damages allowed accordingly. *Western & A. R. Co. v. McCauley*, 68 Ga. 818.

The owner of stock killed by a railway for want of a fence is not entitled to interest on its value from the time of killing. *Toledo, P. & W. R. Co. v. Johnston*, 74 Ill. 83.—DISTINGUISHING *Chicago & N. W. R. Co. v. Shultz*, 55 Ill. 421.

Plaintiff is not entitled to the interest on his damages prior to the finding of the verdict, and it was error to instruct the jury that they might include interest at six per cent. *Brentner v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 448, 68 Iowa 530, 23 N. W. Rep. 245, 27 N. W. Rep. 605.

In the absence of any statutory provision in Kansas allowing interest in actions against railroads for stock killed it is not recoverable. *Atchison, T. & S. F. R. Co. v. Gabbert*, 22 Am. & Eng. R. Cas. 621, 34 Kan. 132, 8 Pac. Rep. 218.—DISTINGUISHING *Mote v. Chicago & N. W. R. Co.*, 27 Iowa 22; *Dean v. Chicago & N. W. R. Co.*, 43 Wis. 305.

Under the Kansas railroad stock law of 1874, in an action for the value of an animal killed by the company in the operation of its railroad—held, that the plaintiff can recover only what the statute permits him to recover, and cannot recover interest on the value of the animal killed prior to the day of trial. *Atchison, T. & S. F. R. Co. v. Gabbert*, 22 Am. & Eng. R. Cas. 621, 34 Kan. 132, 8 Pac. Rep. 218.—DISTINGUISHING *Mote v. Chicago & N. W. R. Co.*, 27 Iowa 22; *Dean v. Chicago & N. W. R. Co.*, 43 Wis. 305.

In an action against a company for negligently killing stock, interest is not allowable for the time between the date of the killing and that of the recovery. *Meyer v. Atlantic & P. R. Co.*, 64 Mo. 542, 17 Am. Ry. Rep.

\* When interest allowed on damages for stock killed, see note, 18 L. R. A. 449.

249.—**FOLLOWING** *Kenney v. Hannibal & St. J. R. Co.*, 63 Mo. 99; *Atkinson v. Atlantic & P. R. Co.*, 63 Mo. 367.

Under the Texas statute the measure of damages for stock killed is limited to the value of the stock, or to the amount of the injury, where they are not killed, and in neither case is interest allowable. *Houston & T. C. R. Co. v. Muldrow*, 54 Tex. 233.

**592. What may not be shown in mitigation.**—The jury having been instructed that the owner of an injured animal must use ordinary care, judgment, and prudence in taking care of it and in employing a veterinary surgeon to treat it, were further instructed that such owner "is not responsible for all mistakes made, if any are made, by such surgeon." *Held*, no error. *Page v. Sumpter*, 53 Wis. 652, 11 N. W. Rep. 60.

**593. Excessive damages.**—The measure of plaintiff's recovery in an action for killing stock is limited to the amount claimed, and where the judgment is in excess of that amount it will be reversed. *Horton v. St. Louis, I. M. & S. R. Co.*, 83 Mo. 541.

Where the judgment as to the value of an animal alleged to have been killed exceeds its market value as shown by the testimony, it is excessive and will be set aside. *Jacksonville, T. & K. W. R. Co. v. Garrison*, 30 Fla. 431, 11 So. Rep. 932.

But if the finding of the jury is slightly in advance of what the court would have assessed the damages at, the verdict will not, for such reason, be disturbed. *Rockford, R. I. & St. L. R. Co. v. Heflin*, 65 Ill. 366.

Suit was brought to recover for the killing of a cow alleged to be worth \$20 and a calf of a certain mixed breed alleged to be worth \$175; the plaintiff testified that the calf was worth \$150 to \$175, but that he knew of no market in the county for such calves. An expert witness testified for the company that Durhams, Jerseys, and other full-blood varieties were worth more than one of the variety sued for, and that full-blood Jerseys were worth from \$50 to \$150, while one of mixed blood such as the calf killed was worth much less. *Held*, that the value of the calf was not sufficiently proved, and that a verdict for \$165 was excessive. *St. Louis, A. & T. R. Co. v. Pickens*, 3 Tex. App. (Civ. Cas.) 471.

**594. Remitting excess.**—If a verdict

against a company be excessive, in an action for negligently killing stock, the plaintiff should be given the choice between a new trial and entering a remitter. *St. Louis, I. M. & S. R. Co. v. Hagan*, 19 Am. & Eng. R. Cas. 446, 42 Ark. 122.

Where a plaintiff sues for \$50 for stock killed a recovery for \$70 cannot be supported, but where the evidence justifies a finding for plaintiff leave will be given him to remit \$20, and upon his doing so the judgment will be affirmed. *Indiana, I. & I. R. Co. v. Dooling*, 42 Ill. App. 63.

In an action for killing mules the whole of the amount awarded by the verdict is damages, although it may include interest added by the jury to the value of the mules. And if the amount thus found is in excess of the amount claimed in the declaration, there being no amendment to cover the excess, the verdict is illegal and should be set aside, unless the court, being otherwise satisfied with the verdict, order the excess to be written off. *Georgia R. & B. Co. v. Crawley*, 87 Ga. 191, 13 S. E. Rep. 508; *former appeal*, 82 Ga. 190.

#### 9. Double Damages.

**595. Under the Arkansas statute.**—Under the Arkansas statute, providing for the recovery of double damages in "all cases" for a failure of a railroad company to advertise the killing, such damages may be recovered where the owner has actual notice of the killing. *Memphis & L. R. R. Co. v. Carley*, 39 Ark. 246.

It is not settled by practice in Arkansas whether double damages for stock killed should be assessed by the jury, or only single damages to be doubled by the court; but either mode would not be reversed on appeal. *Memphis & L. R. R. Co. v. Carley*, 39 Ark. 246.

**596. Under the Colorado statute.**—The penalty provided by Colorado statute for the recovery of double damages for stock killed, in cases where the company fails to enter in a book, kept for the purpose, a description of the animals within a certain time, does not survive a repeal of the statute, and a judgment giving double damages will be reversed where the statute is repealed while the case is pending on appeal. *Union Pac. R. Co. v. Proctor*, 12 Colo. 194, 20 Pac. Rep. 615, 2 Denver Leg. News 99.—**FOLLOWING** *Denver & R. G. R. Co. v. Crawford*, 11 Colo. 598.—*Denver & R. G. R.*

*Co. v. Crawford*, 11 *Colo.* 598, 19 *Pac. Rep.* 673.—FOLLOWED IN *Union Pac. R. Co. v. Proctor*, 12 *Colo.* 194, 20 *Pac. Rep.* 615, 2 *Denver Leg. News* 99.

**507. Under the Georgia Code.**—The penalty provided by Georgia Code, §§ 3038-3041, for a failure on the part of a railroad company to report stock killed, is a separate and independent matter from the damage done by killing the animals, and must be assessed, as provided by law, in a separate action. *Jones v. Americus, P. & L. R. Co.*, 80 *Ga.* 803, 7 *S. E. Rep.* 117.

**508. Under the Indiana statute.**—On appeal to the circuit court from a judgment by a justice of the peace against a company for killing stock, a judgment for double damages and a docket-fee, under § 3 of the Indiana act of March 1, 1853, is erroneous. *Indiana C. R. Co. v. Gapen*, 10 *Ind.* 292.

**509. Under the Iowa statute.\***—The right of the owner of stock killed through the failure of a railroad company to fence as required by Iowa Code, § 1289, to recover double damages against the company, is limited to twice the amount stated in the notice and affidavit of such owner upon failure of the company to pay the same within thirty days after such notice and affidavit. *Manwell v. Burlington, C. R. & N. R. Co.*, 45 *Am. & Eng. R. Cas.* 501, 80 *Iowa* 662, 45 *N. W. Rep.* 568.—REVIEWING *Mendell v. Chicago & N. W. R. Co.*, 20 *Iowa* 11; *Marsh v. Benton County*, 75 *Iowa* 469.

The statutory provision for the recovery of double damages authorizes double damages for the depreciation in value of the stock resulting from the injuries, and also for care and attention provided for the stock, and for other resulting charges. *Manwell v. Burlington, C. R. & N. R. Co.*, 45 *Am. & Eng. R. Cas.* 501, 80 *Iowa* 662, 45 *N. W. Rep.* 568.—REVIEWING *Koons v. Chicago & N. W. R. Co.*, 23 *Iowa* 497.—REVIEWED IN *Hammans v. Chicago, R. I. & P. R. Co.*, 83 *Iowa* 287.

The facts that the owner of a steer killed by a train states its value at \$60, in a notice and affidavit by his agent served on the company under Iowa Code, § 1289, and that, in his own sworn petition, filed after thirty

days, he states its value at \$40, do not in the absence of fraud prevent him from recovering double damages. *Valleau v. Chicago, M. & St. P. R. Co.*, 73 *Iowa* 723, 36 *N. W. Rep.* 760.

Section 1289 of the Iowa Code, allowing the recovery of double damages for stock killed by railroads by reason of the want of a fence, applies to cases where the fence is insufficient, as well as to those where there is no fence; and the rule applies to a case where stock got on the track through a defective gate in defendant's fence. *Payne v. Kansas City, St. J. & C. B. R. Co.*, 35 *Am. & Eng. R. Cas.* 113, 72 *Iowa* 214, 33 *N. W. Rep.* 633.

The first part of § 1289, Iowa Code, provides for the recovery of double damages for stock killed by reason of the railroad company failing to properly fence, and the latter part of the section declares the running of trains on depot grounds at a rate of speed greater than eight miles per hour proof of negligence. *Held*, that the first provision of the section, being in the nature of a penalty, does not apply to the latter provision. *Miller v. Chicago & N. W. R. Co.*, 59 *Iowa* 707, 13 *N. W. Rep.* 859.—QUOTED IN *Moriarty v. Central Iowa P. Co.*, 20 *Am. & Eng. R. Cas.* 438, 64 *Iowa* 696.

An affidavit in a proceeding under the Iowa statute giving double damages, alleging that stock were killed because the company had "fenced up a crossing," estops plaintiff from claiming double damages, as the statute allows such damages only for the "want of a fence." *Davis v. Chicago, R. I. & P. R. Co.*, 40 *Iowa* 292, 8 *Am. Ry. Rep.* 407.

A steer killed was one of a herd of 80, which had been in charge of a boy, who left them for a short time, when another boy took charge, and, supposing that he had all, drove them over the railroad track, but the one killed had separated from the others and was left behind. *Held*, that the steer was "running at large" within the meaning of Iowa Code, § 1289, giving double damages. *Valleau v. Chicago, M. & St. P. R. Co.*, 73 *Iowa* 723, 36 *N. W. Rep.* 760.

Iowa Code, § 1289, allowing a recovery of double damages for stock killed by a railroad for want of a sufficient fence, applies to cases where the fence is defective as well as to those where there is no fence, and to defective gates which are a part of the fence. *Payne v. Kansas City, St. J. & C. B.*

\* Iowa statute making railroad companies liable in double damages for stock killed, if not paid in thirty days construed. Effect of giving due-bill which is not paid in thirty days, see 45 *AM. & ENG. R. CAS.* 505, *abstr.*

*R. Co.*, 35 *Am. & Eng. R. Cas.* 113, 72 *Iowa* 214, 33 *N. W. Rep.* 633.

**600. Under Michigan statute.**—Where a law giving double damages for stock killed by a railroad is repealed between the date of a verdict and that of the entry of judgment, the judgment should be for actual damages only. *Bay City & E. S. R. Co. v. Austin*, 2 *Mich. (N. P.) [Supp.]* 2.

**601. Under Minnesota statute.**—Minnesota Gen. St. 1878, ch. 34, § 56, giving double damages for stock killed, applies to cases brought to the district court by appeal from a justice of the peace, as well as to actions brought originally in said court. *Schimmele v. Chicago, M. & St. P. R. Co.*, 34 *Minn.* 216, 25 *N. W. Rep.* 347.

**602. Under the Missouri statute, generally.\***—The statutory provisions subjecting railroads to the payment of double damages for injuries caused by stock breaking over the fence from the railroad's right of way into adjacent fields, and authorizing adjacent landowners to repair the fence at the cost of the railroad company, are cumulative. *Carpenter v. St. Louis, I. M. & S. R. Co.*, 20 *Mo. App.* 644.—FOLLOWED IN *Buttles v. Chicago, S. F. & C. R. Co.*, 43 *Mo. App.* 280; *Cobb v. Kansas City, Ft. S. & M. R. Co.*, 43 *Mo. App.* 313.

Where a railroad track passes through cultivated lands, the liability of the company for killing stock, under *Wagn. Mo. St. p. 310, § 43*, providing for double damages, does not depend on proof of negligence where the killing occurs before the track is fenced, but otherwise where the killing is after the track is fenced. *Nall v. St. Louis, K. C. & N. R. Co.*, 59 *Mo.* 112, 8 *Am. Ry. Rep.* 447.

In proceedings against a railroad for double damages for the killing of stock under § 43, *Wagn. Stat.* 310, the proper practice is for the jury to find a verdict for single damages only, and the court may then render judgment for double damages. *Wood v. St. Louis, K. C. & N. R. Co.*, 58 *Mo.* 109, 9 *Am. Ry. Rep.* 84. *Hollyman v. Hannibal & St. J. R. Co.*, 58 *Mo.* 480.

Although the jury's finding is in excess of the amount claimed, an appellate court will not presume that the jury intended to find double damages where the record recites

that the verdict is supported by the evidence, and where the jury are limited by the instructions to single damages. *Carpenter v. St. Louis, I. M. & S. R. Co.*, 20 *Mo. App.* 644.—DISTINGUISHING *Wood v. St. Louis, K. C. & N. R. Co.*, 58 *Mo.* 109.

In an action for double damages for the killing of a bull, which was more valuable for breeding purposes than for meat, such greater value should be taken into consideration in the assessment of the damages. *Young v. Kansas City, Ft. S. & M. R. Co.*, 52 *Mo. App.* 530.

**603. When such damages may be recovered.**—Missouri Rev. St. 1879, § 809, providing for the recovery of double damages for the killing of "horses, cattle, mules, or other animals"—held, to include hogs. *Henderson v. Wabash, St. L. & P. R. Co.*, 81 *Mo.* 605.

Railroad companies are only liable for double damages for stock killed, under the *Mo. Gen. St.* 1865, ch. 63, § 43, where the stock are killed by a direct collision with the engine or cars, and not where animals become frightened while on the track and are injured by jumping off. *Lafferty v. Hannibal & St. J. R. Co.*, 44 *Mo.* 291.—DISTINGUISHING *Coy v. Utica & S. R. Co.*, 23 *Barb. (N. Y.)* 643. FOLLOWING *Peru & I. R. Co. v. Haskett*, 10 *Ind.* 409. NOT FOLLOWING *Moshier v. Utica & S. R. Co.*, 8 *Barb. (N. Y.)* 427.—NOT FOLLOWED IN *Meeker v. Northern Pac. R. Co.*, 21 *Oreg.* 513. REVIEWED IN *Young v. St. Louis, K. C. & N. R. Co.*, 44 *Iowa* 172.

A company is liable for double damages for injuries to cattle entering upon the railway tracks by reason of a failure to erect fences between the railway tracks and a contiguous parallel public highway. *Patton v. West End N. G. R. Co.*, 14 *Mo. App.* 589.

Under *Mo. Rev. St.* 1889, § 2611, the owner of stock killed may recover double damages when the killing occurs where the track runs through uninclosed lands, whether the stock went on the track from such lands or not, and without reference as to whether he is an adjoining owner or not. *Jackson v. St. Louis, I. M. & S. R. Co.*, 43 *Mo. App.* 324.—DISTINGUISHING *Ferris v. St. Louis & H. R. Co.*, 30 *Mo. App.* 122.

**604. When such damages may not be recovered.**—In an action under *Mo. Rev. St.* § 809, for double damages for injuries to an animal caused by a failure to fence, it is error to charge that plaintiff

\* For note on the Missouri double damage act for stock killed, see 52 *AM. REP.* 375.

Action for double damages for killing stock in Missouri, see note, 23 *AM. & ENG. R. CAS.* 176.

may recover if the animal was injured where the track was not fenced, without regard to where it entered on the track. *Foster v. St. Louis, I. M. & S. R. Co.*, 90 Mo. 116, 2 S. W. Rep. 138. Compare *Snider v. Current River R. Co.*, 53 Mo. App. 638. *Batman v. Kansas City, Ft. S. & M. R. Co.*, 53 Mo. App. 13.

Where a complaint is filed under § 43 of the Missouri act, giving double damages, plaintiff must recover, if at all, under that section. He cannot recover under § 5 of the damage act, or on a cause of action at common law. *Luckie v. Chicago & A. R. Co.*, 67 Mo. 245.

Under Wagn. Mo. St. p. 310, § 43, providing for double damages for stock killed, a company is not liable where the killing occurs where the track crosses a private road, or where it runs through uninclosed lands, either timbered or from which the timber has been removed; and this is so though it runs through a narrow strip of uninclosed lands, with adjoining inclosed lands on either side of the strip. *Walton v. St. Louis, I. M. & S. R. Co.*, 67 Mo. 56.—DISTINGUISHING AND CRITICISING *Robinson v. Chicago & A. R. Co.*, 57 Mo. 494.—DISTINGUISHED IN *Morris v. Hannibal & St. J. R. Co.*, 19 Am. & Eng. R. Cas. 666, 79 Mo. 367. FOLLOWED IN *Schable v. Hannibal & St. J. R. Co.*, 69 Mo. 91. QUOTED IN *Jenkins v. Chicago & A. R. Co.*, 27 Mo. App. 578. RECONCILED IN *Rutledge v. Hannibal & St. J. R. Co.*, 78 Mo. 286. REVIEWED IN *Roberts v. Quincy, O. & K. C. R. Co.*, 43 Mo. App. 287.

Uninclosed lands which have been cleared of timber are not "prairie-lands," within the meaning of Wagn. Mo. St. p. 310, § 43, providing for double damages for stock killed; and a railroad company is not liable in double damages for cattle killed on such lands. *Schable v. Hannibal & St. J. R. Co.*, 69 Mo. 91.—FOLLOWING *Walton v. St. Louis, I. M. & S. R. Co.*, 67 Mo. 56.

Only persons whose lands adjoin a railroad track can recover the double damages for stock killed, under the Missouri statute; and a person whose cattle strayed from his grounds, which do not adjoin the track, to other grounds which do adjoin, and thence to the track, cannot recover double damages by reason of the company failing to erect and maintain proper fences. *Ells v. Pacific R. Co.*, 55 Mo. 278.

Where it appears that plaintiff's lands do

not border a railroad, and that his horse went from his grounds through the fields of an adjoining owner and thence on the track, he cannot recover the double damages provided by statute for killing the horse, unless he prove that he was in the adjoining proprietor's field by permission, or that the field was inclosed by a lawful fence. *Johnson v. Missouri Pac. R. Co.*, 23 Am. & Eng. R. Cas. 180, 80 Mo. 620.—QUOTING AND FOLLOWING *Harrington v. Chicago, R. I. & P. R. Co.*, 71 Mo. 384.—APPLIED IN *Brandenburg v. St. Louis & S. F. R. Co.*, 44 Mo. App. 224.

Where it appeared that one of its trains was wrecked where the track ran through plaintiff's field; that there was no fence along the track; that the hogs and cattle in the train were necessarily turned into the field in the attempt to extricate them from the wreck; that they were collected together and driven away; and that while in the fields they damaged the crops; and there was no allegation that the damage was caused by the failure of the railroad to construct or maintain fences or cattle-guards as required by law—held, that the statute (Wagn. Mo. St. 310-11, § 43) did not contemplate the allowance of double damages. *Grau v. St. Louis, K. C. & N. R. Co.*, 54 Mo. 240, 12 Am. Ry. Rep. 376.

When the evidence is to the effect merely that an animal was not killed at a public or private road, and does not show the character of the land where the animal got upon the track or where it was killed, it will not warrant a recovery against a railroad company for double damages for the killing of stock. *Sayer v. Kansas City, Ft. S. & M. R. Co.*, 43 Mo. App. 360.—FOLLOWING *Kinion v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 382.

Only the adjoining owner or persons claiming under him can recover, under Mo. Rev. St. § 809, double damages for injury to cattle which go upon the railroad track because of the insufficiency of the railroad fence. *Smith v. St. Louis, I. M. & S. R. Co.*, 25 Mo. App. 113.—FOLLOWING *Carpenter v. St. Louis, I. M. & S. R. Co.*, 25 Mo. App. 110.

#### 10. Procedure in Justices' Courts.

**605. Generally.**—Before the enactment of the Georgia statute of 1843, amending the act of 1840, defining liability of railroads for stock killed or wounded and to regulate

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the procedure in such cases, the justices' courts had no jurisdiction in any case sounding in damages for any trespass on the person or property. *Girtman v. Central R. & B. Co.*, 1 Ga. 173.

The statute (N. C. Rev. St. ch. 17, § 7) giving jurisdiction to a magistrate in cases of stock killed on a railroad does not alter the rules of the common law in relation to such injuries. *Garris v. Portsmouth & R. R. Co.*, 2 Fred. (N. Car.) 324.

**606. Jurisdiction must affirmatively appear.**—In an action before a justice for double damages for killing stock, the fact that the killing occurred in the township where the suit was brought or in an adjoining township is a jurisdictional one. It is not sufficient that such jurisdictional fact be averred in the statement; it must also be shown by the evidence. *Backenstoe v. Wabash*, St. L. & P. R. Co., 86 Mo. 492; affirming 23 Mo. App. 148.—FOLLOWING *Mitchell v. Missouri Pac. R. Co.*, 82 Mo. 106. QUOTING *Nall v. St. Louis, K. C. & N. R. Co.*, 59 Mo. 112.—DISTINGUISHED IN *Ennmerson v. St. Louis & H. R. Co.*, 35 Mo. App. 621. FOLLOWED IN *Roberts v. Missouri Pac. R. Co.*, 19 Mo. App. 649; *Palmer v. Missouri Pac. R. Co.*, 21 Mo. App. 437.

Where suit is commenced before a justice to recover for stock killed, and the statement filed by plaintiff before the justice shows that the injury occurred in the same township where suit was brought, and it appeared by evidence at what point it occurred, the justice obtains jurisdiction, and a judgment on appeal will not be reversed because the circuit court, in a trial there, refused to instruct that proof of venue must affirmatively appear to entitle plaintiff to a verdict. *Nall v. St. Louis, K. C. & N. R. Co.*, 59 Mo. 112, 8 Am. Ry. Rep. 447.—CRITICISED IN *Backenstoe v. Wabash*, St. L. & P. R. Co., 23 Mo. App. 148. QUOTED IN *Backenstoe v. Wabash*, St. L. & P. R. Co., 86 Mo. 492.

Under Mo. Rev. St. § 3060, statements filed in actions before justices of the peace may be amended in the circuit court so as to supply any deficiency or omission. Where suit is brought before a justice to recover for stock killed, a defect in such statement, in failing to show that the justice has jurisdiction, may be cured by amendment in the circuit court under the above statute.

*Vaughn v. Missouri Pac. R. Co.*, 17 Mo. App. 4.

Evidence *dehors* the record of facts which the law does not require to appear of record may be received in aid of a justice's jurisdiction; hence, although a justice's transcript fails to show the venue in a local action, as in an action for damages for stock killed by a railway train, it may be proved in the circuit court on appeal. *St. Louis, I. M. & S. R. Co. v. Lindsay*, 55 Ark. 281, 18 S. W. Rep. 59.

**607. Jurisdiction as dependent upon amount.**—In Indiana a justice of the peace has no jurisdiction in an action for killing a horse where the sum demanded is over one hundred dollars. *Evansville & C. R. Co. v. Kargus*, 10 Ind. 182.

Query, whether the rule that justices have no jurisdiction in actions of tort where the damages claimed exceed fifty dollars, is inapplicable in a case of stock killed or injured by a railroad; and whether § 1711, Ala. Code of 1876, is constitutional. *Alabama G. S. R. Co. v. Christian*, 82 Ala. 307, 1 So. Rep. 121.

In Georgia the civil jurisdiction of justices of the peace, under the constitution and laws, extends to \$100, which is held to include actions against railroad companies for killing stock. The remedy provided by Ga. Code, § 3043, is merely cumulative, and does not oust general jurisdiction under the constitution and statutes. *Western & A. R. Co. v. Brown*, 58 Ga. 534.

In Missouri justices of the peace have jurisdiction over suits against railroads for killing, maiming, etc., cattle, etc., in their respective townships, without regard to the value of the animals or the amount of damages claimed. *Hudson v. St. Louis, K. C. & N. R. Co.*, 53 Mo. 525.—FOLLOWED IN *Parish v. Missouri, K. & T. R. Co.*, 63 Mo. 284.—*Manuel v. Missouri Pac. R. Co.*, 19 Mo. App. 631.

The provision of Mo. Rev. St. 1879, § 2835, conferring jurisdiction upon justices in actions for killing stock, without regard to the value of the animal killed or the amount claimed, is constitutional. *Steele v. Missouri Pac. R. Co.*, 84 Mo. 57.—FOLLOWING *Humes v. Missouri Pac. R. Co.*, 82 Mo. 221.—*Dent v. St. Louis, I. M. & S. R. Co.*, 83

\* See ante, 203.



*Mo. 496.*—REVIEWING *Fitterling v. Missouri Pac. R. Co.*, 79 Mo. 504.

Under Missouri act of 1861, entitled "An act to extend the jurisdiction of justices of the peace," giving them concurrent jurisdiction with the circuit courts in actions for stock killed or injured by railroads, but limiting the action to some justice of the township where the injury was committed, the fact that the suit is under said statute must appear on the face of the papers in order to confer jurisdiction. *Hansberger v. Pacific R. Co.*, 43 Mo. 196.—DISTINGUISHED IN *Minter v. Hannibal & St. J. R. Co.*, 82 Mo. 128. FOLLOWED IN *Roberts v. Missouri Pac. R. Co.*, 19 Mo. App. 649; *Backenstoe v. Wabash, St. L. & P. R. Co.*, 23 Mo. App. 148. QUOTED IN *Rohland v. St. Louis & S. F. R. Co.*, 89 Mo. 180. REVIEWED IN *Polhans v. Atchison, T. & S. F. R. Co.*, 45 Mo. App. 153.

The third subdivision of § 3 of the act concerning the jurisdiction of justices of the peace (*Wagn. Mo. St.* 808) provides that justices shall have concurrent jurisdiction with the circuit courts in all actions for injuries to persons or to personal or real property where the damages shall exceed \$20 and not exceed \$50. The fifth subdivision provides that the jurisdiction shall be concurrent in all actions against any railroad company to recover damages for the killing or injuring of live stock, without regard to the value of such animals or the amount of damages claimed. *Held*, that an action to recover a combined claim for killing a horse and injuries to the harness must be under said subdivision 3, and judgment must be limited to \$50; and that the claim for killing the horse cannot be made under subdivision 5, and the claim for damages to the harness under subdivision 3. *Dillard v. St. Louis, K. C. & N. R. Co.*, 58 Mo. 69.—DISTINGUISHED IN *Fenton v. St. Louis, K. C. & N. R. Co.*, 72 Mo. 259.

**608. Jurisdiction as dependent upon township lines.**—(1) *Justice's own township.*—A justice of the peace has no jurisdiction outside of his own township, and there can be no recovery in an action for killing stock, unless the proofs show that the animals went upon the track or were injured in the township where suit is brought. *Gelfa v. St. Louis & S. F. R. Co.*, 38 Mo. App. 579.

An action before a justice, under *Mo. Rev. St.* § 809, to recover double damages

for stock killed, must be before a justice of the township in which the injury occurred; and as it is a jurisdictional fact it must affirmatively appear of record, and must be supported by proof. *Backenstoe v. Wabash, St. L. & P. R. Co.*, 23 Mo. App. 148; *affirmed in* 86 Mo. 492, 1 *West. Rep.* 743.—CRITICISING *Nall v. St. Louis, K. C. & N. R. Co.*, 59 Mo. 112. FOLLOWING *Hansberger v. Pacific R. Co.*, 43 Mo. 196. REVIEWING *Mitchell v. Missouri Pac. R. Co.*, 82 Mo. 106.—*Roberts v. Missouri Pac. R. Co.*, 19 Mo. App. 649.—FOLLOWING *Hansberger v. Pacific R. Co.*, 43 Mo. 196; *Haggard v. Atlantic & P. R. Co.*, 63 Mo. 302; *Matson v. Hannibal & St. J. R. Co.*, 80 Mo. 229; *Backenstoe v. Wabash, St. L. & P. R. Co.*, 86 Mo. 492. REVIEWING *Mitchell v. Missouri Pac. R. Co.*, 82 Mo. 106.

A judgment in an action for killing stock will be reversed on appeal where the record does not affirmatively show that the killing was in the justice's township. *Matson v. Hannibal & St. J. R. Co.*, 80 Mo. 229.

Under the Missouri statutes, the jurisdiction of justices of the peace in actions to recover for stock killed is confined to cases where the cause of action arises in their respective townships; and if a record on appeal fails to show this fact the appeal will be dismissed. *Iba v. Hannibal & St. J. R. Co.*, 45 Mo. 469.—FOLLOWED IN *Vaughn v. Missouri Pac. R. Co.*, 17 Mo. App. 4. QUOTED AND FOLLOWED IN *Fields v. Wabash, St. L. & P. R. Co.*, 80 Mo. 303. REVIEWED IN *Vaughn v. Missouri Pac. R. Co.*, 17 Mo. App. 4; *Polhans v. Atchison, T. & S. F. R. Co.*, 45 Mo. App. 153.

In determining the question whether suit was brought before a justice of the peace of the township where stock were killed, as required by statute, the supreme court is not limited to an examination of the statement filed by plaintiff, but will examine also the transcript of the justice of the peace. *Fields v. Wabash, St. L. & P. R. Co.*, 80 Mo. 203.—FOLLOWING *Barnett v. Atlantic & P. R. Co.*, 68 Mo. 56. QUOTING AND FOLLOWING *Iba v. Hannibal & St. J. R. Co.*, 45 Mo. 469.

Where the statement and transcript sent up from a justice of the peace to the circuit court, in an action for killing stock, show a failure to fence, and that the killing occurred in the township where the action was prosecuted to judgment before the jus-

tice, the statutory requirements requiring suit in such cases to be in the township where the injury occurs, are met. *Emmerson v. St. Louis & H. R. Co.*, 35 Mo. App. 621. —DISTINGUISHING *Backenstoe v. Wabash*, St. L. & P. R. Co., 86 Mo. App. 492, 23 Mo. App. 148.

(2) *Adjoining township*.—Under the Missouri statute a justice of the peace has jurisdiction of an action to recover for stock killed where he presides in one township and the killing is in an adjoining township. *Fitterling v. Missouri Pac. R. Co.*, 20 Am. & Eng. R. Cas. 454, 79 Mo. 504. —REVIEWED IN *Dent v. St. Louis, I. M. & S. R. Co.*, 83 Mo. 496. —*Chaney v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 661. *Roberts v. Missouri Pac. R. Co.*, 19 Mo. App. 649.

Not only must the action be brought in the township wherein the injury occurred, or in an adjoining one, but the transcript on appeal must show this, or the justice will be held to have been without jurisdiction. *Rohland v. St. Louis & S. F. R. Co.*, 89 Mo. 180, 1 S. W. Rep. 147. —QUOTING *Hansberger v. Pacific R. Co.*, 43 Mo. 196. —*King v. Chicago, R. I. & P. R. Co.*, 90 Mo. 520, 3 S. W. Rep. 217. *Mitchell v. Missouri Pac. R. Co.*, 82 Mo. 106. —FOLLOWED IN *Backenstoe v. Wabash, St. L. & P. R. Co.*, 86 Mo. 492. REVIEWED IN *Roberts v. Missouri Pac. R. Co.*, 19 Mo. App. 649; *Backenstoe v. Wabash, St. L. & P. R. Co.*, 23 Mo. App. 148. —*Whitesides v. St. Louis, K. & N. W. R. Co.*, 49 Mo. App. 250. *Palmer v. Missouri Pac. R. Co.*, 21 Mo. App. 437. —FOLLOWING *Backenstoe v. Wabash, St. L. & P. R. Co.*, 23 Mo. App. 148. —*Wright v. Hannibal & St. J. R. Co.*, 25 Mo. App. 236.

In construing Mo. Rev. St. § 2835, and the fifth subdivision of § 2839 the court held: That, taking the two sections together, the jurisdiction of justices of the peace in actions against railroad companies to recover damages for killing or injuring horses \* \* \* or other animals is still local, with the locality in which the jurisdiction is exercised extended so as to include any township adjoining the township in which the horses, etc., may be injured, etc., and no further; that this jurisdiction, as thus extended, is still purely and entirely local, "without regard to the value of such animals or the amount claimed for killing or injuring the same." *Creason v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 111. —FOLLOWING *Iba v. Han-*

*nibal & St. J. R. Co.*, 45 Mo. 469, *Haggard v. Atlantic & P. R. Co.*, 63 Mo. 303.

Mo. Rev. St. § 2839, provides that "any action against a railroad company for killing or injuring horses, mules, cattle, or other animals, shall be brought before a justice of the peace of the township in which the injury happened, or in an adjoining township." *Held*, that the words "or in an adjoining township" must be construed to mean an adjoining township in the same county only. *Creason v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 111.

A justice of a city formed from territory lying wholly within a township has jurisdiction of a suit against a defendant who resides in a township adjoining said first-named township. *Jebb v. Chicago & G. T. R. Co.*, 31 Am. & Eng. R. Cas. 532, 67 Mich. 160, 10 West. Rep. 905, 34 N. W. Rep. 538.

**609. Jurisdiction as dependent upon county lines.**\*—In Indiana, an action may be brought before any justice of the peace in the county where the animal is killed. *Cincinnati, I., St. L. & C. R. Co. v. Parker*, 109 Ind. 235, 9 N. E. Rep. 787.

**610. Process.**†—A summons issued by a justice of the peace, in an action under *Wagn. Mo. St. ch. 82, § 16*, allowing double damages for stock killed or injured, need not state the nature of the suit and the sum demanded; but such statement is now necessary under *Rev. St. 1879, § 2858*. *Anthony v. St. Louis, I. M. & S. R. Co.*, 76 Mo. 18.

In an action before a justice to recover damages for killing stock, it is not essential, in order to confer jurisdiction upon the justice, that the return of the constable (the writ having been served upon a conductor of the company) shall show that he made the service within his own county. Where the person or individual served resides within the county, or, like conductors of railways, are constantly passing through it, the presumption will be entertained, in the absence of a showing to the contrary, that the officer did not depart from the limits of his jurisdiction. *Baltimore & O. R. Co. v. Brant*, 132 Ind. 37, 31 N. E. Rep. 464. —FOLLOWING *Cincinnati, H. & I. R. Co. v. McDougall*, 108 Ind. 179.

**611. Effect of appearance.**—Where, on an appeal from a justice, the transcript

\* See ante, 290.

† See ante, 296.

shows that the justice acquired jurisdiction over the defendant, it having filed its motion to set aside the judgment by default, a motion in the circuit court to dismiss the suit because of service of summons in the wrong township should not be sustained. *Kelly v. Chicago, R. I. & P. R. Co.*, 86 Mo. 681.

**612. Docket entries.**—In an action to recover the value of cattle killed by a railroad company, which is begun before a justice and is taken on appeal to the circuit court, the action should not be dismissed because the justice had not copied the cause of action upon his docket. *Indianapolis & C. R. Co. v. Toon*, 20 Ind. 230.—FOLLOWED IN *Indianapolis & C. R. Co. v. Smither*, 20 Ind. 228.

**613. When question of jurisdiction must be raised.**—If an action to recover damages for killing a cow of value more than \$50 is brought against a railroad company in a justice's court, objection to his want of jurisdiction must be made before him, and cannot be raised for the first time in the appellate court. *Western R. Co. v. Lazarus*, 88 Ala. 453, 6 So. Rep. 877.

**614. Discretion of justice.**—In an action for the value of a cow killed by one of the defendant's engines, the plaintiff, after he had rested his case and the defendant had introduced part of its testimony, applied to the justice for leave to withdraw his rest for the purpose of proving the value of the cow, which request was granted—*held*, not an abuse of discretion. *Chicago, B. & Q. R. Co. v. Goracke*, 32 Neb. 90, 48 N. W. Rep. 879.

**615. General requisites of the complaint or statement.**\*—An oral statement embodying the substance of plaintiff's claim, in an action before a justice to recover double damages for stock killed, under the Iowa statute, is sufficient, and no written complaint is necessary. *Finch v. Central R. Co.*, 42 Iowa 304.

In civil actions originating before a justice, the complaint is sufficient on demurrer if it states enough facts to inform the defendant of the nature of the plaintiff's action, and is so explicit that a judgment thereon will constitute a bar to another action for the same cause. *Louisville, N. A. & C. R. Co. v. Zink*, 92 Ind. 406.—FOL-

LOWED IN *Louisville, N. A. & C. R. Co. v. Zink*, 92 Ind. 602.

A complaint before a justice against a company averring that on, etc., at, etc., the defendant's servants wilfully and negligently, and without any fault of the plaintiff, ran its cars upon plaintiff's mare, whereby, etc., is sufficient after verdict. *Pennsylvania Co. v. Rusie*, 95 Ind. 236.

A complaint before a justice for killing stock alleged "that the defendant, on or about," etc., "at and in said county of," etc., "and state of Indiana, by its locomotive and train of cars then running on its railroad, at a point on its said road in said county where its railroad track was not securely fenced, ran over and killed two hogs of the plaintiff of the value of fifty dollars; whereof," etc. *Held*, that the complaint stated sufficient facts. *Bellefontaine R. Co. v. Reed*, 33 Ind. 476.

The Kansas stock law of 1874 makes provision for the recovery of a reasonable attorney's fee for the prosecution of a suit for damages for injuring or killing stock in the operation of railroads; therefore there is less reason for favoring insufficient and defective complaints in those actions than in the ordinary cases commenced in justices' courts. *St. Louis & S. F. R. Co. v. Byron*, 24 Kan. 350.

A statement setting forth the ownership of a steer, the fact that it was killed by the negligence of defendant's servants, and the amount of the damage—*held*, to set forth a good cause of action for the negligent killing of the steer by a company. *Kendig v. Chicago, R. I. & P. R. Co.*, 19 Am. & Eng. R. Cas. 493, 79 Mo. 207.—APPLIED IN *Hill v. Missouri Pac. R. Co.*, 49 Mo. App. 520.

Where a company is sued in a justice's court to recover for stock killed, a statement is sufficient which shows that the injury complained of occurred in the township where suit is brought, and was caused by reason of the company's failure to erect and maintain a fence as required by law, and that by reason of such failure the stock went upon the track and were killed. *Razor v. St. Louis, I. M. & S. R. Co.*, 7 Am. & Eng. R. Cas. 562, 73 Mo. 471.

In actions under Missouri Gen. St. 1865, ch. 63, § 43, to recover for stock killed, it should appear that they went on the track by reason of the absence of proper fences or cattle-guards; but where the action is before a justice, a statement which advises the

\* See *ante*, 326-370.

Pleading in action before justice of the peace, see note, 19 AM. & ENG. R. CAS. 605.

defendant of the nature of plaintiff's claim, and which is specific enough to make a judgment a bar to a subsequent action, is sufficient. *Norton v. Hannibal & St. J. R. Co.*, 48 Mo. 387.

In an action before a justice to recover double damages for stock killed, a statement filed by plaintiff showing that the animals "strayed upon the track of said railroad on or near a farm crossing, at a point in the line of said railroad where it was not fenced, and where the crossing and cattle-guards were not made as the law requires, and that defendant so carelessly and negligently ran and managed its cars and locomotives that they ran against and over the animals and killed them," is sufficient.

*Belcher v. Missouri Pac. R. Co.*, 75 Mo. 514.—DISTINGUISHING *Sloan v. Missouri Pac. R. Co.*, 74 Mo. 47. FOLLOWING *Edwards v. Kansas City, St. J. & C. B. R. Co.*, 74 Mo. 117.—FOLLOWED IN *Campbell v. Missouri Pac. R. Co.*, 78 Mo. 639; *Blakely v. Hannibal & St. J. R. Co.*, 79 Mo. 388. QUOTED IN *Vail v. Kansas City, C. & S. R. Co.*, 28 Mo. App. 372. REVIEWED IN *Jackson v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 147.

**616. Must charge negligence.**—A complaint or statement filed on appeal from a justice's court, in an action to recover damages from a railroad for killing stock, which fails to aver that the killing was negligent or the result of negligence on the part of the company, its servants or agents, does not contain a substantial cause of action. *Mobile & O. R. Co. v. Williams*, 53 Ala. 595, 13 Am. Ry. Rep. 153.—QUOTED IN *South & N. Ala. R. Co. v. Hagood*, 53 Ala. 647.

**617. Laying the venue.**—**County or township.**—(1) *County.*—The complaint in an action before a justice, to recover for stock killed, should aver that they were killed in the county, and such averment must be supported by proof. *Indianapolis & C. R. Co. v. Wilsey*, 20 Ind. 229.—CRITICISED IN *Indianapolis & M. R. Co. v. Solomon*, 23 Ind. 534. FOLLOWED IN *Indianapolis & C. R. Co. v. Smither*, 20 Ind. 228; *Indianapolis & C. R. Co. v. Toon*, 20 Ind. 230; *Indianapolis & C. R. Co. v. Brinkman*, 20 Ind. 230.

A statement or complaint filed in a suit before a justice against a railroad company

for killing stock, stating that "a locomotive owned and used by the defendant on its road in the county of F. \* \* \* killed one hog of the plaintiff, and that at the time and place of the killing the road was not fenced," is sufficient to show that the animal was killed in F. county by the defendant. *White Water Valley R. Co. v. Quick*, 30 Ind. 384.

(2) *Justice's own township.*—Where the jurisdiction of justices in actions to recover for stock killed is confined to cases where the killing occurs in their township, a statement filed with the justice must show in which township the killing took place. And this cannot be established by reference to a writ which only shows where the defendant is served and the township where the justice presides. *Huggard v. Atlantic & P. R. Co.*, 63 Mo. 302.—FOLLOWED IN *Creason v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 111; *Roberts v. Missouri Pac. R. Co.*, 19 Mo. App. 649.

Where suit is brought under Mo. Rev. St. 1879, § 809, to recover for stock killed, it should be averred that the killing was in the township where suit was brought; but where there is no specific allegation of this fact, and the defendant appears and goes to trial, and the record shows that the killing was in such township, the defect in the pleadings will be considered cured on appeal. *Kronski v. Missouri Pac. R. Co.*, 77 Mo. 362.

Where an action is commenced before a justice to recover under the statute double damages for stock killed, a statement filed by plaintiff with the justice must show that the stock were killed in the township where suit is brought. *Cummings v. St. Louis, I. M. & S. R. Co.*, 70 Mo. 570.—FOLLOWED IN *Hines v. Missouri Pac. R. Co.*, 86 Mo. 629.

Where a suit is under the Missouri Railway act, § 43, before a justice to recover damages for stock killed, it must appear either from his transcript or a statement filed with him that the killing occurred in the township in which suit is brought in order to give him jurisdiction, and if it does not, the question of jurisdiction may be raised for the first time on appeal. *Barnett v. Atlantic & P. R. Co.*, 68 Mo. 56.—FOLLOWED IN *Thomason v. St. Louis, I. M. & S. R. Co.*, 74 Mo. 560; *Fields v. Wabash, St. L. & P. R. Co.*, 80 Mo. 203.

(3) *Adjoining township.*—In a suit before a justice, under the Missouri statute, for the killing of the plaintiff's cow in a township

\* See ante, 329.

other than that in which the suit is brought, the fact that the two townships adjoin each other is jurisdictional, and must be both averred and proved. *Wiseman v. St. Louis, A. & T. R. Co.*, 30 Mo. App. 516. *Kinion v. Kansas City, S. & M. R. Co.*, 30 Mo. App. 573. *Jones v. Chicago, B. & K. C. R. Co.*, 52 Mo. App. 381.

Under section 2838, Missouri Rev. St. 1879, fixing the jurisdiction of justices' courts in actions against railroads for killing stock in the township where the injury happened, or in any adjoining township, where the action is brought in an adjoining township, plaintiff must allege and prove the township in which the injury happened, and that the township in which the action is brought adjoins the township in which the injury happened; and where the records show no evidence of such facts the court must hold that there was no jurisdiction in the court below, and reverse and remand the cause. *Jewett v. Kansas City, C. & S. R. Co.*, 38 Mo. App. 48. *Briggs v. St. Louis & S. F. R. Co.*, 111 Mo. 168, 20 S. W. Rep. 32. *Vaughn v. Missouri Pac. R. Co.*, 17 Mo. App. 4.—FOLLOWING *Iba v. Hannibal & St. J. R. Co.*, 45 Mo. 475. REVIEWING *Iba v. Hannibal & St. J. R. Co.*, 45 Mo. 469, 475.

And the statement itself, or the transcript of the justice, must show affirmatively in such actions that the animal was killed in the township of the justice, or in the adjoining township. *Manuel v. Missouri Pac. R. Co.*, 19 Mo. App. 631.

**618. Alleging time of injury.**—Where a statement of plaintiff did not show when the injury was done, but the statute of limitation was not interposed, the statement was sufficient. *Revelle v. St. Louis, I. M. & S. R. Co.*, 74 Mo. 438.—FOLLOWED IN *Cooksey v. Kansas City, St. J. & C. B. R. Co.*, 17 Mo. App. 132.

**619. Stating place of entry on track.**—(1) *Sufficient.*—In an action under Missouri Rev. St. § 809, for killing stock, a statement is sufficient which alleges facts showing that the animal got upon the track at a point where the company is required to fence its road, and it is not necessary to state that it did not get upon the track at the crossing of a highway. *Mayfield v. St. Louis & S. F. R. Co.*, 91 Mo. 296, 3 S. W. Rep. 201.

A statement which alleges that the cow was killed at a point where there was no fence and where by law the company was

bound to fence, and that by reason of such failure to fence the cow strayed upon the track and was killed, is sufficient, as showing that the place where animal entered was not fenced as it should have been. *Moore v. Wabash, St. L. & P. R. Co.*, 81 Mo. 499.

In an action under the statute for double damages for killing stock, the statement is sufficient after verdict in that regard if enough is contained therein from which it may be reasonably inferred that the animal escaped upon the right of way where the road had neglected to fence. *Busby v. St. Louis, K. C. & N. R. Co.*, 22 Am. & Eng. R. Cas. 589, 81 Mo. 43.—DISTINGUISHING *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150; *Dayton & M. R. Co. v. Miami County Infirmary*, 32 Ohio St. 566. FOLLOWING *Nance v. St. Louis, I. M. & S. R. Co.*, 79 Mo. 196; *Jackson v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 147. QUOTING *Edwards v. Kansas City, St. J. & C. B. R. Co.*, 74 Mo. 122.

The statement in an action for statutory damages for the killing of stock by a railway company must allege that the stock came upon the railroad track at a place where the company was under a legal obligation to erect and maintain fences, and was injured owing to the company's failure to observe this obligation. But where this appears from the statement by reasonable inference, a judgment against the company will be upheld. *Jones v. St. Louis, I. M. & S. R. Co.*, 44 Mo. App. 15.

Where the statement under § 809, Rev. St. does not in clear and explicit terms charge that the animal killed came upon the right of way at a place where it was the defendant's duty to fence, but contains that averment by fair intendment sufficient to make it good after verdict, and no objection of insufficiency was offered at the trial, an objection to the statement on that account cannot be sustained on appeal. *Henson v. St. Louis, I. M. & S. R. Co.*, 34 Mo. App. 636.

(2) *Insufficient.*—A statement before a justice in an action under Mo. Rev. St. § 809, for double damages for killing stock, is insufficient which fails to allege that the stock entered upon the track at a point where the same passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands where, by law, the railroad is required to fence. *Ward v. St. Louis, I. M. & S. R. Co.*, 91 Mo. 168.—FOLLOWED IN *Wood v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo.



App. 63.—*Mans v. St. Louis, I. M. & S. R. Co.*, 87 Mo. 278.

A statement under the fifth section of the damage act (Mo. Rev. St. § 2124) for killing stock is insufficient which does not allege that the injury occurred at a place where the railroad track might have been inclosed by a lawful fence. *Clarkson v. Wabash, St. L. & P. R. Co.*, 84 Mo. 583.—QUOTING *Tiarks v. St. Louis & I. M. R. Co.*, 58 Mo. 45.

Where action is brought to recover single damages for killing plaintiff's cow, and by the statement it is not averred that the place where the cow went upon the railroad track was where defendant might have inclosed the road with a lawful fence, but it is only averred that the road "was not inclosed with a lawful fence," this is not sufficient. *Boyle v. Missouri Pac. R. Co.*, 21 Mo. App. 416.

**620. — and that such place was not a public crossing or within a city or town.\***—A statement in an action before a justice under Missouri railroad law, § 43, to recover for stock killed, must aver that the killing was not within the limits of an incorporated town. *Schulte v. St. Louis, I. M. & S. R. Co.*, 76 Mo. 324.—FOLLOWING *Rowland v. St. Louis, I. M. & S. R. Co.*, 73 Mo. 619.—DISTINGUISHED IN *Campbell v. Missouri Pac. R. Co.*, 78 Mo. 639; *Williams v. Hannibal & St. J. R. Co.*, 80 Mo. 597. FOLLOWED IN *Holland v. West End N. G. R. Co.*, 16 Mo. App. 172.

In an action under Mo. Rev. St. § 809, for double damages for killing stock, it is not necessary that the statement should contain an express averment that the point at which the animal entered upon the track was not within the corporate limits of an incorporated city or town. It is sufficient if that fact appears by necessary implication from the other facts stated. *Ringo v. St. Louis, I. M. & S. R. Co.*, 91 Mo. 667, 10 West. Rep. 268, 4 S. W. Rep. 396.

A statement under Mo. Rev. St. § 809, for double damages for killing plaintiff's cow, which alleges that she strayed upon the track at a point "one mile eastwardly from Harlem depot, where the road passes through and along uninclosed lands, where there were no fences on the sides of the road as required by law, and where said defendant has not erected or maintained law-

ful fences on the sides of said railroad," and was there killed, reasonably excludes the inference that she came on the track at a public crossing or in an incorporated town or city, and sufficiently alleges that she was killed by reason of the failure to fence. *Jantzen v. Wabash, St. L. & P. R. Co.*, 83 Mo. 171.—FOLLOWED IN *Duke v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 105. QUOTED IN *McGuire v. Missouri Pac. R. Co.*, 23 Mo. App. 325.

A statement for double damages for killing plaintiff's hogs, which alleges that they strayed upon defendant's road at a place where it is required by law to erect and maintain lawful fences on the sides of its road, which it failed to do, by reason of which said hogs were run over and killed by defendant's cars, although defective in not averring that the point was not at a public or private crossing, nor within the limits of an incorporated town or city, is sufficient after verdict, when the deficiency has been supplied by the evidence. *Stanley v. Missouri Pac. R. Co.*, 29 Am. & Eng. R. Cas. 250, 84 Mo. 625.—FOLLOWING *Edwards v. Kansas City, St. J. & C. B. R. Co.*, 74 Mo. 117; *Kronski v. Missouri Pac. R. Co.*, 77 Mo. 362; *Perriquez v. Missouri Pac. R. Co.*, 78 Mo. 91; *Asher v. St. Louis, I. M. & S. R. Co.*, 79 Mo. 432.—REVIEWED IN *Vail v. Kansas City, C. & S. R. Co.*, 28 Mo. App. 372.

**621. Averment that road was not fenced, or was not securely fenced.\***—

(1) *Indiana*.—A complaint before a justice in an action for killing stock need not, under the Indiana statute, allege that the railroad was not securely fenced where the animals entered upon it. *Indianapolis & V. R. Co. v. Sims*, 92 Ind. 496.—DISTINGUISHING *Jeffersonville, M. & I. R. Co. v. Lyon*, 72 Ind. 107; *Toledo, W. & W. R. Co. v. Stevens*, 63 Ind. 337; *Ohio & M. R. Co. v. Miller*, 46 Ind. 215.

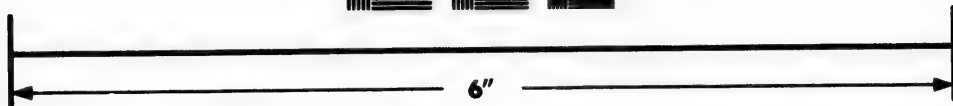
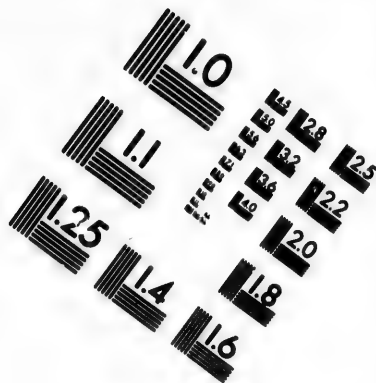
Upon such a complaint, charging a single transaction by which several animals were killed, it is error to admit evidence of more than one occurrence. *Indianapolis & V. R. Co. v. Sims*, 92 Ind. 496.

In an action under the Indiana statute before a justice against a company for killing stock, a complaint is not bad for failure to allege that the road was not fenced where the animal entered upon the track, nor for

\* See ante, 353.

\* See ante, 349-352.





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failure to show by direct averment that the plaintiff was damaged, or that the damages are due and unpaid, where the value of the stock killed is alleged. *Louisville, N. A. & C. R. Co. v. Argenbright*, 19 Am. & Eng. R. Cas. 604, 98 Ind. 254.

A complaint before a justice against a company for killing a cow belonging to the plaintiff charged that the animal was killed by a locomotive of the defendant at a point where the railroad was by law required to be fenced, and where the same was not fenced. *Held*, that the complaint was sufficient. It was not necessary to aver that the animal went upon the track at a place where the road was not fenced, the reasonable inference from the averments of the complaint being that the road was not securely fenced at the place where it went upon the track and was killed. *Ohio & M. R. Co. v. Miller*, 46 Ind. 215, 7 Am. Ry. Rep. 240.—DISTINGUISHED IN *Indianapolis & V. R. Co. v. Sims*, 92 Ind. 496.

A complaint under Indiana Rev. St. 1881, § 4025, before a justice of the peace, to recover for a mare killed, which avers, with other necessary allegations, that "where said mare entered upon said defendant's railway and was killed, said railway was not fenced at all," is good on demurrer. *Louisville, N. A. & C. R. Co. v. Detrick*, 91 Ind. 519.—DISTINGUISHING *Bellefontaine R. Co. v. Suman*, 29 Ind. 40; *Toledo, W. & W. R. Co. v. Stevens*, 63 Ind. 337.

In an action under the statute before the mayor of a city for killing stock, the complaint alleged that "on," etc., "at a point in said county of \* \* \* where said railway track was not securely fenced, and not at a public crossing nor within the limits of an incorporated town or city, said defendant, by her agents, \* \* \* ran a train of cars over and against" the stock of the plaintiff, which was of a certain value, and killed it. *Held*, on an assignment of error in the supreme court, questioning for the first time the sufficiency of the complaint, that it was good after verdict, in an action commenced before a mayor or justice of the peace, though it did not allege that the stock had entered upon the railroad at a point where it was not securely fenced. *Toledo, W. & W. R. Co. v. Stevens*, 63 Ind. 337.—DISTINGUISHED IN *Louisville, N. A. & C. R. Co. v. Detrick*, 91 Ind. 519; *Indianapolis & V. R. Co. v. Sims*, 92 Ind. 496.

Yet a complaint in an action commenced

before a justice against a company, to recover the value of an animal killed by a train of cars, which does not allege that the railroad was not fenced, and does not allege negligence on the part of the defendant, is insufficient. *Toledo, W. & W. R. Co. v. Eidson*, 51 Ind. 67.

(2) *Michigan*.—A declaration which charges that defendant is a corporation owning a railroad in a given township, which it has been operating for over a year last past, and has not fenced its road at any place through the township, and that on a given date the plaintiff was the owner of a colt of the value of \$100, which was lawfully in said township, and which went onto the track of said railroad and was there killed through the negligence of the defendant, and because its track was not fenced, sets out a cause of action, and is as full as is usual or necessary in a justice's court. *Talbot v. Minneapolis, St. P. & S. St. M. R. Co.*, 82 Mich. 66, 45 N. W. Rep. 1113.

(3) *Missouri*.—A statement in an action before a justice of the peace against a railroad for single damages for killing stock, based upon Mo. Rev. St. § 2124, should allege that the defendant might have inclosed with a lawful fence that portion of the road on which the accident occurred. *Russell v. Hannibal & St. J. R. Co.*, 83 Mo. 507.

But the statement under Mo. Rev. St. § 2124, is not defective in failing to allege that the animal was injured in consequence of the failure of the road to erect fences. *Radcliffe v. St. Louis, I. M. & S. R. Co.*, 90 Mo. 127, 2 S. W. Rep. 277.

Where the statement alleges facts which show that the defendant might have fenced its road at the point where the mare entered upon the track, it is sufficient. *Radcliffe v. St. Louis, I. M. & S. R. Co.*, 90 Mo. 127, 2 S. W. Rep. 277.

Where suit is instituted under Mo. Rev. St. § 809, to recover for stock killed, the complaint must allege that the killing was occasioned by reason of a failure of the company to erect and maintain such fences as are required by the statute. *Rowland v. St. Louis, I. M. & S. R. Co.*, 77 Am. & Eng. R. Cas. 566, 73 Mo. 619.—DISTINGUISHED IN *Perriquez v. Missouri Pac. R. Co.*, 78 Mo. 91; *Campbell v. Missouri Pac. R. Co.*, 78 Mo. 639. FOLLOWED IN *Schulte v. St. Louis, I. M. & S. R. Co.*, 76 Mo. 324; *Wade v. Missouri Pac. R. Co.*, 78 Mo. 362.

QUOTED IN *Holand v. West End N. G. R. Co.*, 16 Mo. App. 172. REVIEWED IN *Williams v. Hannibal & St. J. R. Co.*, 80 Mo. 597. —*Cunningham v. Hannibal & St. J. R. Co.*, 70 Mo. 202.—FOLLOWING *Luckie v. Chicago & A. R. Co.*, 67 Mo. 245; *Cecil v. Pacific R. Co.*, 47 Mo. 246.—APPROVED IN *Hudgens v. Hannibal & St. J. R. Co.*, 79 Mo. 418. DISTINGUISHED IN *Edwards v. Kansas City, St. J. & C. B. R. Co.*, 74 Mo. 117; *Williams v. Missouri Pac. R. Co.*, 74 Mo. 453.

In a suit under Mo. Rev. St. 1879, § 809, before a justice and against a railroad company for killing stock, the statement must allege, by direct averment or necessary implication, that the stock got upon the track at a point where by law the defendant was bound to erect and maintain fences. *McIntosh v. Hannibal & St. J. R. Co.*, 26 Mo. App. 377.

Where a suit is brought in a justice's court against a company for killing stock, and a statement is filed showing that the animal got on the track where the company is required to fence, it is not necessary to refer to Mo. Rev. St. § 809, making the company liable. *Jenkins v. Chicago & A. R. Co.*, 32 Mo. App. 552.

Where suit is commenced before a justice to recover for stock killed, a complaint or statement filed by the plaintiff alleging that defendant, where its road passed "along and adjoining inclosed and uninclosed lands, and not at a private or public crossing of said road, by its agents, ran the same upon and over plaintiff's horse, of the value of \$75, thereby killing said horse; and that defendant failed and neglected to erect or maintain good or sufficient fences where said horse got upon the track and was killed;" and recites the statute and claims double damages thereunder, is sufficient. *Johnson v. Missouri Pac. R. Co.*, 23 Am. & Eng. R. Cas. 180, 80 Mo. 620.—QUOTING AND FOLLOWING *Jackson v. St. Louis, I. M. & S. R. Co.*, 80 Mo. 147.

A complaint before a justice against a company to recover for stock killed alleged "that the defendant had failed and neglected to erect or maintain good or sufficient fences on the sides of its road at the point where said cow got on the track and was killed," with a further charge that the injury occurred at a point on the road where the defendant was bound to fence.

*Held*, that after verdict this was a sufficient allegation that the injury was occasioned by a failure to erect and maintain fences. *Kronski v. Missouri Pac. R. Co.*, 77 Mo. 362. —FOLLOWED IN *Campbell v. Missouri Pac. R. Co.*, 78 Mo. 639; *Stanley v. Missouri Pac. R. Co.*, 84 Mo. 625.

In an action for injury to stock it is sufficient if the statement contain such facts as reasonably justify the inference of the absence of a fence, and such as negative the existence of a public road, or that it was inside the town limits, or that it was at a place where the company could fence if it so desired, especially after verdict. And if the road was not fenced at such point it is not incumbent upon the plaintiff to prove actual negligence in running and managing the cars. *Vail v. Kansas City, C. & S. R. Co.*, 28 Mo. App. 372.—QUOTING *Thomas v. Hannibal & St. J. R. Co.*, 82 Mo. 538; *Belcher v. Missouri Pac. R. Co.*, 75 Mo. 514. REVIEWING *Stanley v. Missouri Pac. R. Co.*, 84 Mo. 625.

In an action brought under § 43, Wagn. Mo. St. p. 310, for killing cattle—*held*, that a statement charging merely that, where the accident occurred, the defendant's road was "unfenced," stated no facts constituting a cause of action under said section, and that the section applies only to those localities where the law requires the railroad to be fenced. *Davis v. Missouri, K. & T. R. Co.*, 65 Mo. 441.

A complaint before a justice for killing stock by reason of an insufficient cattle-guard should allege, first, that there was a certain crossing over defendant's railway in a certain township; second, that adjacent thereto defendant had failed to erect and maintain proper cattle-guards, etc.; third, that by reason thereof plaintiff's mare passed from the crossing to the track, etc. *Jones v. Chicago, B. & K. C. R. Co.*, 52 Mo. App. 381.

**622. Averment that no signals were given.**—The statement did not state a cause of action at common law or under the statute where it attempted to state a cause of action under § 806, Mo. Rev. St., but failed, because it averred that the failure of defendant "to ring the bell or blow the whistle" did not occur at a public crossing. *Clemings v. Chicago, R. I. & P. R. Co.*, 21 Mo. App. 606.—DISAPPROVED IN *Polhans v. Atchison, T. & S. F. R. Co.*, 45 Mo. App. 153.

**623. Allegation of ownership of adjoining land.\***—A statement filed before a justice under Mo. Rev. St. § 809, is not defective or insufficient because it fails to allege that the plaintiff is the owner of land adjoining the railway, from which the ox strayed upon the track by reason of the defendant's failure to fence as required by law. It is only where the animal strays upon the track from an inclosed field that the allegation of ownership must appear, and there is nothing here inconsistent with the conclusion that the railway passed through uninclosed lands. *Board v. St. Louis, I. M. & S. R. Co.*, 36 Mo. App. 151.

**624. Negating contributory negligence.†**—In a common-law action commenced before a justice for negligence in killing the plaintiff's mule, the complaint will be held defective when attacked by a motion in arrest of judgment, when it contains no averment that the killing complained of was without the contributory fault or negligence of the plaintiff. While the same strictness of pleading is not required in cases originating before a justice of the peace as in those commenced in the circuit court, still, where there is a failure in an action instituted before a justice to plead some independent fact essential to a recovery, the omission is fatal, even on a motion in arrest of judgment. *Cincinnati, W. & M. R. Co. v. Stanley*, 4 Ind. App. 364, 30 N. E. Rep. 1103.—FOLLOWING Baltimore, P. & C. R. Co. v. Anderson, 58 Ind. 413.—DISTINGUISHED IN *Bostwick v. Minneapolis & P. R. Co.*, 2 N. Dak. 440.

**625. Prayer for damages.**—In a suit before a justice, the statements filed stated the cause of action and claimed \$50 damages, and afterward asked double damages, "in accordance with the statute in such cases made and provided." Held, that the request for double damages might be disregarded as surplusage, and that the justice had jurisdiction of the cause. *Grau v. St. Louis, K. C. & N. R. Co.*, 54 Mo. 240, 12 Am. Ry. Rep. 376.

**626. Bills of particulars—Generally.**—An allegation of gross negligence on the part of the defendant is unnecessary in a bill of particulars which discloses no negligence on the part of the plaintiff, filed in an action to recover damages for stock

killed by a railroad train. *Central Branch R. Co. v. Phillips*, 20 Kan. 9, 19 Am. Ry. Rep. 99.

In an action commenced before a justice under the railroad stock law of 1874 (Comp. Laws 1879, pp. 784, 785), where the only allegation in the plaintiff's bill of particulars with regard to the want of a sufficient fence is as follows: "That the said railway of defendant was not, at the time of said killing, and is not now, inclosed with a good and lawful fence, to prevent said animals or any other animals from being on said railway," and the question is raised for the first time in the supreme court that this allegation was not sufficient—held, that unless the circumstances it must be considered sufficient. *Kansas City, L. & S. R. Co. v. Neville*, 25 Kan. 632.

In an action commenced before a justice for killing a cow, where the plaintiff's bill of particulars does not state or show that the company was either guilty of negligence or that its road was not fenced—held, that the bill of particulars is defective and insufficient. *St. Louis & S. F. R. Co. v. McReynolds*, 24 Kan. 368.—FOLLOWED IN *St. Louis & S. F. R. Co. v. Ellis*, 25 Kan. 108; *Kansas City, L. & S. W. R. Co. v. Richolson*, 31 Kan. 28.

**627. Demand for attorney's fees in bill of particulars.\***—Where a statute provides that defendant shall pay plaintiff's attorney's fees, he may fairly insist upon legal accuracy in the plaintiff's pleadings and proceedings, even before a justice of the peace; and where the bill of particulars alleges that "twenty-five dollars is a reasonable sum for the prosecution of this action," and contains no other allegation as to the value or necessity of attorney fees, no judgment should, in the absence of defendant, be entered for a larger amount, though on appeal and in the district court; and this, notwithstanding the bill prays for twenty-five dollars attorney's fee in a justice's court, and "twenty dollars as a reasonable fee for trial thereof in the district court." *St. Louis & S. F. R. Co. v. Armstrong*, 25 Kan. 561.

An action was brought before a justice, under chapter 94 of the Kansas laws of 1874, to recover from a railroad company the value of certain stock killed by one of its trains. The company recovered judgment before the justice. On appeal the plaintiff recov-

\* See ante, 340.

† See ante, 364.

\* See ante, 363.

ered judgment, and the district court included the fees of the plaintiff's attorney on the trial before the justice. *Held*, no error. *Missouri River, Ft. S. & G. R. Co. v. Shirley*, 20 Kan. 660.

M. commenced an action in a justice's court against a company, under the "act relating to killing or wounding stock by railroads," and set forth in his bill of particulars a good cause of action for \$35 damages for killing his cow, and then alleged "that \$10 is a reasonable attorney fee for the prosecution of this suit," and "prayed for judgment against the said defendant for the said sum of \$35, his damages sustained as aforesaid, and \$10 attorney fee for the prosecution of this suit, and costs." In the district court, to which the case was afterward taken on appeal, the jury found from the evidence for the plaintiff, and assessed his damages at "thirty-five dollars, and ten dollars attorney fee," and judgment was rendered accordingly, and it appeared from the record that the plaintiff was assisted by an attorney. *Held*, that the judgment for the attorney fee will not be reversed where no reason for such reversal can be given except that the said bill of particulars does not state facts sufficient to authorize such a judgment. *St. Louis, L. & W. R. Co. v. Miller*, 18 Kan. 212, 15 Am. Ry. Rep. 215.

In an action in a justice's court under ch. 94 of the laws of 1874, for killing plaintiff's cow, where plaintiff does not allege in his bill of particulars that the company's road was not fenced, and says nothing about attorney fees except in the prayer for judgment, and the only prayer for judgment is "for said sum of \$30, together with costs of suit, and a reasonable attorney fee for the prosecution of this suit," and the case is tried both in the justice's court and in the district court upon this bill of particulars, without any objection being made as to its sufficiency, and the district court finds specially, among other things, that the road was not fenced, that the cow was worth \$30, that a reasonable attorney fee for prosecuting the suit in the justice's court was \$10, and in the district court \$25, for which sums judgment is rendered against the defendant, with costs, and the defendant then brings the case to the supreme court, and assigns for error merely that "the decision of said judge was contrary to law," and the question of the sufficiency of the plaintiff's bill of particulars is raised for the

first time in the supreme court, and then by brief only—*held*, that the judgment of the district court will not be disturbed merely because of any supposed insufficiency in the plaintiff's bill of particulars, nor will it be disturbed because of any supposed insufficiency in the findings of the court below with respect to attorney fee. *Kansas Pac. R. Co. v. Yanz*, 16 Kan. 583.—FOLLOWED IN *Missouri River, Ft. S. & G. R. Co. v. Duckett*, 20 Kan. 623.

**628. Joinder of claims.\***—Georgia Code, §§ 3038, 3040, makes railroad companies liable in damages to double the value of stock killed by them if certain specified officers of the company fail to report the killing. Section 3045 allows a justice to summarily assess damages, not to exceed \$30, against railroads for killing stock. *Held*, that a claim for killing stock and one failing to report the same under the above sections cannot be united in the same proceeding before a justice. *Jones v. Americus, P. & L. R. Co.*, 80 Ga. 803, 7 S. E. Rep. 117.

**629. Amendment of complaint or statement.**†—Where a claim is made for attorney's fees, as allowed by statute in an action for killing stock, before a justice, on removal of the case to court, it is proper to allow an amendment so as to include a demand for such fees. *Chicago & A. R. Co. v. Henry*, 17 Ill. App. 521.

A statement before the justice, under Mo. Rev. St. § 809, which is held insufficient by the supreme court, may, upon the cause being remanded to the circuit court, be there amended, if warranted by the facts. *Manz v. St. Louis, I. M. & S. R. Co.*, 87 Mo. 278.

Upon appeal from a justice of the peace to the court of common pleas or the circuit court, in an action for damages for killing stock, the plaintiff may, under Mo. Rev. St. § 3060, be allowed to amend his complaint so as to show that the township in which the original action was brought adjoined the one in which the injury occurred. *Mitchell v. Missouri Pac. R. Co.*, 82 Mo. 106.—FOLLOWED IN *Kitchen v. Missouri Pac. R. Co.*, 82 Mo. 686.—*Kitchen v. Missouri Pac. R. Co.*, 82 Mo. 686.—FOLLOWING *Mitchell v. Missouri Pac. R. Co.*, 82 Mo. 106.

\* See ante, 335-336.

† See ante, 366.



Under Missouri Rev. St. 1879, § 3060, providing that, on appeal from a judgment of a justice of the peace, the statement may be amended so as to supply any deficiency therein, provided no new cause of action be introduced, a statement filed before a justice of the peace, in an action for killing stock, which shows enough to make it appear that it is intended to be under § 43 of Missouri railroad act, but which omits certain essential facts, may be amended in the circuit court. *King v. Chicago, R. I. & P. R. Co.*, 79 Mo. 328.—FOLLOWED IN *Dryden v. Smith*, 79 Mo. 525.

Where the statement filed before a justice is in the form of a bill for damages "for killing stock," etc., it may, under Missouri Rev. St. § 3060, be so amended on appeal to the circuit court as to allege the failure of the defendant company to fence its track as the cause of the injury; but the effect of such amendment would be to limit the proof solely to the absence of the fence as a ground of recovery. *Minter v. Hannibal & St. J. R. Co.*, 82 Mo. 128.

Where suit against a railroad company for killing stock is commenced before a justice and is removed to the circuit court, it is proper for that court to permit an amendment where it is inferentially evident that the action is brought under Missouri railroad act, § 43. *Rowland v. St. Louis, I. M. & S. R. Co.*, 7 Am. & Eng. R. Cas. 566, 73 Mo. 619.

In an action for injury to live stock, the statement originally filed alleged that the injury was caused by failure of the company to erect and maintain cattle-guards, as required by § 43 of the Missouri railroad law. An amended statement was afterward permitted to be filed charging the same injury, but alleging that it occurred in consequence of the failure of the company to construct a crossing where its road crossed a public highway, as required by the act of 1875, amending § 39 of the railroad law (Sess. acts 1875, p. 130). *Held*, that there was no error in permitting the amendment, both counts referring to the same injury. *Lincoln v. St. Louis, I. M. & S. R. Co.*, 75 Mo. 27.—DISTINGUISHING *Luckie v. Chicago & A. R. Co.*, 67 Mo. 245; *Cary v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 209; *Wood v. St. Louis, K. C. & N. R. Co.*, 58 Mo. 109; *Crutchfield v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 255; *Hansberger v. Pacific R. Co.*, 43 Mo. 196.—

FOLLOWED IN *Straub v. Eddy*, 47 Mo. App. 189.

**630. Evidence under the pleadings.**—In an action commenced before a justice to recover for live stock alleged to have been killed or injured by the defendant's cars, on the defendant's road, where the same was not but ought lawfully to have been securely fenced, the defendant may prove, without plea, in bar of the action, that such road was at the time of such killing or injury owned by another railroad company, but was being run by the defendant, as lessee, in her own name. *Pittsburgh, C. & St. L. R. Co. v. Bolner*, 57 Ind. 572, 18 Am. Ry. Rep. 450.

A complaint in an action before a justice to recover for a cow killed was for "one cow killed by your locomotive," stating the state, county, and township. *Held*, that under such statement it was not competent to prove that the company's track was not fenced. *Toledo & W. R. Co. v. Reed*, 23 Ind. 101.—FOLLOWING *Indianapolis & C. R. Co. v. Clark*, 21 Ind. 150.

In an action before a justice to recover damages for cattle killed on the railroad (under Iowa laws 1862, ch. 169, § 6) it is not necessary to plead the notice and affidavit required in such case, in order to make them admissible in evidence. *Brandt v. Chicago, R. I. & P. R. Co.*, 26 Iowa 114.

When the statement filed before a justice is in the shape of a bill for damages "for killing hogs," etc., the plaintiff is not limited to the proof of any particular character of negligence, but may show the failure of the company to fence its track as a basis of recovery under Mo. Rev. St. § 2124. *Minter v. Hannibal & St. J. R. Co.*, 82 Mo. 128.—DISTINGUISHING *Hansberger v. Pacific R. Co.*, 43 Mo. 196.—FOLLOWED IN *Boone v. Wabash, St. L. & P. R. Co.*, 20 Mo. App. 232.

The plaintiff's statement charged the defendant with negligently and carelessly running over and killing plaintiff's cow, by failing to ring the bell or sound the whistle at a public crossing, "and by otherwise negligently and carelessly operating its locomotive and cars." *Held*, that evidence of other acts of negligence besides failure to ring the bell and sound the whistle was properly admitted under this statement.

\* See ante, 381-384.

*Edwards v. Chicago, R. I. & P. R. Co.*, 76 Mo. 399.—FOLLOWING *Mapes v. Chicago, R. I. & P. R. Co.*, 76 Mo. 367.—APPROVED IN *Keim v. Union R. & T. Co.*, 90 Mo. 314.

**631. Sufficiency of evidence to show killing in township.**—Proof of the fact of killing the animal must be made, and proof of killing in a city, not proved to be in a certain township, will not justify the inference of killing in that township. *Manuel v. Missouri Pac. R. Co.*, 19 Mo. App. 631.—FOLLOWING *Backenstoe v. Wabash, St. L. & P. R. Co.* 86 Mo. 492.

Where the statement in an action before a justice for double damages for killing stock alleges that the killing occurred in a township other than the one in which the action is brought, and does not aver that the two townships adjoin, and the evidence also fails to show that they adjoin, a demurrer to the evidence should be sustained. *Ellis v. Missouri Pac. R. Co.*, 83 Mo. 372.

**632. Appeal from justice's court, generally.**—By appealing a case against a railroad for killing stock from a justice's court, the defendant waives defects in the summons; so, also, by appearing generally in the justice's court and moving to set aside a default. *Boutwell v. Chicago & A. R. Co.*, 79 Mo. 494.—FOLLOWED IN *Gant v. Chicago, R. I. & P. R. Co.*, 79 Mo. 502.

The attorney's fee is properly in issue in the circuit court on an appeal by the company from the judgment of a justice of the peace wherein such fee was allowed and taxed as costs. *Briggs v. St. Louis & S. F. R. Co.*, 111 Mo. 168, 20 S. W. Rep. 32.

**633. Cause of action remains the same.**—Where a company is sued at common law before a justice for negligently killing stock, it is error, on appeal to the circuit court, to allow an amended statement to be filed setting up a cause of action under the statute for a failure to fence. *Hansberger v. Pacific R. Co.*, 43 Mo. 196.—DISTINGUISHED IN *Lincoln v. St. Louis, I. M. & S. R. Co.*, 75 Mo. 27.

On appeal from a justice the trial is *de novo*, yet the cause of action must remain the same; therefore where an action against a railroad before a justice was trespass for killing a horse, and on appeal it was changed to *assumpsit* for breach of a contract to erect and maintain a fence, it was not error to enter judgment of compulsory nonsuit. *Reitse v. Meadville & L. R. Co.*, 126 Pa. St. 437, 17 Atl. Rep. 663.

**634. Transcript and its sufficiency.**—On an appeal from a justice, in an action for the killing of stock, the transcript must show affirmatively that the justice had jurisdiction. Where the transcript does not show that the animal was killed in his township, or the statement itself does not appear in the record, the judgment cannot be sustained. *Matson v. Hannibal & St. J. R. Co.*, 80 Mo. 229.—FOLLOWED IN *Roberts v. Missouri Pac. R. Co.*, 19 Mo. App. 649.

The Missouri statute does not require a justice in sending up a transcript to the circuit court on appeal to state therein the evidence taken before him, and the justice's failure to state in his transcript that there was evidence before him that the animals were killed in the township where he resided, is no ground to sustain an objection to the introduction of any testimony in the circuit court. *Emmerson v. St. Louis & H. R. Co.*, 35 Mo. App. 621.

**635. Effect of recitals in transcript.**—The official character of the justice of the peace before whom an action for the killing of stock has been instituted, is established *prima facie* by a recital thereof in the transcript on appeal. *Burger v. St. Louis, K. & N. W. R. Co.*, 52 Mo. App. 119.

**636. Amendment of the transcript.**—In an action before a justice under Mo. Rev. St. § 809, to recover for stock killed, the record on appeal must show that the justice was an officer of the township in which the animal was killed or of an adjoining township, and if this does not appear a judgment will be reversed. If the facts warrant it, however, the defect may be remedied by amendment when the case goes back to the circuit court. *Lindsay v. Kansas City, Ft. S. & M. R. Co.*, 36 Mo. App. 51.

**637. Affirmance for want of prosecution.**—Where an appeal is allowed from a justice on a day subsequent to that of the judgment, in an action against a railroad for killing stock, and appellant fails to give the ten days' notice of his appeal required by the statute (2 Wagn. Mo. St. 850, § 21), before the second ensuing term of the circuit court, the appellee may appear simply for the purpose of having the judgment affirmed, and will be entitled to such affirmance, by reason of the continued failure of appellee to give such notice. But judgment of affirmance for want of prosecution cannot be taken at the return term of the appeal unless appellee enter his appearance

on or before the second day of the term. *Nay v. Hannibal & St. J. R. Co.*, 51 Mo. 575. — FOLLOWED IN *Transier v. St. Louis, K. C. & N. R. Co.*, 54 Mo. 189; *Dooley v. Missouri Pac. R. Co.*, 83 Mo. 103. REVIEWED IN *Priest v. Missouri Pac. R. Co.*, 85 Mo. 521.

**638. Remanding to justice for new trial.**—In an action against a railroad, in a justice's court, for killing a cow, the undisputed evidence showed that the cow was killed on a rainy, foggy, dark night, making it impossible to see her more than sixty feet away; that after she was seen every effort was made to stop the train, but without success; and that the train hands were free from negligence. Upon this evidence plaintiff obtained judgment. *Held*, on *certiorari* to the superior court, that the court might in its discretion, under the Georgia practice, give judgment for the company or remand the case for a new trial. *Rome R. Co. v. Ransom*, 78 Ga. 705, 3 S. E. Rep. 626.

**639. Double damages.\***—Wagn. Mo. St. 809, § 3, giving justices of the peace jurisdiction of actions for killing stock concurrent with the circuit courts, gives them jurisdiction to render judgment for the double damages allowed by the statute, regardless of the amount of such judgment. *Parish v. Missouri, K. & T. R. Co.*, 63 Mo. 284, 20 Am. Ry. Rep. 417. — FOLLOWING *Hudson v. St. Louis, K. C. & N. R. Co.*, 53 Mo. 525. — REVIEWED IN *Barnett v. Atlantic & P. R. Co.*, 68 Mo. 56.

**640. Instructions.†**—The refusal of a trial justice, in an action to recover for stock killed, to give an instruction to the effect that, "if the stock were killed accidentally and not by reason of negligence on the part of the defendant, then plaintiff cannot recover," is reversible error where no explanation is given of such refusal, although the trial justice gave other instructions intended to embody the one refused, but it was doubtful whether the jury could have understood that such was his intent. *Davis v. Richmond & D. R. Co.*, 30 So. Car. 613, 9 S. E. Rep. 105.

**641. Enforcement of judgment.**—Where a claim against a company for killing stock has been reduced to judgment before a justice of the peace, and a proceeding is

instituted under Indiana Rev. St. 1881, § 4030, to enforce the judgment, an averment that "the judgment was upon a complaint for stock killed by the railway company," is good on demurrer. *Chicago & A. R. Co. v. Summers*, 113 Ind. 10, 12 West. Rep. 205, 14 N. E. Rep. 733. — FOLLOWED IN Indianapolis, D. & W. R. Co. v. Crockett, 2 Ind. App. 136.

Where, upon an appeal from a justice of the peace, a party has obtained a judgment in the circuit court against a company for damages for the killing or injury of his stock, under the provisions of the act of March 4, 1863, 1 Indiana Rev. St. 1876, p. 751, providing compensation to the owners of stock killed or injured on a railroad not securely fenced in, the judgment-plaintiff, although his case is not within the letter of the statute, may enforce the collection of his judgment in the manner provided in the 5th section of said act. *Ft. Wayne, M. & C. R. Co. v. Clark*, 59 Ind. 191.

#### VI. EFFECT OF OPERATION OF ROAD BY ASSIGNEES, LESSEES, RECEIVERS, ETC.

**642. Generally.**—A corporation which has the possession, control, and management, and is engaged in the business of running and operating a railroad in Illinois, is a "railroad corporation," within chapter 94 of the laws of 1874, although it is so engaged in the execution and discharge of a trust for the benefit of the bond and stockholders of the corporation which built and owned the road, and is not itself the absolute owner thereof. *Union Trust Co. v. Kendall*, 20 Kan. 515, 20 Am. Ry. Rep. 294. — FOLLOWING *Central Branch R. Co. v. Ingram*, 20 Kan. 66.

Under the Indiana statute, the company owning a railroad is liable for stock killed by a train on the road, without reference to the company or persons who may have been running the locomotive or cars that caused the injury; and such company may be sued alone. *Ft. Wayne, M. & C. R. Co. v. Hinebaugh*, 43 Ind. 354. — FOLLOWING *Indianapolis & M. R. Co. v. Solomon*, 23 Ind. 534.

**643. Independent contractor's liability.**—The statute of March 4, 1863 (3 Ind. St. 113), makes the company owning the railroad jointly and severally liable with the "lessees, assignees, receivers, and other persons running or controlling any railroad," etc., for stock killed or injured. *Held*, that contractors were embraced in the phrase "other persons," used in the statute.

\* See ante, 595-604.

† See ante, 560-578.

*Huey v. Indianapolis & V. R. Co.*, 45 Ind. 320.

It is no defense for a railroad company in an action to recover for stock killed by a train of cars run on its railway track, that the injury was done by the train of another company, which was in the exclusive use and possession of contractors for the construction of defendant's line of road, who had not finished the same, or delivered to the defendant the completed portion of said road. *Huey v. Indianapolis & V. R. Co.*, 45 Ind. 320.

Under the Texas statute a railroad company is not liable for stock killed where the road and cars are in the possession of, and managed by, independent contractors in the construction of the road. *Houston & G. N. R. Co. v. Van Bayless*, 1 Tex. App. (Civ. Cas.) 247.

**644. Lessor's liability.**—Where a railroad company has leased its road and rolling stock to another company, it remains liable, under the law of California, for cattle killed by the trains of the lessee, on the unfenced portions of the lessor's railroad. *Fontaine v. Southern Pac. R. Co.*, 1 Am. & Eng. R. Cas. 159, 54 Cal. 645.—QUOTING *Illinois C. R. Co. v. Kanouse*, 39 Ill. 272; *Toledo, P. & W. R. Co. v. Rumbold*, 40 Ill. 143.—FOLLOWED IN *Dolan v. Newburgh, D. & C. R. Co.*, 42 Am. & Eng. R. Cas. 611, 120 N. Y. 571, 24 N. E. Rep. 824, 31 N. Y. S. R. 852.

The owner of a railroad leased to another company is liable in Illinois for live stock when killed by reason of a failure to fence the track as required by statute. *East St. Louis & C. R. Co. v. Gerber*, 82 Ill. 632, *Illinois C. R. Co. v. Kanouse*, 39 Ill. 272.—DISAPPROVING *Whitney v. Atlantic & St. L. R. Co.*, 44 Me. 362; *Wyman v. Penobscot & K. R. Co.*, 46 Me. 162.

Under Ind. Rev. St. 1881, § 4025, a railroad corporation is liable for stock killed on its line at a point where it has failed to securely fence its track, whether the railroad is operated by the company owning the line, or by another. *Cincinnati, H. & I. R. Co. v. McDougall*, 108 Ind. 179, 8 N. E. Rep. 571.

Under the Indiana statute the company owning a track is liable for stock killed by the trains of another company that operates its trains in its own name over such track. *Indianapolis & M. R. Co. v. Solomon*, 23 Ind. 534.—DISTINGUISHED IN *Cincinnati, H. & D. R. Co. v. Leviston*, 19 Am. & Eng.

1 D. R. D.—24.

R. Cas. 633, 97 Ind. 488; *Cincinnati & M. R. Co. v. Paskins*, 36 Ind. 380. FOLLOWED IN *Ft. Wayne, M. & C. R. Co. v. Hinebaugh*, 43 Ind. 354.

In Iowa the rule is that neither the owner nor the lessee of a railroad is liable for stock killed by the trains of the other by reason of the track being left unfenced where fences are required by law. *Stephens v. Davenport & St. P. R. Co.*, 36 Iowa 327.

But each is liable for the stock killed or injured by its own trains; and this rule is not changed by the fact that the lessor was bound to keep up the fences and had the right to fix the time-tables of the lessee's trains. *Clary v. Iowa Midland R. Co.*, 37 Iowa 344.

The purpose of the Oregon statute is to make the company owning the road and the company operating the road liable, so that either may be sued, as the plaintiff may elect, who has sustained injury to his live stock by a moving train upon its unfenced track. *Eaton v. Oregon R. & N. Co.*, 43 Am. & Eng. R. Cas. 57, 24 Pac. Rep. 415, 19 Oreg. 391.—FOLLOWING *Hindman v. Oregon R. & N. Co.*, 17 Oreg. 619.

A company leasing its road, under a power contained in its charter, is still liable for stock killed by the negligence of the lessees. *Harmon v. Columbia & G. R. Co.*, 28 So. Cas. 401, 13 Am. St. Rep. 686, 5 S. E. Rep. 835.—REVIEWING *Washington A. & G. R. Co. v. Brown*, 17 Wall. (U. S.) 450; *National Bank v. Atlanta & C. A. L. R. Co.*, 25 So. Car. 222.—DISAPPROVED IN *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. Rep. 165.

A railroad company is liable for killing live stock, unless its track is fenced, whether it owns or operates the railroad; and it is liable as owner, although it may have previously leased the road to some other company or corporation. *Oregon R. & N. Co. v. Dacres*, 1 Wash. 195, 23 Pac. Rep. 415.—EXPLAINED IN *Oregon R. & N. Co. v. Smalley*, 1 Wash. 206.

**645. Lessee's liability.**—(1) *Generally.*—Where a company leases a road for fifty years, with the "exclusive right to run, operate, and control it," and has fenced the same, it is liable for stock injured or killed by reason of defects in the fence. *Tracy v. Troy & B. R. Co.*, 55 Barb. (N. Y.) 529; *affirmed in* 38 N. Y. 433.

A railroad company leasing lands for the purposes of a grain elevator is not liable for stock killed that may be attracted by grain

dropped in loading cars from the elevator. *Gilliland v. Chicago & A. R. Co.*, 19 Mo. App. 411.—REVIEWED IN *Burger v. St. Louis, K. & N. W. R. Co.*, 52 Mo. App. 119.

A lessee of a railroad in possession incurs the same liability as the company for damages to live stock by reason of a failure to fence. He takes the road subject to the duty imposed on the company for the benefit and protection of the public. *McCall v. Chamberlain*, 13 Wis. 637.

Where two railroad companies run and operate a road jointly, the one as owner and the other as lessee, each agreeing to pay for all stock killed by its own trains, the fact that the lease provided that the officers of one of the companies should prescribe the rules for and direct the running of all trains cannot in any way change the character or effect of the contract. *Wabash R. Co. v. Williamson*, 3 Ind. App. 190, 29 N. E. Rep. 455.

(2) *Illinois statute*.—The lessee of an unfenced railroad in Illinois is liable for stock killed when the statute requires the company to fence. *East St. Louis & C. R. Co. v. Gerber*, 82 Ill. 632.—FOLLOWED IN *Dolan v. Newburgh, D. & C. R. Co.*, 42 Am. & Eng. R. Cas. 611, 120 N. Y. 571, 24 N. E. Rep. 824, 31 N. Y. S. R. 852.

Where two companies have the right to use the same track, one as owner and the other as lessee of a joint use, both companies are liable for stock killed by the train of the lessees by reason of the track not being fenced, as required by the Illinois statute. *Illinois C. R. Co. v. Kanouse*, 39 Ill. 272.—DISAPPROVING *Whitney v. Atlantic & St. L. R. Co.*, 44 Me. 362; *Wyman v. Penobscot & K. R. Co.*, 46 Me. 162.—DISTINGUISHED IN *West v. St. Louis, V. & T. H. R. Co.*, 63 Ill. 545. FOLLOWED IN *Toledo, P. & W. R. Co. v. Rumbold*, 40 Ill. 143; *Lake Erie & W. R. Co. v. Cruzen*, 29 Ill. App. 212; *Dolan v. Newburgh, D. & C. R. Co.*, 42 Am. & Eng. R. Cas. 611, 120 N. Y. 571, 24 N. E. Rep. 824, 31 N. Y. S. R. 852. QUOTED IN *Fontaine v. Southern Pac. R. Co.*, 1 Am. & Eng. R. Cas. 159, 54 Cal. 645. REVIEWED IN *Indianapolis & St. L. R. Co. v. People*, 32 Ill. App. 286.

(3) *Indiana statute*.—A railroad company running and operating a railroad under a lease is not liable, either at common law or under the Indiana statute, for stock killed prior to the execution of the lease. *Pitts-*

*burgh, C. & St. L. R. Co. v. Kain*, 35 Ind. 291, 5 Am. Ry. Rep. 574.

In a joint action, under the Indiana statute, against one railroad company as the owner and another as the lessee of a certain railroad, to recover for stock alleged to have been killed by the car of the latter whilst running such railroad, the complaint must, to be sufficient as to the lessee, allege that the lessee was running such railroad in the name of the owner, *Jeffersonville, M. & I. R. Co. v. Downey*, 61 Ind. 287.—DISTINGUISHING *Indianapolis, C. & L. R. Co. v. Warner*, 35 Ind. 515.

Prior to the Indiana act of 1877, p. 61, the owner of stock killed on a railroad run and operated by a lessee in its own name had no remedy under the statute. *Pittsburgh, C. & St. L. R. Co. v. Currant*, 61 Ind. 38. *Cincinnati, H. & D. R. Co. v. Norris*, 61 Ind. 285.

Under a statute providing that "lessees, assignees, receivers, and other persons running or controlling any railroad in the corporate name of such company" shall be liable for stock killed, a company is not liable where it is operating a road, not in the name of the other company, but in its own name. *Cincinnati, H. & D. R. Co. v. Bunnell*, 61 Ind. 183. *Pittsburgh, C. & St. L. R. Co. v. Hannon*, 60 Ind. 417.

Under the Indiana act of March 4, 1863, § 1, where a leased railroad is run or controlled by the lessee in the corporate name of the owner and not otherwise, the lessee is liable, jointly or severally with the owner, for stock killed or injured where the track is not properly fenced; but a road run or operated by a lessee in its own name is not liable, under the statute, for stock killed or injured. *Pittsburgh, C. & St. L. R. Co. v. Bolner*, 57 Ind. 572, 18 Am. Ry. Rep. 450.—FOLLOWED IN *Pittsburgh, C. & St. L. R. Co. v. Gadsbury*, 57 Ind. 327; *Pittsburgh, C. & St. L. R. Co. v. Miller*, 58 Ind. 596; *Pittsburgh, C. & St. L. R. Co. v. Green*, 58 Ind. 598.

(4) *Iowa*.—Where two companies operate trains on the same track, one as lessee and the other as owner, neither is liable for stock killed by the trains of the other by reason of the track not being fenced as required by the laws of Iowa. *Stephens v. Davenport & St. P. R. Co.*, 36 Iowa 327.—QUOTED IN *Brockert v. Central Iowa R. Co.*, 82 Iowa 369.

Where one company owns a track and

another has the privilege of using it, and both operate trains thereon, each is liable for stock killed by its own trains through a failure to fence, under Iowa act 1862, ch. 169. *Clary v. Iowa Midland R. Co.*, 37 Iowa 344. —FOLLOWING *Stephens v. Davenport & St. P. R. Co.*, 36 Iowa 327.

And this rule is not affected by the fact that the lessor was bound to keep up fences and had a right to fix time tables under which the lessee's trains were operated. *Clary v. Iowa Midland R. Co.*, 37 Iowa 344.

But where a company leases a road for fifty years, and operates and controls it as its own, and is charged with the duty of fencing, it is liable for stock killed through a failure to fence, under the Iowa act of 1862, ch. 169, § 6. *Stewart v. Chicago & N. W. R. Co.*, 27 Iowa 282.—DISTINGUISHING *Liddle v. Keokuk, Mt. P. & M. R. Co.*, 23 Iowa 378.—REVIEWED IN *Lee v. Minneapolis & St. L. R. Co.*, 66 Iowa 131.

The Iowa act of 1862, ch. 159, § 6, making railroad companies liable for stock killed by reason of a failure to fence, does not extend to lessees of railroads; but such lessees are liable for killing stock through the negligent operation of trains. *Liddle v. Keokuk, Mt. P. & M. R. Co.*, 23 Iowa 378.

**646. Sublessee's Liability.**—Defendant, a sublessee of a railway company under the Railway Act, Consol. Stat. C. ch. 66, was not liable for neglect to maintain fences by reason of which the plaintiff's cattle had been killed. *Bennett v. Covert*, 24 U. C. Q. B. 38.

**647. Company having running privileges over another's line.**—A company having running privileges over the track of another company is not liable for killed stock, which is the result of defects in a fence which the company owning the track is required to maintain. *Parker v. Rensselaer & S. R. Co.*, 16 Barb. (N. Y.) 315.—APPLIED IN *McGrath v. New York C. & H. R. R. Co.*, 1 T. & C. (N. Y.) 243.

The train was running over a road not owned by the defendant company. At the crossing in question the company who owned the road usually kept a flagman, but there was no flagman there at the time of the accident. *Held*, that it was not negligence on the part of the defendant to run their train across the street when a flagman was not there. *McGrath v. New York C. & H. R. R. Co.*, 1 T. & C. (N. Y.) 243.—AP-

PLYING *Parker v. Rensselaer & S. R. Co.*, 16 Barb. 315.

Where a company, by license or permission of another company, runs trains over the road of the latter company without being assignee or lessee, the company owning the road is liable, under the Kansas statute, for stock killed by the trains of the company having the running privilege, where the injury is the result of a failure to maintain proper fences. *Kansas City, Ft. S. & G. R. Co. v. Ewing*, 23 Kan. 273.

A company having running privileges over part of the track of another company is liable in double damages, under the Missouri statute, for stock killed where the killing is the result of a failure to maintain proper fences. *Farley v. St. Louis, K. C. & N. R. Co.*, 72 Mo. 338.

Where two railroad companies operate trains on the same road, each is liable under the Iowa law only for stock injured or killed by its trains by reason of the road being unfenced, and not for that injured or killed by the trains of the other. *Stephens v. Davenport & St. P. R. Co.*, 36 Iowa 327.

**648. Receiver's Liability.\***—An action under the Indiana act of March 4, 1863, will lie against a company for the value of an animal killed by a passing train, the road not being fenced, although at the time of the killing the railroad was controlled and run by a receiver in bankruptcy. *Indianapolis, C. & L. R. Co. v. Ray*, 51 Ind. 269. *McKinney v. Ohio & M. R. Co.*, 22 Ind. 99.—DISTINGUISHED IN *Ohio & M. R. Co. v. Davis*, 23 Ind. 553; *Heath v. Missouri, K. & T. R. Co.*, 83 Mo. 617.

Where a railroad company, in answer to an action to recover the value of animals killed by its machinery, desires to set up the fact that its road is in the possession of and being operated by a receiver appointed by a federal court, the answer should be accompanied by the original or a copy of the order of the latter court for the appointment of the receiver. *Ohio & M. R. Co. v. Fitch*, 20 Ind. 498.

The mere appointment of a receiver, with the powers usually given to a receiver in

\* Liability of receivers for killing stock under statute, see note, 13 AM. & ENG. R. CAS. 554.

Effect of placing road in hands of receiver where company is made absolutely liable by statute, as for killing stock, etc., see note, 5 AM. ST. REP. 314.



chancery, does not relieve the railroad company from liability to suit for live stock injured or killed. The receiver operates the road subject to that liability. *Ohio & M. R. Co. v. Fitch*, 20 Ind. 498.

A company is liable to an action, under the statute, for killing stock while the road is being run, operated, and controlled by a receiver appointed by the circuit court of the United States, and service of process in such case upon a conductor of a train passing through the county where the animal was killed is sufficient, though the conductor be employed and controlled by such receiver. *Louisville, N. A. & C. R. Co. v. Cagle*, 46 Ind. 277, 6 Am. Ry. Rep. 349.—DISTINGUISHED IN *Heath v. Missouri, K. & T. R. Co.*, 83 Mo. 617.

Where a railroad is being operated by a receiver, the receiver and not the railroad company is liable, under § 1289 of the Code of Iowa, for the value of stock injured on the railroad company's unfenced right of way through the negligence of the railroad employés. Whether in an action to recover damages under such statute the railway company is a proper or necessary party, *quære*. *Brockert v. Central Iowa R. Co.*, 82 Iowa 369, 47 N. W. Rep. 1026.—QUOTING *Ohio & M. R. Co. v. Davis*, 23 Ind. 553; *Stephens v. Davenport & St. P. R. Co.*, 36 Iowa 327.

Under the Kansas act of 1874, making railroad companies liable for stock killed by reason of a failure to fence their tracks, a company may be sued for stock killed while the road is in the hands of a receiver after he is discharged, where the company might have fenced but failed to do so, before the receiver was appointed. *Kansas Pac. R. Co. v. Wood*, 24 Kan. 619.

**649. Road operated by private persons.**—A company is liable for a horse killed by reason of its not maintaining a proper fence, as required by statute, where the road is operated by individuals, at their own expense and for their own benefit, but where, under a provision of the lease, the trains run under the direction and control of the company. *Wyman v. Penobscot & K. R. Co.*, 46 Me. 162.—DISAPPROVED IN *Illinois C. R. Co. v. Kanouse*, 39 Ill. 272. DISTINGUISHED IN *Eaton v. European & N. A. R. Co.*, 59 Me. 520.

A railroad company is not liable under the Missouri damage act, § 5, for stock killed by a locomotive which is being run by an

employé without authority and outside of the purpose of his employment, and for matters pertaining to his own business. *Cousins v. Hannibal & St. J. R. Co.*, 66 Mo. 572.

**650. Road operated by purchasers after sale.**—A railroad company is not liable for stock killed after its road has been sold and is in the possession of and operated by the purchasers. *Western R. Co. v. Huss*, 70 Ala. 565.—FOLLOWING *Western R. Co. v. Davis*, 66 Ala. 578.—*Western R. Co. v. Davis*, 66 Ala. 578.—FOLLOWED IN *Western R. Co. v. Huss*, 70 Ala. 565.

**651. Trustee under a mortgage.**—A trustee under a mortgage, in possession of a road and operating it, is liable for stock killed, the same as the corporation would be. *Farrell v. Union Trust Co.*, 13 Am. & Eng. R. Cas. 552, 77 Mo. 475.

**652. Manager of Troy and Greenfield R. Co.**—Under the various Massachusetts statutes from 1875 to 1880, providing for the appointment of a manager of the Troy & Greenfield Railroad and the Hoosac Tunnel, on behalf of the commonwealth, an action may be maintained against the manager to recover for injuries to a horse caused by the defective construction of the roadbed, though the defective construction was the work of a former manager. *Amstein v. Gardner*, 16 Am. & Eng. R. Cas. 585, 134 Mass. 4.

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### I. WHO MAY APPEAL AND WHAT IS REVIEWABLE.

#### 1. *In general.*

**1. The right to appeal.**—When a right of appeal exists only by virtue of an act, only those embraced within the description of persons to whom the right is given can appeal. *McIntyre v. East on & A. R. Co.*, 26 N. J. Eq. 425.

A party will not be deprived of the right to appeal by an agreement not to appeal, unless such agreement be based on a consideration, or the facts be such as to work an estoppel. *Ogdensburgh & L. C. R. Co. v. Vermont & C. R. Co.*, 63 N. Y. 176; *not dismissing appeal from 4 Hun* 712, 6 T. & C. 488, which are affirmed in 16 Abb. Pr. N. S. 249.—DISTINGUISHED IN *Wheelock v. Lee*, 74 N. Y. 495.

Where two companies are sued jointly for negligently injuring plaintiff, and each answers separately, denying negligence, and a trial results in a verdict against one of the companies only, saying nothing about the other, the company against whom there is no verdict cannot appeal from an order granting a new trial as to the other company. *Rankin v. Central Pac. R. Co.* 73 Cal. 96, 15 Pac. Rep. 57.

An affidavit made for the purpose of obtaining an appeal from a board of county commissioners issuing bonds in aid of a railroad, must show the nature of appellant's interest, as where the appeal is by a taxpayer, that he is a resident taxpayer. *Fordyce v. Board of Com'rs*, 28 Ind. 454.

A separate appeal to the municipal court of the city of St. Paul may be taken by a garnishee from a judgment against him rendered by one of the city justices; and such right of appeal is not dependent upon the removal by appeal of the judgment in the principal action. *Albachten v. Chicago, St. P. & K. C. R. Co.*, 40 Minn. 378; 42 N. W. Rep. 86.—FOLLOWED IN *Richter v. Trash*, 40 Minn. 379, n.

The right of appeal is secured, and not only to all parties in the suit, but to third persons, when they are aggrieved by the judgment, if the amount involved is sufficient to give the appellate court jurisdiction. (La. C. P. 571.) When, therefore,

the state auditor and state treasurer are made parties-defendants in a suit, to compel them to register bonds of the state which have been authorized by law in favor of a railroad company, which registry by these officers is required by law as a prerequisite to their delivery to the company, and the judgment of the court requires them to make such a registry, then and in such case they or either of them have the right of appeal from such judgment secured to them, if the bonds sought to be registered are sufficient in amount to give the appellate court jurisdiction, and a *mandamus* will issue, on application of the auditor and treasurer, or either of them, from the supreme court, directing the judge *a quo* to grant the appeal. *State v. Judge*, 23 La. Ann. 595.

After a decree of foreclosure was entered, but at the same time, in a suit by a railroad mortgage trustee to foreclose, certain bondholders were made parties for the purpose of appealing. *Held*, that an appeal taken thereunder was good as to the interest of such bondholders. *Sage v. Central R. Co.*, 93 U. S. 412.

In an action for damages, the defense was (1) That the action should have been against the township, inasmuch as the accident occurred within the lines of a public highway, and (2) that plaintiff's contributory negligence was a bar to his recovery. The court submitted the second question to the jury and reversed the first. The jury rendered a verdict for plaintiff, but the court entered judgment for defendant *non obstante veredicto*. Upon appeal by plaintiff the judgment was reversed and judgment was entered upon the verdict. Subsequently defendant appealed, assigning as error the submission of the question of plaintiff's contributory negligence to the jury. *Held*, that defendant was entitled to an appeal. There is nothing in the Pennsylvania acts of May 9, 1889 (P. L. 158), and May 20, 1891 (P. L. 101), to prevent such appeal. *Gates v. Pennsylvania R. Co.*, 154 Pa. St. 566, 26 Atl. Rep. 598.

**2. — as dependent upon the amount in controversy.**—(1) *Illinois*.—Where an action is brought to recover damages to real estate by the construction of tracks in a street in close proximity to plaintiff's lots, and by depressing the grade of the street, and the declaration charges damages exceeding \$1000, and the evidence tends to prove them in excess of that sum, an appeal may be allowed to the supreme court, from

the final judgment of the court affirming a judgment in favor of defendant. *Baber v. Pittsburgh, C. & St. L. R. Co.*, 93 Ill. 342.

In an action against a railroad for negligently killing stock, the damages, being susceptible of direct proof, must exceed the sum of \$1000, in order to give the supreme court jurisdiction on appeal from the appellate court. It is not enough that the damages amount to \$1000 and no more. *Hankins v. Chicago & N. W. R. Co.*, 100 Ill. 466.

Where a judgment for the defendant, in an action on the case to recover damages for a personal injury claimed to have been caused by the negligence of the defendant's servants, is affirmed by the appellate court, the judgment being for "less than \$1000, exclusive of costs," no appeal or writ of error lies to review the judgment of the appellate court, unless a majority of the judges of that court shall certify the case under the statute. *Baxstrom v. Chicago & N. W. R. Co.*, 117 Ill. 150, 7 N. E. Rep. 268.

(2) *Iowa*.—Under the Code, § 3173, in cases where the amount in controversy does not exceed \$100 the supreme court has no jurisdiction on appeal, except as to questions of law. Where the question certified was where the evidence, in a suit against a railroad to recover for injuries to a horse, showed contributory negligence on the part of the plaintiff, as held by the trial judge, upon which he directed a verdict for the defendant, there is no question of law raised, and the supreme court has no jurisdiction except to dismiss the case. *Chilton v. Chicago, R. I. & P. R. Co.*, 72 Iowa 689, 34 N. W. Rep. 473.

(3) *Kentucky*.—The act of April 22, 1882, giving the superior courts exclusive appellate jurisdiction, except, *inter alia*, over "judgments for money or personal property, if the value in controversy be greater than \$3000," confers upon such courts jurisdiction of an appeal by a railroad company from a judgment against it for \$1600, in an action for a personal injury, where plaintiff sued for \$5000. *Louisville & N. R. Co. v. Wade*, (Ky.) 12 S. W. Rep. 279.

(4) *New York*.—If an appeal be taken by the defendant, the amount in controversy is the amount of the judgment, regardless of the amount demanded in the complaint, or the manner in which the referee made up the aggregate of damages; and if the amount of the judgment is \$500 or more, the court of appeals has jurisdiction. *Graville v.*

*New York C. & H. R. R. Co., 1 Silv. App. 331, 5 N. Y. S. R. 721; affirming 34 Hun 224.*

(5) *Texas*.—The supreme court of Texas cannot review on appeal a judgment of the court of civil appeals, affirming and rendering a final judgment for \$283.03, for freight, brought up from the district court of Trinity county, which by statute exercises the same jurisdiction as county courts. *Missouri, K. & T. R. Co. v. Trinity County Lumber Co., 85 Tex. 405, 21 S. W. Rep. 539.*

Under Tex. Rev. St. art. 1068, providing that the court of appeals shall have jurisdiction of cases on appeal where "the judgment rendered or the amount in controversy shall exceed \$100, exclusive of interest and costs," the court has no jurisdiction unless the judgment exceeds \$100; and it does not have jurisdiction of a case commenced against a railroad company to recover \$92.25 damages where a judgment is rendered for \$47.50 and \$79.89 costs. *Houston & T. C. R. Co. v. Pressley, 2 Tex. App. (Civ. Cas.) 451.*

A builder sued a railroad company for \$480 special damages, being for wages paid to workmen while kept idle by reason of the company failing to promptly carry building material, and \$18, the amount paid out for telegraphing in trying to find the material. It was adjudged that he was not entitled to recover the \$480. Held, that the amount as to the \$18 did not give the county court jurisdiction, and it could not be adjudged on appeal. *Ligon v. Missouri Pac. R. Co., 3 Tex. App. (Civ. Cas.) 17.*

(6) *Virginia*.—Where the right of a county to levy taxes is involved, the supreme court has jurisdiction, under Va. Const., art. 6, § 2, of an appeal in an action to recover a tax of less than \$500 illegally collected. *Prince George County v. Atlantic, M. & O. R. Co., 87 Va. 283, 12 S. E. Rep. 667.*

(7) *Washington*.—The supreme court can acquire no jurisdiction by appeal over an action begun in a justice's court, where the amount in controversy as determined by the pleadings is \$75, although the justice may have erroneously sustained a demurrer to a counterclaim for damages in the sum of \$500, as *certiorari* is the proper remedy for reviewing the ruling of the justice upon the defense interposed. *Gabriel v. Seattle & M. R. Co., 7 Wash. 515, 35 Pac. Rep. 410.*

(8) *West Virginia*.—The supreme court

has no jurisdiction to review an order of the circuit court refusing to award a writ of *certiorari* to the judgment of a justice rendered on a verdict of a jury, when the amount of such judgment is less than \$100, and the matter in controversy is merely pecuniary. *Farnsworth v. Baltimore & O. R. Co., 28 W. Va. 815.*

3. — *effect of remittitur of part of amount recovered.*\*—A remittitur entered after verdict rendered in a case in which the matter in dispute exceeds \$2000, does not cut off defendant's right to appeal from a judgment against him. *Gayden v. Louisville, N. O. & T. R. Co., 39 La. Ann. 269, 1 So. Rep. 792.*

Where a verdict in a personal injury case is for \$5500 plaintiff should not be permitted to remit \$750, so as to deprive the supreme court of jurisdiction, though the trial judge be of opinion that the defendant would not be successful on appeal. *Smith v. Memphis & L. R. R. Co., 18 Fed. Rep. 304.*—FOLLOWING *Thompson v. Butler, 95 U. S. 694.*

4. *Appeals to intermediate appellate court.*—A bill filed to test the authority of a railroad company to use a public street in front of complainant's residence for the use of its railroad track does not involve the right, title, or validity of a franchise, and an appeal in such case is properly taken to the appellate court in the first instance. *Mills v. Parlin, 14 Am. & Eng. R. Cas. 147, 106 Ill. 60.*

An action of debt, brought by the state attorney in the circuit court, against a railroad company, for the recovery of penalties for alleged extortion and unjust discrimination, which is dismissed by the court, not being a criminal case above the grade of a misdemeanor, and not involving a franchise or freehold, or the validity of a statute, or construction of the constitution, and not relating to the revenue, and the state not being interested in it, as a party or otherwise, when the only question involved is the right of the state's attorney to bring the suit, no appeal lies directly to the supreme court. In such case the appeal should be to the appellate court. *People v. St. Louis & C. R. Co., 106 Ill. 412.*

## 2. What is Appealable.

5. What is appealable, generally.—Power in a railroad company to exercise the

\* See also *post*, 126.

right of eminent domain in a city is a "franchise," within the meaning of the constitution, defining what cases must be taken to the superior court by appeal or writ of error. *Chicago & W. I. R. Co. v. Dunbar*, 1 *Am. & Eng. R. Cas.* 214, 95 *Ill.* 571.—REVIEWING Chicago City R. Co. *v. People*, 73 *Ill.* 541; Board of Trade *v. People*, 91 *Ill.* 80; Bank of Augusta *v. Earle*, 13 *Pet. (U. S.)* 519; Bridgeport *v. New York & N. H. R. Co.*, 36 *Conn.* 255.

Although the direct object of a bill in chancery be not to oust a railroad company from the possession of a franchise, but to enjoin it from condemning property within a city, and a decree is rendered granting the relief sought on the assumed ground that the company has no such right, thus depriving the company of the right claimed, an appeal will lie from such decree to the supreme court. *Chicago & W. I. R. Co. v. Dunbar*, 1 *Am. & Eng. R. Cas.* 214, 95 *Ill.* 571.—DISTINGUISHED IN Highway Com'rs *v. Chicago & N. W. R. Co.*, 34 *Ill. App.* 32.

Where a question is whether the board of railway commissioners can maintain an action in equity to enforce an order which they have made, and the demurrer denies their right to the relief which they demand, and questions their right to maintain the action, the filing of the demurrer questions their right to maintain an action, and is reviewable on appeal. *Smith v. Chicago, M. & St. P. R. Co.*, 86 *Iowa* 202, 53 *N. W. Rep.* 128.

Though a chancery court that has appointed a receiver of a railroad has not jurisdiction of an action against the receiver to recover for personal injuries caused by the negligence of persons operating trains under him, such party being entitled to a trial by jury in an action at law, yet where such proceeding is instituted in chancery, and an order refusing the right of trial by jury is not appealed from, and both parties submit to trial before the vice-chancellor, his decision is reviewable on the merits on appeal. *Pahys v. Jewett*, 32 *N. J. Eq.* 302; *reversing, on another point*, 30 *N. J. Eq.* 604.

**6. What is not.**—Under Ala. Rev. Code, § 2759, a voluntary nonsuit taken in consequence of the courts sustaining a demurrer to the complaint is not reviewable on appeal. *Amerson v. Montgomery & M. R. Co.*, 50 *Ala.* 497.

Where a judgment, recovered at a special term of the superior court by a plaintiff for

an injury to his person, is reversed at a general term of said court, and remanded to special term for a new trial, and thereafter the plaintiff dies, no appeal lies from such reversal to the supreme court in favor of the administrator of the deceased. *Stout v. Indianapolis & St. L. R. Co.*, 41 *Ind.* 149.

There is no appeal to the court of appeals to review questions of fact passed upon by commissioners, after personally inspecting the premises and hearing proofs, in a proceeding under the New York general railroad act, laws of 1850, ch. 140, § 22, by an aggrieved landowner who petitions for a change in the proposed route of a railroad. *In re New York, L. E. & W. R. Co.*, 99 *N. Y.* 388, 2 *N. E. Rep.* 35; *dismissing appeal from* 26 *Hun* 673.—FOLLOWED IN Niagara Falls, H. P. & M. Co. *v. Niagara Falls & L. R. Co.*, 51 *N. Y. S. R.* 887.

Under the constitution of West Virginia the supreme court of appeals can only review proceedings of the circuit courts which are of a judicial nature; and since a proceeding in a circuit court, supervising the decision of the board of public works in assessing railway property for taxation, is administrative only, it follows that no appeal lies in such case. *Pittsburg, C. & St. L. R. Co. v. Board of Public Works*, 28 *W. Va.* 264.

A special case stated by the railway commissioners under the Regulation of Railways Act 1873, § 26, cannot be appealed from a divisional court to the court of appeal. *Hall v. London, B. & S. C. R. Co.*, 17 *Q. B. D.* 230, 5 *Ry. & C. T. Cas.* 28.

The college of Ste. Therese having petitioned for an order for payment to them of a sum of \$4000, deposited by the appellants as security for land taken for railway purposes, a judge of the superior court in chambers, after formal answer and hearing of the parties, granted the order under the railway act, R. S. C. ch. 109, § 8, sub-sec. 31. *Held*, that the order in question having been made by a judge sitting in chambers and further acting under the statute as a *persona designata*, the proceedings had not originated in a superior court within the meaning of § 28 of the supreme and exchequer courts act, and the case was therefore not appealable. *Canadian Pac. R. Co. v. Little Seminary of Ste. Therese*, 16 *Can. Sup. Ct.* 606.

**7. What judgments or decrees are final.**—A judgment is final which disposes of all matters in controversy as

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to all the parties to a suit; hence, a judgment dissolving an injunction which was once issued to restrain a railway company from constructing and operating its road, when to secure such restraint was the object of the suit, is a final judgment. From such a judgment an appeal may be taken which will give jurisdiction to the supreme court over the case; and this though the case may have been dismissed by the court below, on the plaintiff's request after the entry of the order dissolving the injunction. *Gulf, C. & S. F. R. Co. v. Ft. Worth & N. O. R. Co.*, 68 *Tex.* 98, 2 *S. W. Rep.* 199, 3 *S. W. Rep.* 564.

In a suit growing out of an assignment of a railroad, a perpetual injunction restraining the assignor violating the terms and purposes of the assignment is a final decree for the purposes of an appeal. *French v. Shoemaker*, 12 *Wall* (U. S.) 86.

A decree in a suit to foreclose a railroad mortgage which ascertains the amount of the debt and directs that the property be sold at public auction, unless the amount, with interest and costs, be paid by a given time, is a final decree for the purposes of an appeal, and the time fixed in which an appeal can be taken begins to run from the date of the decree. *Bronson v. La Crosse & M. R. Co.*, 2 *Black* (U. S.) 528.

In a suit to compel a transfer of certain shares of railroad stock, a decree denying appellant relief, and dismissing the bill as to him, but retaining it as to a matter in which he was not interested, is a final decree within the law relating to appeals, and matters adjudicated therein cannot be reviewed in an appeal from a subsequent decree. *Hill v. Chicago & E. R. Co.*, 140 *U. S.* 52, 11 *Sup. Ct. Rep.* 690.—REVIEWED IN *Grant v. East & W. R. Co.*, 50 *Fed. Rep.* 795, 2 *U. S. App.* 182, 1 *C. C. A.* 681.

Where an auxiliary bill is filed in a railroad foreclosure suit, which charges that certain bonds are involved, and seeks to exclude them from benefit under the mortgage, a decree dismissing the auxiliary bill, but retaining the suit, and referring it to a master, is a final decree as to the auxiliary bill, and therefore appealable. *Grant v. East & W. R. Co.*, 50 *Fed. Rep.* 795, 2 *U. S. App.* 182, 1 *C. C. A.* 681.—REVIEWING *Hill v. Chicago & E. R. Co.*, 140 *U. S.* 52, 11 *Sup. Ct. Rep.* 690.—APPROVED IN *Pennsylvania Co. v. Jacksonville, T. & K. W. R. Co.*, 55 *Fed. Rep.* 131.

A decree establishing liens on railroad property and directing a sale thereof is a final decree and appealable, and the right to appeal therefrom is not affected by a subsequent decree consolidating the suit with other causes and directing a sale, but providing that the proceeds of sale shall be paid into court until the priorities of the various liens are ascertained. *Texas, S. F. & N. R. Co. v. Orman*, 3 *N. Mex.* 308, 9 *Pac. Rep.* 253.

A proceeding by motion under § 4029, Rev. St. Ind. 1881, to enforce the payment of a judgment against a railroad company for stock killed, is a new and original suit, a civil action, and the decision of the court upon a hearing is not interlocutory, but is a final order and judgment from which an appeal will lie. *Indianapolis, D. & W. R. Co. v. Crockett*, 2 *Ind. App.* 136, 28 *N. E. Rep.* 222.—FOLLOWING *Chicago & A. R. Co. v. Summers*, 113 *Ind.* 10.

A court in Louisiana, on the *ex parte* application of a holder of railroad bonds, granted an order in the nature of a foreclosure. Afterward the railroad company appealed and filed a petition seeking to suspend the order to seize and sell the road until a final hearing, and, among other things, denying the power to make the order without notice to the company. The court dismissed the company's petition with costs. *Held*, to be a final judgment for the purposes of an appeal. *New Orleans, O. & G. W. R. Co. v. Morgan*, 10 *Wall* (U. S.) 256.

An express company filed a bill against a railroad to enjoin any interference with the facilities it enjoyed over the railroad. After a preliminary injunction a decree was entered which required the road to carry the express goods, fixed the compensation, adjudged costs, and awarded an execution. *Held*, to be a final decree for the purposes of an appeal, although leave was given the parties to apply for a modification of rates. *St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.*, 16 *Am. & Eng. R. Cas.* 95, 108 *U. S.* 24, 2 *Sup. Ct. Rep.* 6.—SEE 10 *Fed. Rep.* 869.—FOLLOWED IN *Missouri, K. & T. R. Co. v. Dinsmore*, 108 *U. S.* 30, 2 *Sup. Ct. Rep.* 9.

**8. What judgments or decrees are not final.**—There must be a degree of finality about every judgment taken up to be reviewed by appellate courts. Judgment appointing commissioners to fix a just com-



pensation for land proposed to be taken in condemnation proceedings is not final and appealable. *Ludlow v. Norfolk*, 87 Va. 319, 12 S. E. Rep. 612.—FOLLOWED IN *Postal Tel. Cable Co. v. Norfolk & W. R. Co.*, 87 Va. 349.—*Postal Tel. Cable Co. v. Norfolk & W. R. Co.*, 87 Va. 349, 12 S. E. Rep. 613.—FOLLOWING *Ludlow v. Norfolk*, 87 Va. 319.

A judgment, in a suit against two defendants, for plaintiff, against one defendant, without showing any disposition of the cause as to the other, is not a final judgment, and is therefore not appealable. *Missouri Pac. R. Co. v. Scott*, 78 Tex. 360, 14 S. W. Rep. 791.

A judgment dissolving a temporary injunction and awarding costs, but not otherwise disposing of the subject-matter of the litigation, is not a final judgment, and will not support an appeal. *International & G. N. R. Co. v. Smith County*, 58 Tex. 74.—FOLLOWING *Herndon v. Bremond*, 17 Tex. 432.

Where suit is instituted against a railroad for failing to provide farm-crossings, a judgment reciting that a plea is bad, and that plaintiff is entitled to damages, but staying judgment therefor until the damages could be ascertained, is not final so as to be appealable. *Grand Trunk R. Co. v. Amey*, 20 U. C. C. P. 6.

A decree directing one railroad to pay rent to another for rolling stock which does not settle the title to the rolling stock, which is the real matter in litigation, is not a final decree, so that an appeal therefrom may be had. *Milwaukee & St. P. R. Co. v. Soutter*, 131 U. S. 86, app'x.

A decree in a railroad foreclosure suit which directs a sale, but which leaves the amount of the debt undetermined, and does not ascertain and define the property to be sold, is not a final decree so as to allow an appeal therefrom. *North Carolina R. Co. v. Swasey*, 23 Wall. (U. S.) 405.

A decree that all proceedings on a judgment should be stayed, and that no writ of *habere facias possessionem* should issue thereon until the final determination of a pending proceeding to assess damages for taking the land recovered, subject to such further order of the court as the justice of the case may require, is not a final decree, and a writ of error thereto will not lie. *O'Hara v. Pennsylvania R. Co.*, 2 Grant's Cas. (Pa.) 241.

**9. What orders are appealable, generally.**—Under the Indiana law, an

appeal may be taken from an order of the board of county commissioners donating money to aid in the construction of a railroad. *Fordyce v. Board of Com'rs*, 28 Ind. 454.

As an attorney-general has a supervisory power over the acts of district-attorneys in matters in which the public is interested, the attorney-general may demand that a judgment be set aside in a suit to recover state and county taxes against a railroad, which, by the consent of the district-attorney, has been entered for a sum less than that sued for, and if the court refuses to set aside such judgment, an appeal will lie. *Sacramento County v. Central Pac. R. Co.*, 61 Cal. 250.

Certain bonds were pledged for the security and protection of the receiver of a railroad against debts and liabilities of the corporation. Held, that an order of court for the sale of the bonds, or granting leave to the receiver to dispose of them, made on rule to show cause why they should not be disposed of, is an appealable order. *Philadelphia & R. R. Co. v. Little*, 41 N. J. Eq. 519, 7 Atl. Rep. 356.

**10. What orders are not appealable.**—As the Indiana statute was in December, 1872 (Rev. St. 1881, § 5772), an appeal was not allowed from an order of a board of county commissioners, selling railroad stocks belonging to the county. *O'Boyle v. Shannon*, 80 Ind. 159.

In an action appointing a receiver an appeal will not lie from the ruling of the court overruling a motion to vacate an order appointing a receiver, but in order to secure an appeal the course pointed out by the statute must be followed. *Wabash R. Co. v. Dykeman*, 133 Ind. 56, 32 N. E. Rep. 823.

Prior to the adoption of the Iowa Code of 1873, § 3165, there was no appeal from an order of a judge of the supreme court dissolving an injunction; and said section allowing such appeal will not be construed to be retroactive, so as to include an order of such judge, dissolving an injunction, restraining a railroad company from laying its track in a city street. *Davenport v. Davenport & St. P. R. Co.*, 37 Iowa 624.

An order appointing a receiver for railroad property pending litigation to foreclose a trust, is not appealable. *Maysville & L. R. Co. v. Punnett*, 15 B. Mon. (Ky.) 47.—FOLLOWED IN *Douglass v. Cline*, 12 Bush (Ky.) 608.

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An order of the supreme court, general term, overruling exceptions in that court in the first instance, and ordering judgment on the verdict is not appealable to the court of appeals before there is any judgment entered in pursuance of the order. *Delaware, L. & W. R. Co. v. Burkhard*, 15 N. Y. S. R. 517.

An order refusing leave to individuals to bring an action against a railroad company, in the name of the state, for the purpose of avoiding the company's charter, is not one from which an appeal will lie, not being an order in "an action or suit." *Oregon v. Oregon C. R. Co.*, 2 *Oreg.* 256.

Appeals as of right from orders of the county court in controversies concerning roads only exist where the controversy is concerning the establishment of a road, and not where it is a collateral controversy concerning the damages occasioned by a road already established. *Hancock v. Richmond & P. R. Co.*, 3 *Gratt. (Va.)* 313.

Where the order of the county court is interlocutory and not final, it cannot be revised by the circuit court in any mode of proceeding. *Hancock v. Richmond & P. R. Co.*, 3 *Gratt. (Va.)* 313.

**11. What orders are final.**—A writ of error or appeal will lie to the refusal of a judge to vacate a commissioner's certificate of "ascertainment and assessment," in a proceeding to condemn land for a railroad, such being a final determination. *Denver & N. O. R. Co. v. Jackson*, 6 *Colo.* 340.

Though the property of a railroad be sold under a decree for the foreclosure of a mortgage, on bill taken *pro confesso*, still the company may appeal from a final order directing a distribution of the proceeds of sale, and adjudging a balance still due the mortgage creditors. *Ohio C. R. Co. v. Central Trust Co.*, 133 *U. S.* 83, 10 *Sup. Ct. Rep.* 235.

**12. What orders are not final.**—The discharge of a receiver furnishes no ground of appeal. Nor does the rescission of an interlocutory order of sale, which determined no right. *Washington City & P. L. R. Co. v. Southern Md. R. Co.*, 55 *Md.* 153.

An order of reference in proceedings by *certiorari* under the act of 1880 (chap. 269, Laws of 1880), to review and correct an alleged illegal, erroneous, or unequal assessment, or an order refusing to set aside such an order of reference, is not reviewable in the court of appeals; neither order is final,

nor does it affect a substantial right within the meaning of the Code of Civil Procedure, section 190. *People ex rel. v. Smith*, 85 *N. Y.* 628; *dismissing appeal from 24 Hun.* 66.

In controversies concerning roads no appeal or *supersedeas* lies to an interlocutory order of the county court. *Trevilian v. Louisa R. Co.*, 3 *Gratt. (Va.)* 312.

Where a common carrier is sued for an overcharge on freights, an order requiring the company to produce its books to show that other shippers had been allowed rebates, is not a final order, and is therefore not appealable under the Iowa Code, § 3164. *Cook v. Chicago, R. I. & P. R. Co.*, 75 *Iowa* 169, 39 *N. W. Rep.* 253.

Under §§ 426, 429, Code Proc. when an arbitration of the differences between parties has failed for any reason, the superior court is clothed with full jurisdiction to proceed to a final determination of the controversy, and an order of such court setting aside the award of the arbitrators is not such a final order as will sustain an appeal. *Tacoma R. & M. Co. v. Cummings*, 5 *Wash.* 206, 31 *Pac. Rep.* 747, 33 *Pac. Rep.* 507.

Where in an action against a railroad company the jury returned a verdict against the company, and also made certain special findings of fact, and the company made a motion for judgment upon those findings, the verdict to the contrary notwithstanding, which motion was overruled by the court, and thereafter the company made a motion to set aside the verdict and judgment and for a new trial, which motion was sustained—*held*, that as no judgment had been rendered against the company and no final order made against it, no petition in error would lie in this court to review the action of the district court in refusing a judgment upon the special findings in favor of the company. *Atchison, T. & S. F. R. Co. v. Brown*, 6 *Am. & Eng. R. Cas.* 228, 26 *Kan.* 443—**FURTHER APPEALS**, *Brown v. Atchison, T. & S. F. R. Co.*, 15 *Am. & Eng. R. Cas.* 271, 31 *Kan.* 1.

*The following orders have been held not to be "final orders," and hence not to be reviewable on appeal or error:*

An order made in a railroad foreclosure suit before judgment, making certain indebtedness of the receiver of the road a first lien, and ordering its payment out of the proceeds of sale. *Illinois T. & S. Bank v. Pacific R. Co.*, 99 *Cal.* 407, 33 *Pac. Rep.* 1132.

An order overruling a motion to set aside

a sale of a railroad, previously ordered. *Racine & M. R. Co. v. Farmer's L. & T. Co.*, 70 Ill. 249.

An order in an equitable action against an elevated railway, to the effect that plaintiff was not entitled to an injunction to restrain the operation of the road, and providing that the complaint shall be dismissed unless plaintiff, within a designated time, give notice that he elects to try the case on the law side of the court. *Rich v. Manhattan R. Co.*, 53 N. Y. S. R. 346, 138 N. Y. 668, mem., 34 N. E. Rep. 402; *dismissing appeal from* 19 N. Y. Supp. 543.

An order appointing a receiver to receive the revenues, etc., of a railroad, and bring the same into court, subject to its order, etc., and without any application of its funds except to certain costs accrued. *Eaton v. H. R. Co. v. Varnum*, 10 Ohio St. 622. —DISTINGUISHED IN *Cincinnati, S. & C. R. Co. v. Sloan*, 31 Ohio St. 1.

An order in condemnation proceedings directing a writ of inquiry as to damages. *Camp v. Coal Creek & W. G. R. Co.*, 14 Am. & Eng. R. Cas. 372, 11 Lea (Tenn.) 705.

**13. Orders affecting a substantial right.**—An order of the circuit court condemning land for the use of a railroad company is a final order, affecting a substantial right in a special proceeding, and is appealable. *Wisconsin C. R. Co. v. Cornell University*, 49 Wis. 162, 5 N. W. Rep. 331.

An order made in a special proceeding, pursuant to Wis. Act of 1859, ch. 211, directing the election of directors of a railroad, is an order "affecting a substantial right," within the meaning of the act of 1860, ch. 264, §10, and is therefore appealable. *In re Fleming's Petition*, 16 Wis. 70.

**14. Matters conclusively settled in court below.**—The supreme court will not review the conclusion of the court below, as to the existence of negligence, unless it can see from the record that in drawing its inference the trier imposed some duty upon the parties which the law did not impose, or absolved them from some duty which the law required of them in the circumstances, or in some other respect violated some rule or principle of law. *Farrell v. Waterbury Horse R. Co.*, 46 Am. & Eng. R. Cas. 207, 60 Conn. 239, 21 Atl. Rep. 675, 22 Atl. Rep. 544.—APPLIED IN *Fritts v. New York & N. E. R. Co.*, 62 Conn. 503. FOLLOWED IN

*Andrews v. New York & N. E. R. Co.*, 60 Conn. 293.

In an action to recover for a personal injury, the question of negligence of the defendant, and also that of the plaintiff, are questions of fact, and the judgment of the appellate court affirming that of the trial court is conclusive upon this court on appeal or error. *Toledo, St. L. & K. C. R. Co. v. Clark*, 147 Ill. 171, 35 N. E. Rep. 167.

All controverted questions of fact, such as whether the verdict is sustained by the evidence and whether the damages found are excessive or not, are conclusively settled by the finding of the appellate courts, and are not subject to review in the Illinois supreme court. *Chicago, B. & Q. K. Co. v. Sullivan*, (Ill.) 17 N. E. Rep. 460.

Where a trial court has not misstated the rule for ascertaining damages or otherwise misdirected the jury to the hurt of the defendant, judgment of the appellate court sustaining the findings of the trial court as to the damages sustained will be regarded as conclusive in the supreme court. *Chicago, B. & Q. R. Co. v. Sullivan*, (Ill.) 17 N. E. Rep. 460.

Issues of fact arising in the trial term are properly for the exclusive determination of that term, and, consequently, when they are heard and decided there the decision will not be revised here. To support a bill of exceptions, some legal error must be alleged and shown. *Mooney v. Boston & M. R. Co.*, 65 N. H. 670, 19 Atl. Rep. 571.

The court referred a proceeding by contractors against a receiver of a railway to recover payment for certain work done, the order of reference directing the master to ascertain the amount "justly and equitably due as the true value of the work done and materials furnished." The master found the work was done and the materials furnished under a contract, and reported the contract price as the amount due, and refused to hear evidence as to their value, which report was confirmed by the court and judgment thereon entered. *Held*, that the trial court having confirmed the report, an appellate court would not reverse the finding, though the language of the reference might seem to be open to a broader construction as to the true value of the work than was given it by the master and court. *Girard Life Ins., A. & T. Co. v. Cooper*, 51 Fed. Rep. 332, 4 U. S. App. 631, 2 C. C. A. 245.

3. *Matters of Discretion in Court Below.*

**15. In general.**—Where a charge to a jury lays down no erroneous rule of law, but contains statements which may have improperly influenced the jury, the court below, in its discretion, may set aside the verdict, but the charge is not reviewable in the court of appeals. *Conners v. Walsh*, 131 N. Y. 590, 30 N. E. Rep. 59, 42 N. Y. S. R. 868.

It is generally in the discretion of the court, when it finds error in part of a judgment requiring a reversal of that part, to reverse the whole judgment, and such discretion will not, except under peculiar circumstances, be interfered with upon appeal to the court of appeals. *Gray v. Manhattan R. Co.*, 128 N. Y. 499, 28 N. E. Rep. 498, 40 N. Y. S. R. 478; *affirming* 35 N. Y. S. R. 32, 12 N. Y. Supp. 542.

The court of appeals will review upon appeal the determination of the courts below, even upon a discretionary order, where it appears that the discretion was based on the ground of a want of power to grant the application. *So held*, in reviewing the order of the general term, denying a motion to compel a plaintiff to give security for costs in an action against a railroad. *Tolman v. Syracuse, B. & N. Y. R. Co.*, 92 N. Y. 353; *reversing* 29 Hun 143.

**16. Admitting evidence founded on experiment.**—Experiments and demonstrations used in evidence should be made under conditions similar to those attending the fact to be illustrated; and when this rule is observed, the discretion of the trial court in allowing the result of such experiments to go to the jury will not be reviewed in the absence of abuse thereof. *Leonard v. Southern Pac. R. Co.*, 21 Oreg. 555, 28 Pac. Rep. 887.

**17. Amendment of pleadings.**—Suit was brought against a company to recover a strip of land used for a right of way, plaintiff admitting that he had conveyed a right of way, but not the land where the road was built; and without denying these allegations, the company proceeded to trial; but after it had begun, asked to file a denial, which the court refused. *Held*, that such matter rested in the discretion of the trial court, and such refusal was not an abuse of that discretion. *Owensboro, F. R. & G. R. Co. v. Harrison*, (Ky.) 22 S. W. Rep. 545.

**18. Denial of requests to charge.\***—

Where a railroad company is sued for killing stock, a refusal to instruct the jury to make a separate finding as to each animal killed is within the discretionary power of the court. *Gulf, C. & S. F. R. Co. v. Washington*, 49 Fed. Rep. 347, 4 U. S. App. 121, 1 C. C. A. 286.

In an action against a railroad for killing stock, the company's attorney asked the court to instruct the jury that a failure to produce as witnesses the company's employes who operated the train doing the killing should not be considered in determining how the injury was inflicted, but which the court refused to give. *Held*, that the refusal to so instruct was a matter discretionary with the trial court. *Taylor v. Chicago, St. P. & K. C. R. Co.*, 76 Iowa 753, 40 N. W. Rep. 84.

**19. Granting or refusing continuances.**—The granting or refusing of a continuance is largely within the discretion of the trial court, and, unless it appears that such discretion has been abused, its ruling will be sustained. *St. Louis, W. & W. R. Co. v. Ransom*, 29 Kan. 298.

**20. Granting or refusing mandamus.**—An action was commenced by the people to vacate the charter of a railroad corporation which had applied for a writ of mandamus to compel the issuing of a permit to enter upon the streets along its route for the purpose of commencing the construction of its road; an alternative writ was granted and a return made thereto. The court denied a motion by the people for an injunction to stay such proceeding by mandamus, upon the relator's stipulating that no permit should issue until the determination of said action. Before such determination, the relator, after a trial of the issues presented by the motion, moved for a peremptory mandamus, which motion was denied. *Held*, that the granting of the motion was at least discretionary, and so the decision was not reviewable in the court of appeals. *People v. Newton*, 126 N. Y. 656, 27 N. E. Rep. 370, 37 N. Y. S. R. 391, *dismissing appeal from* 26 J. & S. 439, 34 N. Y. S. R. 584, 11 N. Y. Supp. 782, 19 Civ. Pro. Rep. 416.

**21. Granting or refusing order for discovery.**—The granting or withholding an order for a discovery is a matter of dis-

\* See also *post*, 53, 83.

cretion of the court at special term, and will not be reviewed by the general term, unless it clearly appears that the special term has erroneously exercised its discretion. *So held*, on a motion to compel a railroad to produce its books for the purpose of a discovery. *Hart v. Ogdensburg & L. C. R. Co.*, 69 *Hun* (N. Y.) 497, 52 *N. Y. S. R.* 834, 23 *N. Y. Supp.* 713.

## 22. Limiting number of witnesses.

—At the trial of an action against a railroad company for destroying property by fire, the court made an order limiting the number of witnesses on each side. *Held*, that such matters rest largely in the discretion of the trial court, and its action will not be disturbed, unless there is an abuse of such discretion. *Kesee v. Chicago & N. W. R. Co.*, 30 *Iowa* 78.—FOLLOWED IN *Everett v. Union Pac. R. Co.*, 10 *Am. & Eng. R. Cas.* 203, 59 *Iowa* 243.

**23. New trials—Granting.**—(1) *General rules.*—The rule laid down and followed in numerous decisions is that an order granting a new trial on the ground that the verdict was not justified by the evidence is within the discretion of the trial court, and should not be disturbed on appeal. *Crosby v. St. Paul City R. Co.*, 34 *Minn.* 413, 26 *N. W. Rep.* 225.—FOLLOWED IN *Congdon v. Bailey*, 39 *Minn.* 22.

The granting of a new trial by the trial court will not be reversed, unless the evidence was manifestly and palpably in favor of the verdict. *Smith v. St. Paul & D. R. Co.* 44 *Minn.* 17, 46 *N. W. Rep.* 149.

An order of the general term, granting a new trial in a case tried by a jury, is not appealable to the court of appeals where a material and controverted question of fact was involved, upon which the general term might have granted the new trial; and, although both parties desire it, such an appeal will not be entertained. *Bronk v. New York & N. H. R. Co.*, 95 *N. Y.* 656.—FOLLOWED IN *Solomon v. Manhattan R. Co.*, 95 *N. Y.* 672.

An order granting a new trial will not be reviewed on appeal in a suit for negligently causing death, where no appeal is taken after final judgment. *Louisville & N. R. Co. v. Conley*, 10 *Lea* (Tenn.) 531.

In a case where the evidence is such that opposite conclusions might reasonably be drawn from it by different persons, the granting of a new trial, on the usual terms, upon the ground that the verdict is against

the weight of evidence, is not an abuse of discretion. *Kittner v. Milwaukee & N. R. Co.*, 77 *Wis.* 1, 45 *N. W. Rep.* 815.—DISTINGUISHING *Bushnell v. Scott*, 21 *Wis.* 451; *Jones v. Evans*, 28 *Wis.* 168; *Duffy v. Chicago & N. W. R. Co.*, 34 *Wis.* 188.

Where there is no error of law in the action of a county judge in granting a new trial, in an action for loss or injury to live stock while being carried, no appeal will lie from his order granting such new trial, on the ground that the verdict is contrary to the weight of evidence. *How v. London & N. W. R. Co.* [1892], 1 *Q. B.* 391.—APPLYING *Metropolitan R. Co. v. Wright*, 11 *App. Cas.* 152.

(2) *Illustrations.*—Where a watchman was injured by a passing engine through the negligence of the engineer suddenly opening the cylinder-cocks, and obtained a verdict for \$6000 damages, which was set aside and a new trial granted below, to reverse the order for a new trial it must affirmatively appear that the court erred in granting the same. *Vickery v. Central R. & B. Co.*, 89 *Ga.* 365, 15 *S. E. Rep.* 464. *Hardenbergh v. St. Paul, M. & M. R. Co.*, 41 *Minn.* 200, 42 *N. W. Rep.* 933.

In a suit to recover back an overcharge on freights, a new trial was granted on the ground of misconduct on the part of plaintiff's attorney in presenting his case to the jury. *Held*, that the granting of new trials in cases rests largely in the discretion of the trial court, and its acts will not be disturbed on appeal, unless there is a clear abuse of discretion. *Boardman v. Chicago & N. W. R. Co.*, 32 *Iowa*, 391, 10 *Am. Ry. Rep.* 41.

In a personal injury suit the court set aside the verdict and granted a new trial on the ground of error in submitting to the jury questions not supported by evidence. *Held*, that the order came within the discretionary powers of the court, and such discretion will not be reviewed on appeal, unless it be shown that there was an abuse of discretion. *Stutz v. Chicago & N. W. R. Co.*, 69 *Wis.* 312, 34 *N. W. Rep.* 147.

Plaintiffs sued as sub-contractors to enforce an alleged lien for the construction of a railroad bridge, and obtained judgment, which the supreme court reversed on the ground that the law gave no such lien; but the clerk made an entry that the judgment was reversed and the cause remanded for a *venire facias de novo*. *Held*, on appeal from a second trial, that the decision of the su-

preme court on the first appeal was final, and it was error to grant a second trial. *Vanderpool v. La Crosse & M. R. Co.*, 44 Wis. 652.

**24. New trials—Refusal to grant.**

—(1) *General rules.* In actions for damages, an order of the trial court, refusing a new trial on the ground that the damages are excessive, is not reviewable on appeal. *Petrie v. Columbia & G. R. Co.*, 35 Am. & Eng. R. Cas. 430, 29 So. Car. 303, 7 S. E. Rep. 515.

Where a motion for a new trial, upon the grounds that the verdict is contrary to the legal preponderance of the testimony and that the damages are excessive, is refused by the circuit judge, his decision is final and cannot be reviewed. *Steele v. Charlotte, C. & A. R. Co.*, 11 So. Car. 589.—APPLIED IN *Bowen v. Atlantic & F. B. V. R. Co.*, 14 Am. & Eng. R. Cas. 332, 17 So. Car. 574.

The action of the trial court in refusing to set aside a verdict on the ground of misconduct on the part of a juror, will not be disturbed where, upon a review of the evidence, there is nothing to show improper influence. *Brookhaven, L. & M. Co. v. Illinois C. R. Co.*, 68 Miss. 432, 10 So. Rep. 66.

In an action by a servant to recover for personal injuries there can be no reversal for the refusal to grant a new trial when the case turned upon the credibility of the witnesses, there being no abuse of discretion. *Richmond & D. R. Co. v. Wright*, 88 Ga. 19, 13 S. E. Rep. 820.

(2) *Illustrations.*—A verdict for defendant on the ground of contributory negligence of plaintiff (a boy of eleven years), in jumping from the pilot of a moving engine, was sustained by the trial court on motion for new trial. *Held*, that the appellate court would not interfere. *Branham v. Central R. Co.*, 78 Ga. 35, 1 S. E. Rep. 274.

Where it was shown that a horse was killed by a train, a presumption of negligence arose, and although the engineer testified that he was in the use of all ordinary and reasonable diligence, yet where there was some evidence tending to contradict his account of the occurrence, and to sustain the presumption of negligence, and where two juries have found in favor of the plaintiff, and the court has refused a second new trial, this court will not interfere. *Georgia R. & B. Co. v. Phillips*, 78 Ga. 619, 3 S. E. Rep. 449.

Where it was impossible to tell whether plaintiff's cranberry marsh was burned by the fire set out by defendant's locomotive,

or by some other fire, the origin of which the defendant had no connection with, and for the consequence of which it was not responsible, it was error to refuse to grant a new trial. *Marvin v. Chicago, M. & St. P. R. Co.*, 45 Am. & Eng. R. Cas. 50, 79 Wis. 140, 47 N. W. Rep. 1123.—QUOTING *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223.

In an action against a street railroad company for personal injuries alleged to have been caused by the negligence of the driver of a horse-car, plaintiff testified that while riding on horseback his horse fell and he fell under the horse, about 150 feet ahead of the car, and while he was lying there the wheel of the car ran over his arm. His testimony as to the place where the horse fell was not corroborated, but four disinterested witnesses who were riding on the car in a position to see the accident, testified that the horse fell by the side of the car. *Held*, that it was an abuse of discretion not to set aside a verdict in favor of plaintiff as being contrary to the weight of evidence. *McCoy v. Milwaukee St. R. Co.*, 82 Wis. 215, 52 N. W. Rep. 93.

In such case, the answer having alleged contributory negligence, that question should have been submitted to the jury, even on plaintiff's theory of the facts, and it was error to charge the jury to the effect that there was no claim on the part of defendant that plaintiff was guilty of contributory negligence, so that if they came to the conclusion that plaintiff's version was correct, the only thing for them to inquire after was whether the driver was guilty of negligence. *McCoy v. Milwaukee St. R. Co.*, 82 Wis. 215, 52 N. W. Rep. 93.

**25. Refusal of time to prepare instructions.**—Where, in an action for personal injuries, the only doubtful question is as to the amount that the plaintiff ought to recover, and there are no intricate or difficult questions of law involved, and the defendant, who was represented by two counsel, at the close of the testimony presents to the judge four instructions in writing, and requests time to prepare further instructions in writing, and where the amount of the verdict is not grossly excessive, the judgment will not be reversed because the court refused to grant further time. *Atchison, T. & S. F. R. Co. v. Frazier*, 8 Am. & Eng. R. Cas. 72, 27 Kan. 463.

**26. Refusal to reopen case.**—In an action for personal injuries the refusal to



permit plaintiff, after the close of defendant's testimony, to show by mortality tables the probable length of her life, was within the sound discretion of the court. *McDermott v. Chicago & N. W. R. Co.*, 85 Wis. 102, 55 N. W. Rep. 179.—*APPLYING Berrinkott v. Traphagen*, 39 Wis. 219.

Defendant company owned a railroad bridge across the Missouri river, between the states of Iowa and Nebraska, and contracted with plaintiff company for the joint use of it. Suit was brought to enforce this contract, and at the final argument, and after the evidence had closed, defendant offered evidence to show that plaintiff had never complied with a Nebraska statute prescribing the conditions upon which it might enter that state, and that the contract was not, therefore, mutually enforceable. *Held*, that the refusal of such evidence was within the discretion of the trial judge. *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 51 Am. & Eng. R. Cas. 162, 51 Fed. Rep. 309, 2 C. C. A. 174; *affirming* 47 Fed. Rep. 15, 47 Am. & Eng. R. Cas. 340.—*FOLLOWING Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. Rep. 243.

**27. Restraining counsel in their arguments.**\*—It is in the sound discretion of the trial court to determine the effect upon the jury of improper remarks and statements made by counsel when trying a case, and whether such remarks and statements were prejudicial to the defeated party. *Mykleby v. Chicago, St. P., M. & O. R. Co.*, 49 Minn. 457, 52 N. W. Rep. 213.—*FOLLOWING Loucks v. Chicago, M. & St. P. R. Co.*, 31 Minn. 526.

In a suit against a company for causing the death of an employé, where the evidence is not conflicting, and the issues under the instructions are direct and simple, it is not an abuse of the discretion of the trial court to limit the arguments of counsel to 25 minutes. *Louisville & N. R. Co. v. Earl*, (Ky.) 22 S. W. Rep. 607.

**28. Rulings upon evidence.**—Rulings on the admission of testimony will not be reviewed on appeal to the supreme court unless they have done substantial injustice. *Port Huron & S. W. R. Co. v. Voorheis*, 14 Am. & Eng. R. Cas. 227, 50 Mich. 506, 15 N. W. Rep. 882.

It is so largely a matter of discretion in the trial judge as to whether a witness in a condemnation proceeding shows sufficient

knowledge as to the value of land in the neighborhood of the land taken, to render him competent to testify as to the damages, that his ruling thereon will not be disturbed on appeal unless there is a manifest abuse of such discretion. *Smalley v. Iowa Pac. R. Co.*, 36 Iowa 571.

In an action upon a contract promising to pay a specified amount upon the completion of a certain railroad, where the declaration avers the contract to have been made for a valuable consideration, and the antecedent negotiations out of which the contract grew are relied upon as constituting such consideration, it is not error to allow such preliminary negotiations to be very fully disclosed, and a wide discretion in that regard must be left with the trial judge. *Tower v. Detroit, L. & L. M. R. Co.*, 34 Mich. 328.

The question of permitting the introduction of records to prove the title of the plaintiff, in an action for injury to crops and to the land itself, instead of requiring the production of the original evidence of title, rests, to a great extent, in the discretion of the trial court, and unless there is a clear abuse of that discretion error will not lie. *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138, 40 N. W. Rep. 948.

## II. HOW APPELLATE JURISDICTION IS EXERCISED.

### 1. The presumption of regularity.

**29. In general.**—Where the court makes out the bill of exceptions and states that there is a disagreement of counsel, it must be conclusively presumed that this statement is true, and no facts outside of the record will be considered to show the contrary. *Sabine & E. T. R. Co. v. Joachimi*, 58 Tex. 452.

Where a clerk executes a release from liability for damages to the goods of a firm employing him, it will be presumed that the trial court acted correctly, where the evidence contained in the record does not show the extent of his authority. *McCann v. Baltimore & O. R. Co.*, 20 Md. 202.

Where the consideration for a release of damages for personal injuries was ordered to be deposited with the clerk and the cancellation of the release decreed, it will be presumed on an appeal from a judgment in an action at law for the damages, the record being silent on the subject, that the re-

\* See also *post*, 39, 69, 97.

quired deposit was made. *Blair v. Chicago & A. R. Co.*, 89 Mo. 383, 1 S. W. Rep. 350.

Where a petition avers that a great railway company leased the roadbed and sidetracks of another railway company, it will be presumed after judgment in favor of plaintiff, when the evidence admitted on the trial is not brought to this court, that the roadbed leased is an extension and continuation of the railroad of the lessee. *Atchison, T. & S. F. R. Co. v. English*, 38 Kas. 110, 16 Pac. Rep. 82.

Where a railroad in the hands of a receiver consists of two or more divisions, which are sold under foreclosure separately and at different times to different purchasers, it will be presumed, in the absence of any evidence to the contrary, that the court below correctly distributed charges for supplies furnished among the different divisions to which they properly belonged. *Kneeland v. Bass Foundry & Mach. Works*, 48 Am. & Eng. R. Cas. 675, 140 U. S. 592, 11 Sup. Ct. Rep. 857.

An appeal was taken from a decree allowing a judgment in a railroad foreclosure suit, and directing payment out of the proceeds of sale, the decree reciting that the judgment was one of a class already adjudged to be of a preferential character, but the record did not show the nature of the demand on which the judgment was recovered. *Held*, that an appellate court must presume that the finding of the lower court was correct as to the nature of the claim. *St. Louis S. W. R. Co. v. Graham*, 56 Fed. Rep. 258.—FOLLOWING *St. Louis S. W. R. Co. v. Stark*, 55 Fed. Rep. 758.

**30. As to age of person injured.**—Where a child is injured at a crossing, and there is no evidence of her exact age, but the witnesses refer to her as "a little child," the court will presume that she was too young to be guilty of contributory negligence. *Wiley v. Long Island R. Co.*, 27 N. Y. Supp. 722, 76 Hun 29.

**31. As to the pleadings.**—In considering and determining an appeal from an order of a judge of a circuit court allowing an injunction, the bill being properly verified by the affidavit of the plaintiff, and the proceeding being altogether *ex parte*, the appellate court must take and consider the allegations of the bill as being *prima facie* true. *Freshwater v. Pittsburgh, W. & K. R. Co.*, 6 W. Va. 503.

1 D. R. D.—25.

**32. As to evidence.**—Where judgment for plaintiff in an action for the death of plaintiff's intestate is affirmed by the appellate court, it will be assumed that whatever the evidence tended to prove was found in favor of plaintiff, and such finding is conclusive upon the supreme court. *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *affirming 9 Ill. App. 319*.

In suit for injuries from negligence, where the specific acts constituting such negligence are averred in the complaint, it must be presumed on appeal, in the absence of anything in the record to the contrary, that the evidence of negligence was confined to those acts, even where there is a general verdict for plaintiff. *Kelley v. Chicago, M. & St. P. R. Co.*, 5 Am. & Eng. R. Cas. 469, 53 Wis. 74, 9 N. W. Rep. 816.

The material charge in a complaint against the defendant being that the defendant, with notice of the negligence and carelessness of its engineer, carelessly and negligently retained him in its service, it will be presumed, in the absence of a finding by the jury of the existence of this fact, that it was not proven on the trial. *Lake Shore & M. S. R. Co. v. Stupak*, 41 Am. & Eng. R. Cas. 382, 123 Ind. 210, 23 N. E. Rep. 246.

The bill of exceptions in an action for killing stock did not show where the killing was done, but it did not appear that the evidence was all certified. *Held*, that the appellate court would presume that there was evidence at the trial to show that it was in the township alleged in the complaint. *Wade v. Missouri Pac. R. Co.*, 19 Am. & Eng. R. Cas. 586, 78 Mo. 362.

**33. As to instructions.**—In cases so near the border-line between fact and law that nice discrimination is required to determine to which side it belongs, where the verdict of the jury has been sustained by the general term, this court will presume in favor of the judgment that the questions were properly submitted to the jury, and will require the party alleging error to show it with reasonable certainty. *Hackford v. New York C. & H. R. R. Co.*, 53 N. Y. 654; *affirming 13 Abb. Pr. N. S. 18*, 43 How. Pr. 222, 6 Lans. 381.

Where the evidence, as certified in an action for killing a colt, does not show the circumstances of the killing, the appellate court will presume that the trial court instructed according to the facts in telling the

jury that the defendant is liable if the colt was killed "under the circumstances" testified to by plaintiff. *South & N. Ala. R. Co. v. Brown*, 53 Ala. 651, 13 Am. Ry. Rep. 166.

Where it does not appear whether the interruption of the flow of surface water complained of consisted in preventing its flow from the land of an adjacent owner upon premises of respondent, or in preventing its flow from one part of defendant's farm to another part, it will be presumed that the court below was correct, under the facts of the case, in instructing the jury that if the construction of the railroad interfered with the flow of surface water in such a way as to depreciate the value of the farm, they had a right to take it into consideration. *Pflegger v. Hastings & D. R. Co.*, 5 Am. & Eng. R. Cas. 85, 28 Minn. 510, 11 N. W. Rep. 72.

**34. As to verdict, damages, etc.**—Two causes of action against a railroad company, one for a trespass to land, and the other for a failure to construct a crossing over a track and a drain underneath it, according to the provisions of a deed conveying to the company a right of way, were, by agreement, consolidated, and upon a trial the jury rendered a verdict in favor of the plaintiff for \$20 for the trespass, and for \$28 for the breach of covenant. An application for a new trial was refused on condition that plaintiff remit \$20 from the verdict generally; whereupon the defendant moved for judgment for costs, on the ground that the record did not show a recovery of \$5 for the trespass, which was necessary under the statute to entitle plaintiff to costs, which motion was refused. *Held*, that the appellate court would presume that sufficient damages were retained in the verdict in the action of trespass to entitle plaintiff to his costs, and the action of the court in refusing defendant's motion would not be reversed. *Baltimore, O. & C. R. Co. v. Crissman*, 11 Am. & Eng. R. Cas. 410, 83 Ind. 167.

Where the jury, being instructed that plaintiff, if he recovered, was entitled to interest, found his damages at a certain sum,—*Held*, that it must be presumed that this included the interest; and a judgment taken for a larger sum, including interest on that named in the verdict, was reversed, with directions to grant a new trial unless plaintiff remitted the excess. *Diedrich v. Northwestern R. Co.*, 47 Wis. 662, 3 N. W. Rep. 749.

**35. Trying case upon theory adopted below.**—Where the case was tried below upon the theory that the cause of action was the negligence of the appellant, that theory must prevail upon the appeal; and the action will not be treated as one for a breach of contract. *Louisville, N. A. & C. R. Co. v. Thompson*, 27 Am. & Eng. R. Cas. 329, 107 Ind. 442, 9 N. E. Rep. 357.

When it is manifest from the record that both parties, without objection, have tried an action for personal injuries to its conclusion, as if on issue joined upon the plea of contributory negligence, although the record shows no other plea than the general issue, the appellate court will review the rulings of the trial court as if such defence had been specially pleaded. *Richmond & D. R. Co. v. Farmer*, 97 Ala. 141. *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240. *Louisville & N. R. Co. v. Mothershed*, 97 Ala. 261.

But if no plea of contributory negligence is interposed, and the cause is not conducted in such manner as if it had been interposed, the appellate court will not review the rulings of the lower court with respect to matters falling within that issue. *Tennessee C., I. & R. Co. v. Hayes*, 97 Ala. 201, 12 So. Rep. 98.

An action was brought by a lot owner to recover damages from a railroad company for obstructing the alley at the rear of his lot and preventing passage to and from the same. It was tried by the parties and the court below upon the theory that the occupancy and obstruction were permanent and enduring. *Held*, that it will be so considered and treated in the supreme court. *Leavenworth, N. & S. R. Co. v. Curtan*, 56 Am. & Eng. R. Cas. 636, 51 Kan. 432, 33 Pac. Rep. 297.—QUOTING Central Branch U. P. R. Co. v. Andrews, 26 Kan. 702.

## 2. What errors are ground for reversal.

**36. In general.**—Where an action for personal injuries received at a highway crossing from collision with a train of cars without an engine, was tried upon the theory that the action was based upon the negligent omission of the statutory signals alone, which the defendant was not required to give, it cannot be concluded that the jury found for the plaintiff on the ground that the defendant was chargeable with some other negligence, and a verdict in his favor must be set

aside. *Ohio & M. R. Co. v. McDaniel*, 5 Ind. App. 108, 31 N. E. Rep. 836.

Pending an appeal from an order appointing a receiver for a railroad, the parties filed an agreement dismissing the case, and the court entered an order that each party should pay half the costs of the appeal, but neither should recover costs otherwise. Afterward the receiver moved in the court below for an allowance for his services, which was allowed and ordered to be taxed as costs, defendant to pay one half. An appeal was taken from this order. *Held*, that it was in conflict with the order of the appellate court and should be reversed. *Morse v. Hannibal & St. J. R. Co.*, 72 Mo. 585.

In a suit on a verbal contract made with its chief engineer for erecting depot buildings, whose authority was denied by defendant, the plaintiff and his witnesses were allowed to refer repeatedly to the defendant, "as the party dealing or dealt with," against objection. *Held*, that the objection should have been regarded, and that the court, by allowing witnesses to persist in such references, placed the jury in a position where they were not only liable to be misled, but to overlook the necessity of proof of the engineer's authority to make the contract. *Bond v. Pontiac, O. & P. A. R. Co.*, 26 Am. & Eng. R. Cas. 571, 62 Mich. 643, 29 N. W. Rep. 482.

**37. Erroneous admission of evidence.\***—(1) *General rules*.—It is reversible error to admit parol evidence of a written subscription to stock, without any excuse for the absence of the original; and without any attempt to produce a certified copy from the books of the corporation. *Cincinnati, P. & C. R. Co. v. Cochran*, 17 Ind. 516.—FOLLOWED IN *Cincinnati, P. & C. R. Co. v. Emrick*, 19 Ind. 289.

Where a street-car company is sued for negligently causing a personal injury in the operation of its cars, evidence that fails to show that the driver who was on the car at the time was employed by the defendant, or whether the defendant owned or controlled the cars doing the injury, fails to show that the company was negligent, and therefore a judgment for plaintiff should be reversed. *Cords v. Third Ave. R. Co.*, 24 J. & S. (N. Y.) 570, 4 N. Y. Supp. 713, 23 N. Y. S. R. 201.

In an action for killing plaintiff's intestate, it is error to allow a witness to testify

to what he heard the engineer in charge say after the killing occurred; nor is such error cured by the subsequent admission of the engineer upon his examination at the trial that he had said what the witness had testified to. *Sotherland v. Wilmington & W. R. Co.*, 106 N. Car. 100, 11 S. E. Rep. 189.

Where a company is sued for an injury at a crossing, and the negligence averred consists in running a train at an excessive rate of speed, and failing to give the statutory signals, it is reversible error to allow proof of other acts of negligence not averred, such as that the company had no light at the crossing. *Missouri Pac. R. Co. v. Hennessey*, 42 Am. & Eng. R. Cas. 225, 75 Tex. 155, 12 S. W. Rep. 608.

Error in the admission of incompetent testimony received under objection and exception, and which may have affected the verdict, is not cured by directing the stenographer to strike it out and admonishing the jury to disregard it. *Wersebe v. Broadway & S. A. R. Co.*, 1 Misc. (N. Y.) 472, 49 N. Y. S. R. 619, 21 N. Y. Supp. 637.

(2) *Illustrations*.—Where, in an action for personal injuries, a rule of the company prohibiting running switches was permitted to be introduced, and the evidence showed that the injury was not caused by an attempt to make a running switch—*held*, that, under the circumstances, the introduction of the rule constituted prejudicial error. *Jeffrey v. Keokuk & D. M. R. Co.*, 51 Iowa 439.—FOLLOWED IN *George v. Keokuk & D. M. R. Co.*, 53 Iowa 503.

In an action for killing a person, where the declarations of S., an employé of the company, were purely hearsay as offered, and not part of the *res gesta*, and therefore inadmissible as affirmative proof for the plaintiff, the fact that S. was afterwards called by the defendant, and the jury had the benefit of his denial of any such statement, does not deprive the defendant of the right to avail himself of such error on appeal. *Baltimore & O. R. Co. v. State*, 75 Md. 526, 24 Atl. Rep. 14.—DISTINGUISHING *Wyeth v. Walz*, 43 Md. 426.

In an action against a street-car company for unlawfully expelling a passenger, a witness for plaintiff on cross-examination was asked whether the plaintiff told him the cause of his expulsion on the same night of the occurrence, and answered "No, not for two days after." The company's counsel

\* See also *post*, 61-67.

then said, "Oh, it was two days after he told you, then," and the witness answered in the affirmative. Plaintiff was then allowed to ask what the statement made to him was, and the witness stated that the plaintiff told him that he gave the conductor money to pay his fare, and in making the change the conductor gave him back 50 cents less than belonged to him. The jury found that the expulsion was justifiable, but that unnecessary force was used. *Held*, that the admission of the evidence was ground for reversal. *Perlmutter v. Highland St. R. Co.*, 121 *Mass.* 497.

**38. Erroneous exclusion of evidence.**\*—In a case where plaintiff's evidence is competent, and in some fairly appreciable degree tends to show, on the part of the railroad company, a want of ordinary care in keeping a reasonable look-out ahead for persons and animals, and other obstructions on the track, in front of the moving train, which runs over and kills a child between four and five years old seated on the track in plain view, recognizable as a child by any one using ordinary care and precaution to discover it, and for a distance not less than twice that within which a train can be stopped, it is error to withdraw the case from the jury by the method of striking out all the plaintiff's evidence. *Gunn v. Ohio River R. Co.*, 54 *Am. & Eng. R. Cas.* 167, 36 *W. Va.* 165, 14 *S. E. Rep.* 465.—FOLLOWED IN *Gunn v. Ohio River R. Co.*, 37 *W. Va.* 421.

Where a passenger sues for an injury and the company claims that it was the result of his own act in going upon the platform, and the conductor testifies that he and plaintiff went to the platform together, and, after giving an order about setting the brakes, he returned into the car and sat down, while plaintiff remained on the platform, all of which is denied by plaintiff, it is reversible error to refuse a question put by the defendant to a passenger on the train tending to corroborate the conductor as to whether he returned to the car and sat down before the accident occurred. *Mitchell v. Southern Pac. R. Co.*, 87 *Cal.* 62, 25 *Pac. Rep.* 245.

It is error to refuse to permit one who was in a buggy behind that in which plaintiff was travelling to testify that he, at a point one hundred feet from the crossing, looked along the railroad in the direction of

the approaching train, and could not see the train, as this testimony tended to show that when the buggy in which plaintiff was travelling was within about seventy feet of the crossing, the train, not yet in sight, must have been more than twelve hundred feet away, that being the distance at which a train could be seen, and therefore, if running at the usual speed, would probably not have struck the buggy. *Cahill v. Cincinnati, H. O. & T. P. R. Co.*, 49 *Am. & Eng. R. Cas.* 390, 92 *Ky.* 345, 18 *S. W. Rep.* 2.

A witness was asked, "How much rent more, in your opinion, was it worth (meaning plaintiff's premises) on account of the road being there?" This was excluded as immaterial. *Held*, that while the question was objectionable on grounds not taken on the trial, it was error to exclude it as immaterial, as evidence of benefits is always material and admissible. *Odell v. Metropolitan El. R. Co.*, 3 *Misc. (N. Y.)* 335, 52 *N. Y. S. R.* 7.

Plaintiff alleged that he was wrongfully ejected from a train and robbed by defendant's employes. The evidence was conflicting as to whether it was plaintiff or his son who was ejected from the train, and as to the car from which he was ejected. *Held*, that it was error to strike out the testimony of plaintiff that he never made any complaint to defendant about the ejection or robbery until the action was commenced, two years afterwards. *Washburn v. Chicago, St. P., M. & O. R. Co.*, 84 *Wis.* 251, 54 *N. W. Rep.* 504.

Upon the question as to the identity of the person ejected, a wide range of inquiry should have been allowed; and it was error to refuse to allow defendant to cross-examine the son as to whether he had trouble with the conductor of the train, what he said to the conductor or brakeman, whether he was put off from the train by the conductor or trainmen, and whether, for several minutes prior thereto, he had not been engaged in a conversation or wrangle with the conductor. *Washburn v. Chicago, St. P., M. & O. R. Co.*, 84 *Wis.* 251, 54 *N. W. Rep.* 504.

**39. Improper remarks by counsel.\***

—(1) *General rules.*—In suits for personal injuries, it is reversible error to allow plaintiff's attorney to read to the jury reported cases from the supreme court, where large damages have been given, and the cases af-

\* See, also, *post*, 68.

\* See, also, *ante*, 27; *post*, 69, 97.

firmed. *Galveston, H. & S. A. R. Co. v. Wesch*, 85 Tex. 593, 22 S. W. Rep. 957.

The argument of counsel in addressing a jury should be confined to a discussion of facts in evidence, and when language is used relating to matters not in evidence, and of a character calculated to inflame and prejudice the minds of the jurors against the adverse party, the judgment will be reversed, especially in a case where the verdict seems excessive. *Galveston, H. & H. R. Co. v. Cooper*, 70 Tex. 67, 8 S. W. Rep. 68.

Statements by counsel for plaintiff, in an action against a railroad, to the effect that "railroad companies never do justice to any one unless compelled to do so; they will take any advantage, no matter how just the cause against them," and that he hopes the jury will make the defendant company pay "the last cent they can," are good grounds for reversal, though the court instructed the jury not to be influenced by such remarks, where it appears, nevertheless, from the amount of the verdict, that the jury did attempt to make the company pay the "last cent" that they could. *Galveston, H. & S. A. R. Co. v. Kutac*, 72 Tex. 643, 11 S. W. Rep. 127.

(2) *Illustrations*.—In an action for killing a boy, counsel for plaintiff, in his closing address to the jury, used the following language: "They talk about the corporation; what is the corporation? Go to New York City and there view Huntington in his princely mansion, surrounded by all that wealth can give—there is the corporation. What does he care for the lives of these boys? There is only one thing to make him care, and that is, 12 men of his country." The verdict was in favor of the plaintiff for \$7000 damages. *Held*, as it could not be made to appear that the jury was not influenced by the improper language of counsel, that it was ground for reversal. *Dillingham v. Scales*, 78 Tex. 205, 14 S. W. Rep. 566.

In an action by a husband to recover for personal injuries to his wife, the court made an order for a physical examination of her injuries by a board of physicians, who made the examination and testified as to the result. No objection was made to the order directing the examination, but in his closing address to the jury, plaintiff's attorney denounced the order for the examination as an outrage upon the wife, etc. No attempt was made by the court to control the attorney or to suppress his language. *Held*, that

the language of the attorney, together with the silence of the court, may have misled the jury, and is ground for reversing a judgment in favor of the plaintiff for large damages. *Gulf, C. & S. F. R. Co. v. Butcher*, 52 Am. & Eng. R. Cas. 615, 83 Tex. 309, 18 S. W. Rep. 583.

In an action by a passenger for damages received in an accident alleged to have been occasioned by the company's wanton disregard of its legal obligations, and by its gross negligence in running its train, and in permitting its bed and track to become grossly defective and unfit for use, wherein the plaintiff recovered \$2000 for actual damages and \$6000 for exemplary damages, the court trying the cause permitted the counsel for the plaintiff, in his closing argument, over the objection of the defendant, to read to the jury, as was read by plaintiff's counsel in the opening argument, the following quotation from Redfield on Carriers, coupled with the statement that the author was counsel for railway companies where he lived, viz.: "Section 539. The truth is that common juries, with the highest instincts of justice, have always in our country been accustomed to view the matter of railway responsibility for passenger transportation in the light of higher and fuller responsibility than either the courts or the profession." *Held*, error sufficient to entitle defendant to a new trial. *Houston & T. C. R. Co. v. Nichols*, (Tex.) 9 Am. & Eng. R. Cas. 361.

Judgment reversed because of the reference by plaintiffs' counsel in his argument to the jury, without provocation, to the defendant, as "the unfortunate city railway, whether driven through the streets by the mob or driving along in its usual course," in view of the great excitement and anger of the populace, which culminated in mob violence against the defendant but a few weeks before the trial, and of which the court cannot fail to take judicial knowledge as a matter of current history. *Geist v. Detroit City R. Co.*, 91 Mich. 446, 51 N. W. Rep. 1112.

**40. Erroneous instructions, generally.**\*—There may be cases where the proof is so strong as to justify the court in instructing the jury as a matter of law that certain acts constitute negligence, but demurrers to evidence and peremptory instructions are not favored under the Texas

\* See, also, *post*, 70-83.



practice; and where such instructions are complained of, the judgment will not be supported, unless it clearly appears that the complaining party was not injured thereby. *Texas & P. R. Co. v. Murphy*, 46 Tex. 356, 13 Am. Ry. Rep. 319.

Where an employé is injured while on a construction train by being run into by a rear passenger train, questions whether the accident was due to the negligence of fellow-servants, or whether the injury was produced by causes incident to the service, are essential to a recovery by the plaintiff, and the action of the court below in ignoring such questions is ground for reversal. *Wabash, St. L. & P. R. Co. v. Gordon*, 17 Ill. App. 63.

Where an employé sues the company for a personal injury caused by the negligence of another employé, an instruction which tells the jury that defendant is liable, if the one causing the injury was a vice-principal, is ground for reversal where there is a general verdict for plaintiff, and the appellate court decides that the one causing the injury was a fellow-servant and not a vice-principal. *What Cheer Coal Co. v. Johnson*, 56 Fed. Rep. 810.

Where the evidence is conflicting as to the fact whether a railway company, on the approach of one of its trains to a public road crossing, gave the statutory signals, it is error to instruct that if the defendant failed to give such signals as to enable the person injured or killed to ascertain its approach and avoid injury, the company is liable. *Chicago, B. & Q. R. Co. v. Dougherty*, 19 Am. & Eng. R. Cas. 292, 110 Ill. 521; reversing 14 Ill. App. 196; further appeal, 125 Ill. 127.

It was error on the part of the court below to authorize a finding because the company failed to ring its bell or blow its whistle continuously until the train passed the crossing at which the plaintiff was injured by a passing train. *Paducah & M. R. Co. v. Hoebl*, 12 Bush (Ky.) 41, 18 Am. Ry. Rep. 338.

In an action for personal injuries counsel for plaintiff asked the court to charge "that if defendants here failed to produce witnesses that they could have done, who were in the employ of the contractors at the time of the accident, and who were present at the time of the accident, that fact the jury shall take into consideration in coming to a conclusion." The court said: "That is a ques-

tion the jury will consider for themselves." *Held*, reversible error. *Flynn v. New York El. R. Co.*, 18 J. & S. (N. Y.) 375.

The case did not disclose that the witnesses were under the control of defendants more than of plaintiff, or more in their interest, or more easily reached by subpoena. Neither side had called them. So far as the contingencies of the request are regarded, the fact of not calling them bore against one party as much as against the other. *Flynn v. New York El. R. Co.*, 18 J. & S. (N. Y.) 375.

Arbitrators having awarded compensation to the plaintiff for injuriously affecting his land, to an action on the award defendants pleaded that the sum awarded was excessively and fraudulently exorbitant, and that the award was made by the fraud of the plaintiff and the arbitrators. The jury were directed that if the plaintiff contended before the arbitrators that by law and under his deed he had such an exclusive right to the water in front of his land as would entitle him to damages, when he had not, this was evidence of fraud under the plea. *Held*, that this was a misdirection. *Widder v. Buffalo & L. H. R. Co.*, 27 U. C. Q. B. 425.

**41. Instructions outside of, or broader than the issue.**—It is reversible error to submit a case on instructions which are broader than the case made by the pleadings. *Houston & T. C. R. Co. v. Terry*, 42 Tex. 451.

Where a complaint charges negligence in running trains over a track that had been rendered unsafe by recent floods, an instruction is erroneous which permits the jury to find the company negligent as to its roadbed, or as to the ties or other materials used. *Ely v. St. Louis, K. C. & N. R. Co.*, 16 Am. & Eng. R. Cas. 342, 77 Mo. 34.

It is error to instruct that if there was a city ordinance requiring the defendant to keep a flagman at a crossing, "then the defendant could not fail or neglect to comply with its requirements, without being guilty of negligence," if such negligence be not connected with the alleged injury. *Pennsylvania Co. v. Hensil*, 6 Am. & Eng. R. Cas. 79, 70 Ind. 569, 36 Am. Rep. 188.

Where suit is brought to recover for personal injuries, and the issue is made as to whether plaintiff was a passenger at the time or not, an instruction which permits the jury to find for plaintiff, though they might believe that such relation did not

exist, is error, justifying a reversal. *Chicago, B. & Q. R. Co. v. Mehlsack*, 44 Ill. App. 124.—DISTINGUISHING *Chicago & A. R. Co. v. Wilson*, 63 Ill. 167. QUOTING *Chicago, B. & Q. R. Co. v. Mehlsack*, 131 Ill. 61.

In an action for personal injuries where the plaintiff specifically alleged that the injury was caused by the negligence of his co-employé, the engineer of the train, and no other basis of recovery was stated, it was error for the court to present to the jury a question not made by the pleadings, by instructing them that the plaintiff might recover if the injury was caused by the negligence of the fireman. *Atchison, T. & S. F. R. Co. v. Irwin*, 35 Kan. 286, 10 Pac. Rep. 820.

**42. Instructions on the weight of evidence.**—It was prejudicial to defendant for the court to tell the jury that he knew of no direct testimony tending to show plaintiff's knowledge of the character of machinery used by which he was injured, and of his consent to its use, when plaintiff was present and saw the pole used, and the manner of its use; and the error was not cured by leaving it to the jury to say what were the facts, after having called their attention to the contention of the defendant's counsel in regard to these facts. *Young v. Virginia & N. C. Const. Co.*, 109 N. Car. 618, 14 S. E. Rep. 58.

Plaintiff's icehouses were destroyed by a fire which started a few minutes after defendant's engine had passed along a sidetrack near them. Defendant's evidence tended to show that the engine had the most approved appliances to prevent the escape of fire, that these appliances were all in good condition, the dampers properly closed, and the ash-pan properly cleaned at the time, and that under such circumstances coal or cinders could not escape from the ash-pan. There was no positive evidence of any defect in the engine, and no evidence as to the size of the coal or spark that started the fire; but the evidence tended to show that the fire started between the rails of the track, and that a strong wind was blowing at the time. *Held*, that from this evidence it might be inferred that the fire was not started by a cinder from the smoke-stack, which would probably have been blown to some distance from the track, but by cinders escaping from the ash-pan, and that, in fact, the ash-pan was not properly constructed or was out of repair, or not prop-

erly cleaned or managed. It was error, therefore, for the trial court to rule that there was no evidence tending to show negligence of the defendant in that respect, and to take that question from the jury. *Kurts & H. Ice Co. v. Milwaukee & N. R. Co.*, 84 Wis. 171, 53 N. W. Rep. 850.—DISTINGUISHING *Spaulding v. Chicago & N. W. R. Co.*, 30 Wis. 110.

**43. Instructions assuming disputed facts.**—In an action for personal injuries by an employé, alleged to have resulted from a defective hand-car, it was a disputed fact under the evidence as to whether notice had been given to the company of the defect. *Held*, that it was error for the court to assume as a fact that such notice had been given, and so charge the jury. *Texas & P. R. Co. v. Kane*, 2 Tex. App. (Civ. Cas.) 24.

Suit was brought for a breach of contract to sell railroad bonds. Plaintiff claimed that the number sold was 600, while defendant claimed it was but 500. The evidence was conflicting and would have supported a verdict for either party. The contract was oral, and the amount of each bond was not shown. Five days after the contract was made defendant gave plaintiff a written order for 60 bonds, which closed: "You may also deliver him any other of said bonds, not exceeding \$600,000 in all, he may take at same time." In instructing the jury, the court assumed that this meant 600 bonds at \$1000 each, which would make the total amount mentioned in the order, and told the jury that it plainly fixed the terms and the number of bonds at 600. *Held*, that, while it might tend to prove that number of bonds, it was a question for the jury, and such instruction was reversible error. *Goodwin v. Burke*, 10 N. Y. Supp. 628.

**44. Instructions unsupported by evidence.**—It may be reversible even to charge a sound proposition of law upon a supposed state of facts which there is no evidence to support. *Texas Pac. R. Co. v. Wisenor*, 66 Tex. 674, 2 S. W. Rep. 667.

In an action against a railroad to recover damages for a personal injury to a passenger, it is error to instruct the jury that plaintiff can recover for loss of time, where there is no evidence to show the value of the time lost. *International & G. N. R. Co. v. Lock*, (Tex. Civ. App.) 20 S. W. Rep. 855.

Where an instruction told the jury, in

estimating plaintiff's damages, to allow any expense incurred for drugs or treatment by physicians, and there was no evidence of any such expense, it was reversible error. *Culbertson v. Chicago, M. & St. P. R. Co.*, 50 Mo. App. 556.

In an action for personal injuries, in which it was alleged that the plaintiff, while attempting to enter one of defendant's "down-cars," and actually being on one of the steps of its platform, was thrown from it upon the street, and in consequence of the negligence of defendant's servants, in both the "down-car" and a passing "up-car," was severely injured by collision with the "up-car," a judgment for the plaintiff will be reversed if the trial judge, while instructing the jury correctly as to the negligence of defendant's servants upon the "down-car," instructs them to take into consideration the conduct of the driver of the "up-car," and there is no testimony of any negligence upon his part, and it does not appear from the verdict upon which charge the jury passed their findings. *Black v. Brooklyn City R. Co.*, 34 Am. & Eng. R. Cas. 526, 108 N. Y. 640, 1 Silv. App. 580, 15 N. E. Rep. 389, 13 N. Y. S. R. 645.

Where a suit is brought to recover against a railroad company for various items of damage to land, among which is one for throwing dirt and rocks upon plaintiff's land while a railroad is being constructed, it is reversible error for the court to instruct the jury that they are authorized to find damages for such cause, where there is no evidence showing that any dirt or rocks were thrown upon the land, and where plaintiff, at the trial, has expressly abandoned this item of damage. *Missouri Pac. R. Co. v. Cox*, 2 Tex. App. (Civ. Cas.) 217.

Plaintiff, who was employed as a sweeper, was injured by stepping into a hole in the round-house. There was no evidence that plaintiff had ever been employed about the round-house before. The court nevertheless instructed the jury that if plaintiff had been employed about the round-house before, and knew of the excavation, he could not recover. *Held*, that as the instruction was based upon facts of which there was no proof, it was erroneous. *Manning v. Burlington, C. R. & N. R. Co. (Iowa)* 15 Am. & Eng. R. Cas. 171, 17 N. W. Rep. 669.

**4b. Instructions invading province of jury.**—A charge which takes from the consideration of the jury the question of

whether jumping from a moving train was an act of negligence or not is erroneous. *Covington v. Western & A. R. Co.*, 34 Am. & Eng. R. Cas. 469, 81 Ga. 273, 6 S. E. Rep. 593.

It is error to instruct a jury that they may presume that a party did that which was necessary to self-preservation, when the facts and circumstances are so proved that the jury are able themselves to pass upon a party's conduct. It is only where there is an absence of evidence to the contrary, or where there is a rational doubt upon the evidence as to the acts and conduct of the parties, that such presumption can be properly invoked. *Philadelphia, W. & B. R. Co. v. Stebbing*, 19 Am. & Eng. R. Cas. 36, 62 Md. 504.—APPLIED IN *Elliot v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 62, 5 Dak. 523, 3 L. R. A. 363, 41 N. W. Rep. 758.

Where a boy is riding a horse near a track, and the horse takes fright and runs on the track, where it is killed, and the boy injured, the liability of the company depends upon whether the track was properly fenced, if at a place where it should have been, and as to whether the boy was guilty of contributory negligence, which are questions for the jury; and an instruction which takes from the jury the question whether the boy exercised due care, considering his age and all the circumstances of the case, is such error as to be ground for reversal. *Hynes v. San Francisco & N. P. R. Co.*, 20 Am. & Eng. R. Cas. 486, 65 Cal. 316, 4 Pac. Rep. 28.

Where a passenger sues for damages, and it clearly appears from his own evidence that the relation of carrier and passenger did not exist, it is not reversible error, as an invasion of the province of the jury, for the court to instruct that the evidence justifies a verdict for the company; but where it becomes important to determine whether the statements of the agent who sold the ticket formed part of the contract, and whether he had authority to bind the company by a special stipulation in reference to the right to stop over on a connecting road, the question should be left to the jury, and a failure to do so is ground for reversal. *Robinson v. Louisville & N. R. Co.*, 2 Lea (Tenn.) 594.

Where a company is sued for an injury at a crossing, the question of the company's negligence should be left to the jury, where

there is evidence upon which the jury might have found that no whistle was sounded or bell rung, and a failure to so submit the case to the jury is error. *Duffy v. Chicago & N. W. R. Co.*, 32 *Wis.* 269.

To instruct the jury that "plaintiff's testimony shows that deceased was familiarly acquainted with the crossing and the time of the passing of trains, and it was his duty to have avoided being run against by defendant's train by keeping off the track at crossing-time, and if he failed so to avoid the train and placed himself so close to the train as to put it out of the power of the defendant's employes to avoid injuring him, then the law is for the defendant" is error, inasmuch as it interferes with the province of the jury. It requires that all care and caution be used by the deceased and none by the railroad company. *Louisville, C. & L. R. Co. v. Goetz*, 14 *Am. & Eng. R. Cas.* 627, 79 *Ky.* 442, 42 *Am. Rep.* 227.

In an action for damages for injuries caused by the alleged negligence of defendant, the trial justice charged the jury as follows: "You have a right to believe or disbelieve the plaintiff entirely, unless he is corroborated; if he is corroborated, you have no right to disbelieve him." *Held*, that as the charge of the court took from the jury the right to determine as to whether plaintiff's conduct was such as to bring him within the rule that the jury were at liberty to accept or reject the testimony of an interested witness, a judgment for plaintiff should be reversed. *Duygan v. Thir. Ave. R. Co.*, 6 *Misc. (N. Y.)* 66, 26 *N. Y. Supp.* 79, 55 *N. Y. S. R.* 777.

**46. Instructions on duty of carrier of passengers.**—An instruction that "the defendant, as a carrier of passengers for hire, was bound, as far as human foresight and care would enable it, to carry the plaintiff with safety, and that its obligation to the plaintiff did not cease until she had alighted and freed herself from defendant's car, or until she had alighted and had reasonable time to free herself," etc., etc., is erroneous. *Louisville City R. Co. v. Weams*, 80 *Ky.* 420.

It was error to charge the jury in a suit for injuries to a passenger on defendant's hand-car, that it was the duty of the defendant "to employ a greater degree of care for the protection of plaintiff in proportion to the greater degree of danger" arising from that method of transportation; when the

hand-car had been furnished for the conveyance of the plaintiff, and was manned by a crew who used it alone for themselves, and had not been accustomed, in operating it, to look after the safety of passengers travelling on it. *International & G. N. R. Co. v. Cock*, 68 *Tex.* 713, 5 *S. W. Rep.* 635.

Where a person sues to recover for injuries done to him as a passenger, and there is evidence tending to show that the relation of carrier and passenger had ceased before the injury was received, an instruction to the jury that the company is liable if the injury was caused by negligence, and without contributory negligence, is reversible error, though a subsequent charge be given, to the effect that if a reasonable time had elapsed for the plaintiff to get out of the cars, the relation of common carrier had ceased, and the company could not be held liable as a common carrier. *Imhoff v. Chicago & M. R. Co.*, 20 *Wis.* 344.—APPROVED IN *Yarnell v. Kansas City, F. S. & M. R. Co.*, 113 *Mo.* 570.

In the absence of any law requiring railroad companies to have an agent at stations, whose special duty it is to warn passengers not to go on board till cars stop, and to inform them in which cars to enter, it is error to instruct the jury, in an action by a passenger for injuries received by the sudden starting of the train when he is about to enter it, that the company is liable for failing to have such agent, if having him would have prevented the injury. *Detroit & M. R. Co. v. Curtis*, 23 *Wis.* 152.

**47. Instructions ignoring doctrine of contributory negligence.**—In an action for a personal injury resulting from negligence, an instruction for the plaintiff which omits to state, as a condition precedent to the right of recovery, that the plaintiff, at the time of the injury, was in the exercise of ordinary care, is such an error as to require a reversal, unless the defect is supplied in other instructions, or it appears that the defendant was not injured thereby. *Lake Erie & W. R. Co. v. Morain*, 140 *Ill.* 117, 29 *N. E. Rep.* 869; affirming 36 *Ill. App.* 632.

The jury were directed, that if they were satisfied the accident would not have happened if the defendants had erected proper fences, they should find for the plaintiff. *Held*, a misdirection, for that if the driver, by his negligence, contributed to the accident, so that but for his want of reasonable

care it would not have happened, the plaintiff could not succeed. *Rastrick v. Great Western R. Co.*, 27 U. C. Q. B. 396.

**48. Instructions as to elements of, or measure of, damages.\***—In an action for trespass in constructing a railroad upon plaintiff's land, it was error to give instructions implying that the plaintiff was entitled to recover the difference between the value of the use of the premises with the railroad constructed, and used as it was, with all its inconveniences; and the value of such use as it would have been with the railroad where it was, but without such inconveniences. *Blesch v. Chicago & N. W. R. Co.*, 43 Wis. 183.—REVIEWED IN *Uline v. New York C. & H. R. R. Co.*, 23 Am. & Eng. R. Cas. 3, 101 N. Y. 98, 4 N. E. Rep. 536; reversing 31 Hun 85.

In an action by an adjoining property owner against an elevated railway for damages caused by the construction and operation of the road, an instruction which limits the consideration of the jury to the use of the premises to what they were then used for is reversible error, and such error is not cured by the consent of the opposite party that this part of the charge may be withdrawn, where the jury is not instructed to disregard it. *Scott v. Manhattan R. Co.*, 42 N. Y. S. R. 697, 17 N. Y. Supp. 364.

In an action to recover for personal injuries caused by the negligence of one of defendant's servants while driving one of defendant's cars, the court charged that, as matter of law, \$5000 would not be an exorbitant amount of damages. *Held*, error for which a judgment in plaintiff's favor would be reversed. *Wersebe v. Broadway & S. A. R. Co.*, 1 Misc. (N. Y.) 472, 49 N. Y. S. R. 619, 21 N. Y. Supp. 637.

**Instructions as to punitive damages.†**—It is error to leave the question of punitive or exemplary damages to the jury when there is no testimony to warrant a verdict for such damages. *Atchison, T. & S. F. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. Rep. 453.—FOLLOWING *Kansas City, Ft. S. & G. R. Co. v. Kier*, 41 Kan. 671.

An error in authorizing the jury to give punitive damages in a case in which they are not recoverable will work a reversal where it cannot be determined from the verdict whether or not it includes such

damages. *Patry v. Chicago, St. P., M. & O. R. Co.*, 77 Wis. 218, 46 N. W. Rep. 56.

A charge is erroneous which merely instructs the jury that they may allow vindictive damages if they find that the defendant's act was characterized by "gross negligence," without explaining that "gross negligence" in this connection implies such entire want of care or recklessness of conduct as is the equivalent of "positive misconduct," or evinces "a conscious indifference to consequences." *East Tenn., V. & G. R. Co. v. Lee*, 90 Tenn. 570, 18 S. W. Rep. 268.

It was error to instruct the jury that if the defendant was guilty of wilful neglect they ought to award punitive damages. Nor was the error cured by telling them in another instruction that they "could" find any sum as punitive damages not exceeding the amount claimed in the petition. *Kentucky C. R. Co. v. Gastineau*, 83 Ky. 119.

It is error to charge that a corporation master is liable in punitive damages for the wilful tort of its servant, in the absence of evidence that the master authorized or ratified the tort, or was guilty of misconduct in the employment or retention of the servant. *Donivan v. Manhattan R. Co.*, 1 Misc. (N. Y.) 368, 49 N. Y. S. R. 722, 21 N. Y. Supp. 457.—QUOTING *Cleghorn v. New York C. & H. R. R. Co.*, 56 N. Y. 44; *Fisher v. Metropolitan El. R. Co.*, 34 Hun 433.

It is error to charge that a corporation master is responsible in punitive damages for an inexcusable assault and battery by its servant, when the evidence authorizes the inference that the servant acted from an innocent motive, and in the supposed discharge of his duty. *Donivan v. Manhattan R. Co.*, 1 Misc. (N. Y.) 368, 49 N. Y. S. R. 722, 21 N. Y. Supp. 457.

**50. Misleading instructions.\***—An instruction that "where a plaintiff was compelled to act at once in the presence of immediate imminent danger, he cannot be held guilty of contributory negligence as a matter of law merely because he did not choose the best means of escape," was improper, since, as applied to the facts, it left the jury to conclude that if plaintiff chose the best means of escape which occurred to him, this fact might relieve him from the consequences of the contributory negligence, if any, by which he was brought into

\* See also *post*, 81.

† See also *post*, 82.

\* See also *post*, 74.

the dangerous condition. *Baltzer v. Chicago, M. & N. W. R. Co.*, 83 Wis. 459, 53 N. W. Rep. 885.—QUOTING *Lockwood v. Chicago & N. W. R. Co.*, 55 Wis. 50.

Plaintiff sued for an assault and battery committed while being expelled from a car, which, it appeared, he had unlawfully entered. The defendant contended that the force which its servants used was necessary to overcome force used by plaintiff in resisting the expulsion, while plaintiff claimed that the force which he used was necessary to repel the blows of such employés. The defendant asked the court to instruct, that in resisting the blows the plaintiff would have no right to resist being expelled from the car, to which the court replied "that this was so if the jury could make the distinction upon the evidence," but left the jury to infer that the burden was upon defendant to establish it. *Held*, error and ground for reversal. *Coleman v. New York & N. H. R. Co.*, 106 Mass. 160, 6 Am. Ry. Rep. 306.—QUOTED IN *Atchison, T. & S. F. R. Co. v. Gants*, 34 Am. & Eng. R. Cas. 290, 38 Kan. 608. REVIEWED IN *Gillett v. Missouri Valley R. Co.*, 55 Mo. 315.

**51. Inconsistent or conflicting instructions.**—A judgment in an action for negligence will be reversed where the instructions are conflicting as to the degree of care required of defendant. *Fath v. Tower Grove & L. R. Co.*, 50 Am. & Eng. R. Cas. 426, 105 Mo. 537, 16 S. W. Rep. 913.

Inconsistent charges, one given at the instance of the plaintiff and the other of the defendant, may be grounds for reversal, as where a passenger sues for having to pay extra compensation, and the court charges for the plaintiff, that if, having paid his fare, he was obliged, without any fault on his part, and under threats of expulsion, to pay extra compensation, then he is entitled to recover; and charges at the instance of the company, that if the plaintiff only had a ticket covering part of his desired journey; then the conductor had a right to require him to pay regular fare for the portion not covered by the ticket, or to compel him to leave the cars, and might use such force as was necessary to make him so do. *Baltimore & O. R. Co. v. Blocher*, 27 Md. 277.

An instruction to find for plaintiff upon finding certain enumerated facts, ignoring a fact necessary to be found in order to justify a verdict for plaintiff, is not cured by another instruction from which the jury

might infer the necessity of the ignored fact; nor even by an instruction which makes the finding of that fact necessary; for then the instructions are in conflict, and it cannot be known which one the jury followed. *Neville v. Chicago & N. W. R. Co.*, 79 Iowa 232, 44 N. W. Rep. 367.

**52. Urging jury to agree.**—After the jury had been out several hours they came into court and were discharged until the next day, with an admonition by the court to come back the next morning "with a determination to compromise." On the following morning the court reminded them again of the great importance of agreeing upon a verdict, saying that "many things juries were authorized to compromise, such as amounts; very seldom twelve men went into the jury rooms with the same notions as to amounts, and compromises were necessary." *Held*, reversible error. *Edens v. Hannibal & St. J. R. Co.*, 5 Am. & Eng. R. Cas. 459, 72 Mo. 212.

**53. Refusal to correctly instruct.\***—It is generally error for the trial court to refuse to submit to the jury questions of fact material to the case and based upon the evidence. *Atchison, T. & S. F. R. Co. v. Plunkett*, 2 Am. & Eng. R. Cas. 127, 25 Kan. 188.

Where there has been evidence as to contributory negligence, in a suit for causing death, it is error to refuse an instruction as to the law touching such subject; and such error is not cured by a charge that defendant is entitled to a verdict unless the accident is caused solely by its negligence. *Philadelphia, W. & B. R. Co. v. State*, 66 Md. 501, 8 Atl. Rep. 272.

It is the duty of one about to cross the track to look in the direction in which a train just due would come, and a failure to do so is such negligence as will preclude a recovery, and a refusal of the court to so charge is ground for reversal. *Gonzales v. New York & H. R. Co.*, 38 N. Y. 440; reversing 39 How. Pr. 407, 6 Robt. 93, 297; affirming 1 Sweeney 506.—QUOTED IN *Armstrong v. New York C. & H. R. R. Co.*, 66 Barb. (N. Y.) 437.

Where a cable railway is sued for injuring a child through the alleged negligence of a gripman, refusing to instruct the jury as to its duty in case the company's servants did all that could have been done after they

\*See also *ante*, 18; *post*, 83.



saw, or could have seen, the threatening danger, is error. *West Chicago St. R. Co. v. Campbell*, 46 Ill. App. 503.

In an action by an employé to recover for personal injuries, a refusal to give the following charge is reversible error: "That if the jury find from the evidence that the accident by which plaintiff sustained the injuries complained of was the result of fast running of the train, and that the train was so run against the orders of defendant's superior officers, and against regulations made in that respect by defendant, then plaintiff will not be entitled to recover more than his actual damages in this suit." *Texas Trunk R. Co. v. Johnston*, 41 Am. & Eng. R. Cas. 122, 75 Tex. 158, 12 S. W. Rep. 482.

#### 54. Erroneous direction of verdict.

—Where a street car company is sued for an assault by one of its drivers, and the evidence as to the assault is contradictory, the case should be submitted to the jury. An order directing a verdict for the defendant is reversible error. *Bush v. Christopher & T. S. R. Co.*, 41 N. Y. S. R. 92, 16 N. Y. Supp. 212.

Where in an action for personal injuries alleged to have been sustained by reason of the want of repair of the machinery of a power grain-shovel which the plaintiff was operating, the evidence tended to show that the injuries were caused by a defect in such machinery which had existed for a sufficient length of time for the defendant to have known of it, and did not show that the plaintiff was guilty of contributory negligence, it was error to direct a verdict for the defendant. *Radmann v. Chicago, M. & St. P. R. Co.*, 78 Wis. 22, 47 N. W. Rep. 97.

In an action by a brakeman for injuries received while coupling cars upon which the draught-irons were at different heights, where there was no evidence tending to show that such difference in any way contributed to the accident, there was no question for the jury as to defendant's negligence in that respect. But, there being evidence tending to prove that just as plaintiff was about to couple the cars, without any signal the train suddenly came back with increased speed, and thereby crushed his hand between the bumpers, it was error to direct a verdict for defendant. For negligence of the engineer in such a case defendant is liable under ch. 438, laws

of 1889. *Kruse v. Chicago, M. & St. P. R. Co.*, 82 Wis. 568, 52 N. W. Rep. 755.

Upon evidence in an action for injuries sustained in a collision between defendant's electric car and plaintiff's wagon, tending to show, among other things, that while plaintiff was driving on defendant's track with his heavily loaded wagon he saw the car approaching and tried to turn out, but, owing to the slipperiness of the rails his team was unable to pull the wagon from the track, and that the motorman of the car saw the plaintiff trying to get off the track, and his difficulty in doing so, in ample time to have stopped the car, it was error to direct a verdict in favor of the defendant. *Will v. West Side R. Co.*, 84 Wis. 42, 54 N. W. Rep. 30.

**55. Erroneous verdict.**—Though an instruction be erroneous, yet, if the verdict upon the undisputed evidence is in conflict therewith, the judgment must be reversed. *Dutton v. Wabash, St. L. & P. R. Co.*, 66 Iowa 352, 23 N. W. Rep. 739.

A verdict which is the result of mere conjecture, and is not founded upon evidence, cannot be sustained. *Hickey v. Chicago, M. & St. P. R. Co.*, 64 Wis. 649, 26 N. W. Rep. 112.

Where the verdict is abnormal, and circumstances occurred at the trial which might have unduly influenced the action of the jury, the court will not hesitate to set it aside. *Central Texas & N. W. R. Co. v. Hancock, (Tex.)* 27 Am. & Eng. R. Cas. 325.

In an action to recover damages for injuries caused by a collision at a highway crossing, where the evidence showed that the collision was caused by plaintiff's gross negligence, a judgment for plaintiff will be reversed. *Ohio & M. R. Co. v. Maisch*, 29 Ill. App. 640.

A judgment will be reversed where there is a general verdict upon a petition stating distinct causes of action, and the question has been brought to the attention of the trial court. *Sturgeon v. St. Louis, K. C. & N. R. Co.*, 65 Mo. 569.

**56. Prejudice, when presumed.**—If there be error at the trial a presumption of prejudice arises therefrom, and it will be disregarded only when the record shows there was no prejudice in fact. *Potter v. Chicago, R. I. & P. R. Co.*, 46 Iowa 399, 16 Am. Ry. Rep. 57.—QUOTED IN *Hall v. Chicago, R. I. & P. R. Co.*, 84 Iowa 311.

The reception of illegal evidence is pre-

sumptively injurious to the party objecting to its admission. Any illegal evidence that has a tendency to excite the passions, arouse the prejudices, awaken the sympathies, or warp or influence the judgment of jurors in any degree cannot be considered harmless. Evidence cannot be said to be entirely harmless where the party objecting to it is obliged to call a witness to explain or contradict it. *Anderson v. Rome, W. & O. R. Co.*, 54 N. Y. 334.

Unless it is made to appear that an erroneous charge, which was calculated to mislead the jury, did not have this effect, the judgment will be reversed. The burden of showing that no injury resulted is, in such case, on the appellee. *Gulf, C. & S. F. R. Co. v. Greenlee*, 23 Am. & Eng. R. Cas. 322, 62 Tex. 344.

Where the evidence is conflicting upon the question of negligence, a judgment will be reversed unless it appears that the instructions on behalf of the successful party stated the law correctly and were free from errors calculated to mislead the jury. *Lake Shore & M. S. R. Co. v. Elson*, 15 Ill. App. 80.

### 3. What errors and irregularities may be disregarded.

**57. In general.**—A railroad company was sued for the loss of baggage. The proof was conflicting as to whether the baggage was delivered on the 10th or the 16th of a certain month. The owner of the baggage recovered, and the court allowed interest on its value from the 10th of the month. *Held*, that the error, if any, was too small to be ground of reversal, whether the baggage was delivered on the 10th or the 16th. *Missouri Pac. R. Co. v. Colquitt*, (Tex.) 9 S. W. Rep. 603.

Plaintiff's awning was set on fire by a coal of fire almost as large as a walnut, emitted from one of defendant's engines. Defendant's evidence showed that the apparatus of the engines for preventing the escape of fire were of the most approved pattern, and that orders were issued for frequent examination and reparation, which were habitually carried out; but no evidence was given as to this particular engine. The evidence showed that the engines frequently emitted large sparks and that the ash-pans had openings in the side through which the coals might fall. *Held*, that the conclusion of the court that defendant's

negligence caused the fire was not such error as to call for reversal. *Sugarman v. Manhattan El. R. Co.*, 42 N. Y. S. R. 30, 16 N. Y. Supp. 533.

**58. Errors favorable to appellant.**—When the measure of damages given by the court to the jury is more favorable to the plaintiff than the one prescribed by law, the plaintiff has no cause to be dissatisfied therewith. *Wilson v. Atlanta & C. R. Co.*, 40 Am. & Eng. R. Cas. 25, 82 Ga. 386, 10 S. E. Rep. 1076.

The fact that the court treated the deceased, in an action for his death by reason of defendant's negligence, as a trespasser on the company's track, being error in defendant's favor, affords no ground for a reversal of the judgment. *Lynch v. St. Joseph & I. R. Co.*, 111 Mo. 601, 19 S. W. Rep. 1114.

**59. Non-prejudicial errors, generally.**—In an action for personal injuries, the plaintiff having recovered a judgment on the verdict, and reserved exceptions to several rulings of the court on the trial, the supreme court, on appeal by him, will not consider any ruling adverse to him which does not affect the question of the measure or amount of damages, since, if erroneous, it could not have injured him. *Carrington v. Louisville & N. R. Co.*, 41 Am. & Eng. R. Cas. 543, 88 Ala. 472, 6 So. Rep. 910.—FOLLOWING *Donovan v. South & N. Ala. R. Co.*, 79 Ala. 429.

Where, in a suit for the value of stock killed by a railway company, testimony was received on both sides tending to show the value of the animals killed and the damage to those injured, and the jury were permitted to take to the jury-room a statement made by the plaintiff's counsel showing the highest amounts given by any witness of such value and damage, and the jury rendered a verdict for less than the average of such amounts, with interest, the use by the jury of such statement was error without prejudice. *Harroun v. Chicago & W. M. R. Co.*, 68 Mich. 208, 12 West. Rep. 556, 35 N. W. Rep. 914.

A railroad company brought ejectment to recover lands claimed under certain grants. Defendant failed to show that her right attached prior to the location of the land by the company and its withdrawal by the government from entry, as was essential to do in order to hold the land. *Held*, that errors in the reception or rejection of evidence touching other questions was not

reversible error. *Link v. Union Pac. R. Co.*, 3 *Wyom.* 680, 29 *Pac. Rep.* 741.

**60. Errors and irregularities respecting the pleadings.**—In an action against a company to recover for a loss resulting from fire negligently escaping from a locomotive, the plaintiff should aver as definitely as he can the train from which and the time when the fire escaped; but the failure of the court to require such definite statement is not ground for reversal where it appears that the company was not prejudiced thereby. *Missouri Pac. R. Co. v. Merrill*, 40 *Kan.* 404, 19 *Pac. Rep.* 793.

Where a passenger sues for being ejected from a train, and charges that he was "forced off," and the company in its answer denies committing any violence toward him, a judgment for plaintiff will not be reversed on the ground that there was no claim made for punitive damages. *Knowles v. Norfolk S. R. Co.*, 102 *N. Car.* 59, 9 *S. E. Rep.* 7.

Although it may, strictly speaking, be irregular for the court, after an improper plea has been filed, and thereby become a part of the record, to entertain and grant a motion to reject the same, still, if the court does so, it must, in substance and effect, be regarded as setting aside the plea, and though it is done irregularly the proceedings will not be reversed for such irregularity. In such case the court, having done right substantially, its proceedings will not be reversed because of mere informality in the mode of doing it. *Hart v. Baltimore & O. R. Co.*, 6 *W. Va.* 336.

The injury to plaintiff was caused by the negligence of the C. & D. R. Co. Subsequently the said railway was sold to the D. & S. C. R. Co., under a contract whereby the latter company assumed all the debts and liabilities of the former, and the plaintiff sought to recover the amount of his damages by virtue of said contract of the said D. & S. C. R. Co., but alleged in his petition that such agreement was made by the S. C. & D. R. Co., instead of by the railway named. Held, that as there was no room to doubt that it was intended to charge the D. & S. C. R. Co. with such liability, the error was without prejudice. *Knott v. Dubuque & S. C. R. Co.*, 84 *Iowa* 462, 51 *N. W. Rep.* 57.

About 60 days after a railroad had been sold and the receiver discharged, suit was brought against the receiver for services rendered, and an order was permitted strik-

ing out the name of the receiver as defendant and substituting that of the purchasers. Under the terms of sale the purchasers became liable for all the debts of the company. Held, that it was not such error as would allow the purchasers to prosecute an appeal, where they had been served with process and allowed the statutory time in which to answer. *Abbott v. New York, L. E. & W. R. Co.*, 120 *N. Y.* 652, 24 *N. E. Rep.* 810, 31 *N. Y. S. R.* 649, 2 *Sito. App.* 599; affirming 46 *Hun* 680, 12 *N. Y. S. R.* 565.

**61. Non-prejudicial or harmless evidence.**—Mere abstract error is not enough to justify a reversal; it must be error with reference to the issues, and where the bill of exceptions does not show whether the evidence could have prejudiced the complaining party, its admission is not ground for reversal. *Missouri Pac. R. Co. v. Edwards*, 75 *Tex.* 334, 12 *S. W. Rep.* 853.

The putting of an improper question to a witness can afford no ground for the reversal of a judgment when, from the nature of the answer, it is manifest that it did not affect injuriously the rights of the party complaining. *Hughes v. Galveston, H. & S. A. R. Co.*, 34 *Am. & Eng. R. Cas.* 66, 67 *Tex.* 595, 4 *S. W. Rep.* 219.

In an action for negligently causing the death of an engineer, if it was not competent to show that the defendant's manager was the first on the ground after the accident, it was not prejudicial on the ground that it might be argued therefrom that evidence was prepared under his direction. *Worden v. Humeston & S. R. Co.*, 76 *Iowa* 310, 41 *N. W. Rep.* 26.

Where the negligence of defendant, as charged, consisted of a defective coupling, which was admitted, and it was charged that the accident was caused thereby, an error in admitting evidence that the rolling stock also was in bad condition is harmless. *Wells v. Denver & R. G. W. R. Co.*, 7 *Utah* 482, 27 *Pac. Rep.* 688.

A judgment will not be reversed for error in the admission of testimony when the court is satisfied, upon an examination of the whole case, that the appellant has not been prejudiced thereby. *McGean v. Manhattan R. Co.*, 117 *N. Y.* 219, 22 *N. E. Rep.* 957, 27 *N. Y. S. R.* 337.—DISTINGUISHED IN *Bohlen v. Metropolitan El. R. Co.*, 39 *N. Y. S. R.* 151.—*Norwich & W. R. Co. v.*

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*Worcester*, 36 Am. & Eng. R. Cas. 447, 147 Mass. 518, 18 N. E. Rep. 409.

Errors in the admission of evidence as to the rate of speed at which a train was running at the time of the collision is not reversible error where it appears that the engineer only saw the other train when 100 feet away, and that he was running at a rate of speed making it impossible to stop in that distance. *Kansas City, Ft. S. & M. R. Co. v. Stoner*, 52 Am. & Eng. R. Cas. 462, 51 Fed. Rep. 649, 4 U. S. App. 109, 2 C. C. A. 437.

A company was sued for injuries alleged to have been caused by a defective or mismanaged switch. At the trial a switchman was asked if he recollected a prior act of negligence on his part. It appeared that the question was asked more to test his memory than for any other purpose, and it was not followed up by other evidence. *Held*, harmless error and not ground for reversal. *Stodder v. New York, L. E. & W. R. Co.*, 2 N. Y. Supp. 780.

Plaintiff sued a railroad company for negligently destroying his building by fire. At the trial a witness for plaintiff was permitted to testify that the company had paid him for certain property of his that was stored in plaintiff's building at the time of the fire, but on cross-examination denied that the company had paid him for the property, but said they had made him a present of some money because he was a poor man. *Held*, that, though the evidence was improperly admitted, it could not have prejudiced the company, and was therefore not ground for reversal. *Caswell v. Chicago & N. W. R. Co.*, 42 Wis. 193, 15 Am. Ry. Rep. 162.

**62. Evidence which could not have misled the jury.**—In a suit for personal injuries, a witness was asked to describe the extent of the accident, its cause, and to describe the thing that caused it. The witness was not an expert in matters relating to machinery, a defect in machinery being the alleged cause of the injury. *Held*, that while the question was objectionable in so far as it sought to elicit the opinion of the witness as to what caused the accident, yet as he stated also the facts on which he based that opinion, the failure to exclude the answer afforded no ground for reversal, since the jury was in possession of the evidence of machinists and experts, and could not have been misled by the opinion of the witness. *Houston & T. C. R. Co. v. Larkin*, 64 Tex. 454.

### 63. Improper opinion evidence.—

It is a general rule that a witness must testify to facts, and not to his opinions. But when the witness testifies to facts showing that his opinion was the only conclusion that could be drawn from the facts, the error in allowing him to state that opinion will be harmless and will afford no ground of reversal. *Central R. Co. v. Allmon*, 147 Ill. 471, 35 N. E. Rep. 725.

Where plaintiff sues for personal injuries, it is no ground for reversal that he was permitted to give his opinion as to the value of his services while he was disabled, where the value of the services is not definitely fixed, and where he gives facts upon which his opinion is based. *Hart v. Charlotte, C. & A. R. Co.*, 33 So. Car. 427, 12 S. E. Rep. 9.

A question propounded to a witness who is not an expert, calling for his opinion, which is not responded to by said witness expressing his opinion, is not such an error as would prejudice the party excepting to said question. *Bullington v. Newport News & M. V. R. Co.*, 32 W. Va. 436, 9 S. E. Rep. 876.

**64. Admission of improper evidence cured by instructions.**—Error in admitting in evidence a void city ordinance regulating the blowing of locomotive whistles may be fully corrected by the court's subsequently instructing the jury that it was void, and that they should not consider it, but should treat the case as if no ordinance had been passed, and then instructing them correctly as to the rules of law applicable to the case. *Dugan v. St. Paul & D. R. Co.*, 43 Minn. 414, 45 N. W. Rep. 851.

Where the instructions given required the driver of the car to exercise only that care which the common law imposed upon him, the introduction in evidence of a city ordinance in part invalid, because requiring an unreasonable degree of care, will be deemed harmless. *Senn v. Southern R. Co.*, 108 Mo. 142, 18 S. W. Rep. 1007.

Under an instruction that the plaintiff could only recover as damages caused by the motor line the actual loss of rent, the admission of evidence showing the diverting of travel from the street was not prejudicial to the defendant. *Stange v. Dubuque*, 14 Am. & Eng. R. Cas. 107, 62 Iowa 303, 17 N. W. Rep. 518.

Where suit is brought for a personal in-

jury, a verdict for \$1500, which is shown to be not excessive for the actual injury suffered, will not be reversed because of the improper admission of evidence as to a lung trouble a year later, which the jury were instructed not to consider as an element of damages. *Doyle v. Manhattan R. Co.*, 15 *Daly (N. Y.)* 475, 8 *N. Y. Supp.* 324, 29 *N. Y. S. R.* 316.

Error in allowing the contents of medical books to be improperly introduced on the examination of a medical witness, and in permitting the witness to testify to his treatment of various cases, is cured by the court's subsequently withdrawing the evidence from the jury, with an instruction to disregard it, where in view of all the evidence the excepting party was not thereby prejudiced. *Waterman v. Chicago & A. R. Co.*, 52 *Am. & Eng. R. Cas.* 592, 82 *Wis.* 613, 52 *N. W. Rep.* 247, 1136.

A. sued a carrier for breach of a contract to carry goods from B. to C. One witness stated the value of part of the goods at B., but the rest of the evidence was confined to their value at C., and the court charged that this was the proper basis upon which to estimate the damages. The jury found for the plaintiff, and judgment was so entered. *Held*, that defendant had suffered no injury from the evidence as to the value at B., and that therefore the judgment would not be reversed. *Evansville & T. H. R. Co. v. Montgomery*, 9 *Am. & Eng. R. Cas.* 195, 85 *Ind.* 494.

In an action to recover damages for a malicious assault committed by a conductor upon a passenger, the court admitted testimony to the effect that the conductor had stated that "this" (referring to his punch) was what he "had done" the plaintiff up with. Upon objection being taken the court directed the jury not to consider this testimony. *Held*, that any error in admitting such testimony was cured by the instruction to disregard it. *Dillingham v. Russell*, 37 *Am. & Eng. R. Cas.* 1, 73 *Tex.* 47, 3 *L. R. A.* 634, 11 *S. W. Rep.* 139.

**65. — or by further evidence.**— A judgment based on facts, where sufficiently proven by circumstances, will not be reversed because such circumstances are corroborated by certain evidence admitted as *res gestæ*, but not strictly admissible as such. *Hogle v. New York C. & H. R. R. Co.*, 12 *N. Y. S. R.* 415, 46 *Hun* 679. *Par-*

*shall v. Minneapolis & St. L. R. Co.*, 35 *Fed. Rep.* 649.

If the court erred in permitting an ordinance regulating speed to be offered in evidence at that stage of the trial, such error would furnish no ground for reversal if evidence subsequently introduced established the fact that the average rate of speed of the car was more than the prohibited rate. *Baltimore C. P. R. Co. v. McDonnell*, 43 *Md.* 534, 14 *Am. Ry. Rep.* 272.

In an action by a passenger for a personal injury after alighting from a car, it appeared that in order to reach a highway he must walk up the track some distance or go across private property by a private way. *Held*, that a refusal of the court to strike out the testimony of a witness as to the ownership of such way founded on hearsay was harmless error, where there was other evidence showing that the way, in fact, was private. Neither is the admission of hearsay evidence as to the ownership of the way reversible error where there is other competent evidence proving the same thing. *Reid v. New York, N. H. & H. R. Co.*, 44 *N. Y. S. R.* 688, 63 *Hun* 630, 17 *N. Y. Supp.* 801; *affirmed* 136 *N. Y.* 638, *mem.*; 32 *N. E. Rep.* 1014, 49 *N. Y. S. R.* 913, *mem.*

On cross-examination, a plaintiff who sued for a personal injury received by walking on a track was asked whether he had at any time climbed on the cars to get a ride. An objection to this question was sustained, but he was allowed to testify that he did not attempt to climb upon the cars at the time he was injured, but that sometimes when cars were switching about the place of the injury he did get on freight cars for a ride. *Held*, that the error in the ruling, if any, was cured. *Whalen v. Chicago & N. W. R. Co.*, 41 *Am. & Eng. R. Cas.* 558, 75 *Wis.* 654, 44 *N. W. Rep.* 849.

In an action for personal injuries, where one of the principal disputed questions is, whether the plaintiff at the time of the injury was in the employ of the company sued or of a contractor constructing the road, it is error for the court to permit the general question to be asked of plaintiff: "In whose employ were you at the time of your injury?" But where the witness upon further examination narrates in detail all the facts and circumstances connected with his employment—*held*, the error is not material. *Solomon R. Co. v. Jones*, 34 *Kan.* 443, 8 *Pac. Rep.* 730.

The trial court permitted a witness, who was present at the origin of the fire out of which the action arose, to testify that he had said at the time, "that if there were any coals under the plank walk we would have a blaze." *Held*, to be error, but, in view of other testimony in the cause corroborating the correctness of the remark, error without injury. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 *Am. & Eng. R. Cas.* 603, 27 *Fla. 1*, 9 *So. Rep.* 661.

In an action against an elevated railway to recover damages to abutting property, a witness, over various objections, was permitted to testify as to the rental value of the property for the following years, both with and without the road. In the further progress of the trial both parties gave similar testimony without objection. *Held*, that the error was no ground, under the circumstances, for reversal. *Kernochan v. New York El. R. Co.*, 29 *N. Y. S. R.* 523.

**66. Result not affected by the improper evidence.**—Error in admitting evidence upon a point on which plaintiff failed to recover is no ground for reversing the cause on defendant's appeal. *Keyser v. Kansas City, St. J. & C. B. R. Co.*, 61 *Iowa* 175, 16 *N. W. Rep.* 68.

Where a court tries a case without the intervention of a jury, the admission of improper, immaterial, or irrelevant evidence is no ground for reversal where it clearly appears that it did not influence the judgment. *St. Louis, A. & T. R. Co. v. Turner*, 1 *Tex. Civ. App.* 625, 20 *S. W. Rep.* 1008.

Where a company is sued for an injury alleged to have been caused by a defective car, the admission of a book showing that subsequent to the injury the car was sent to the shops and repaired, is not ground for reversal where the jury find that the car was defective in the particular which caused the injury. *Belair v. Chicago & N. W. R. Co.*, 43 *Iowa* 662.

It is not reversible error to have permitted the plaintiff to testify that she had an infant child by a former marriage, where the verdict was for thirty-five hundred dollars, as such evidence does not appear to have influenced the amount of damages. *Soeder v. St. Louis, I. M. & S. R. Co.*, 100 *Mo.* 673, 13 *S. W. Rep.* 714.

The admission of evidence as to exemplary damages is not ground for reversal where the court excludes a recovery for such

damages and where the verdict rendered is clearly within the amount of compensatory damages which plaintiff was shown to be entitled to. *Keyes v. Minneapolis & St. L. R. Co.*, 36 *Minn.* 290, 30 *N. W. Rep.* 552.

In an action to restrain the operation of an elevated railway, and for damages, the admission of evidence under questions improper in form is not reversible error, where it appears that the judgment of the court was not based on such evidence. *Korn v. New York El. R. Co.*, 37 *N. Y. S. R.* 630, 59 *Hun* 625, 13 *N. Y. Supp.* 514.

In an action for personal injuries the trial court permitted the defendant to cross-examine the plaintiff as to encumbrances on his property, the object being to show that he was financially embarrassed, and was simulating or exaggerating the character and extent of the injuries. The jury found that there was no actionable negligence. *Held*, that the error in permitting the cross-examination could not have prejudiced the plaintiff. *Beery v. Chicago & N. W. R. Co.*, 73 *Wis.* 197, 40 *N. W. Rep.* 687.

The admission of evidence as to damages on account of the loss of hire of the mules in question, if error at all, was not such error as would give the plaintiff in error a right to complain, it not appearing that the jury allowed any damages for such loss of hire, and the amount of damages found being fully authorized by the evidence as to the injury to the wagon and the mules, which damages were sufficiently alleged in the declaration. *East Tenn., V. & G. R. Co. v. Warmack*, 86 *Ga.* 351, 12 *S. E. Rep.* 813.

**67. Waiver of objections to evidence.**—When a witness for a landowner is asked and testifies, over the objection of the company, that his farm was damaged a certain sum per acre, naming it, by the taking of the right of way through it, this is erroneous; yet if it is shown that the objection made was also to the competency of the witness to testify as an expert who was competent, and it is also shown that objections to like questions asked other witnesses were sustained, and also that in the course of the trial like evidence had been given to proper questions without any objection of defendant, and the defendant also, in cross-examination, repeatedly asked like questions, the error is not sufficient to compel a reversal of the judgment. *Chicago, K. &*

\* See also *ante*, 37.



*W. R. Co. v. Brunson*, 43 Kan. 371, 23 Pac. Rep. 495.

In an action for the killing of stock, where both plaintiff and defendant introduced testimony respecting the broken-down condition of gates at the place of the accident, the appellant cannot in the Supreme Court object that the evidence was introduced improperly. *McMaster v. Montana Union R. Co.*, 49 Am. & Eng. R. Cas. 564, 12 Mont. 163, 30 Pa. Rep. 268.

**68. Exclusion of evidence.\***—(1) *Generally*.—A judgment will not be reversed for error in excluding evidence which is merely cumulative. *Gulf, C. & S. F. R. Co. v. Shearer*, 1 Tex. Civ. App. 343, 21 S. W. Rep. 133.

Where a company is sued for destroying property by fire the exclusion of the report of the engineer who was in charge of the locomotive starting the fire is not ground for reversal where the engineer himself is a witness, and states everything that is in the report. *Chicago & A. R. Co. v. Shenk*, 30 Ill. App. 586; *reversed on another point*, 131 Ill. 283.

Where the boy testified that he knew it was wrong to ride on the cars, and that he had often been driven away from them, the exclusion of evidence by the father that he had told the boy to keep away from them is harmless error. *Brill v. Eddy*, 115 Mo. 596, 22 S. W. Rep. 488.

Where a certain rule adopted by a railroad company is in question, and the court sanctions it, and instructs the jury that it is a legal and valid rule, it is not error to reject other evidence tending to show that the rule is the same as that of railroad companies generally. *Tracy v. New York & H. R. Co.*, 9 Bosw. (N. Y.) 396.

(2) *Illustrations*.—The error, if any, in excluding a question put to defendant's superintendent as to whether there was anything in the appearance of the broken rod "from which a person could tell whether there was a flaw in it previous to the time it broke, or how extensive that flaw was," was cured by allowing him to answer the question, "Is there anything in the condition of that iron which would indicate to you what its condition was at the time it broke?" *Cowan v. Chicago, M. & St. P. R. Co.*, 80 Wis. 284, 50 N. W. Rep. 180.

Where the trial court excluded evidence of a rule forbidding employes "jumping on or off trains or engines in motion, and getting between cars in motion to uncouple them," but the testimony for defendant showed a practical abandonment of the rule by employes and their managing superiors, the exclusion of that evidence was not prejudicial error. *Alcorn v. Chicago & A. R. Co.*, 53 Am. & Eng. R. Cas. 87, 108 Mo. 81, 18 S. W. Rep. 188.—*REVIEWING* *Parker v. Georgia Pac. R. Co.*, 83 Ga. 539; *Memphis & C. R. Co. v. Askew*, 90 Ala. 5, 7 So. Rep. 823; *Shenandoah Valley R. Co. v. Lucado*, 86 Va. 422, 10 S. E. Rep. 422; *Alexander v. Louisville & N. R.*, 83 Ky. 589.

In a trial where the defense consists of proceedings under the provisions of the statute for the condemnation of certain real estate to the use of a railroad company, evidence was offered tending to prove that said real estate was necessary to said company for the purpose of its business, which evidence was excluded. Evidence tending to prove the condemnation of the real estate by the railroad company was offered and received. It having been held in a former opinion of this court in the same case that said condemnation proceedings as proved were ineffectual on account of defects in the notices and other material matters of procedure, without considering and before arriving at the point as to whether the real estate in question was necessary to the railroad company or not—*held*, that the fact of said real estate being necessary to the said company, as affecting its power to condemn, is ancillary to that of actual legal condemnation, and that actual legal condemnation not being proved, the exclusion of the evidence under consideration was not reversible error. *Chicago, B. & Q. R. Co. v. Hull*, 24 Neb. 740.

On the trial the court refused to allow a witness of the plaintiff to testify as to an accident other than that in question, but subsequently a witness of the defendant testified that another accident happened, the plaintiff's counsel declaring that it was the same he sought to prove by the plaintiff's witness. It was not questioned that the accident occurred. *Held*, that if there was error in rejecting the evidence offered by the plaintiff, the same was harmless. *Grant v. Raleigh & G. R. Co.*, 108 N. Car. 462, 13 S. E. Rep. 209.

\* See also ante, 38.

**69. Improper remarks of counsel.\***

—(1) *In general.*—The practise of using language in an argument referable to facts not in evidence and calculated to rouse the prejudices of the jury against a party to the cause, should not be permitted. But when such language is used in response to similar language used by the adverse counsel, and equally unauthorized, the party provoking such a course of argument will not be heard to complain on appeal. *Texas & P. R. Co. v. Garcia*, 21 *Am. & Eng. R. Cas.* 384, 62 *Tex.* 285.

Where the jury appear to be uninfluenced by an improper appeal made by counsel in addressing them regarding matter outside of the record, the misconduct is immaterial. *Gulf, C. & S. F. R. Co. v. Fox*, 33 (*Tex.*) *Am. & Eng. R. Cas.* 543, 6 *S. W. Rep.* 569.

It is not reversible error for an attorney on the trial of a cause to comment in his closing argument upon the absence of witnesses or their non-production, when they are shown to be cognizant of the facts in issue. *Missouri Pac. R. Co. v. White*, 48 *Am. & Eng. R. Cas.* 206, 80 *Tex.* 202, 15 *S. W. Rep.* 808.

It is not reversible error that plaintiff's counsel, in the closing argument to the jury, illustrated the force of a relevant physical fact by the use of apparatus not previously exhibited in evidence, and that the court, in the charge to the jury, commented upon the conclusive effect of the illustration. *Hoffman v. Bloomsburg & S. R. Co.*, 143 *Pa. St.* 503, 22 *Atl. Rep.* 823.

A statement by plaintiff's counsel in his argument to the jury that "we know that the accident occurred, from defendant's own agent," although not warranted by the testimony, is not prejudicial error where the fact of the occurrence of the accident is not disputed. *Harris v. Detroit City R. Co.*, 76 *Mich.* : 1, 42 *N. W. Rep.* 1111.

It does not sufficiently appear that a jury, in an action to recover for damage done to cattle while being carried, were unduly influenced by the argument of plaintiff's counsel expressing a regret at the trial in court that a larger sum had not originally been claimed, it appearing that the case had been first tried before a justice, and that the jury in court renders no greater verdict than had been rendered in the trial before the justice.

*Galveston, H. & S. A. R. Co. v. Johnson*, (Ky.) 19 *S. W. Rep.* 867.

(2) *Illustrations.*—The plaintiff's counsel, in his closing argument to the jury, said: "For more than twenty years I have stood as a humble advocate of the people against the power of such monopolies as this." On objection thereto, the court observed that "the remark was very objectionable and must not be repeated, and the jury should entirely disregard it." *Held*, that the remark was culpably out of place, in violation of professional duty, and should meet a court's pointed rebuke; but the court declined to reverse for that alone. *Chicago & A. R. Co. v. Johnson*, 116 *Ill.* 206, 4 *N. E. Rep.* 381.

The court permitted plaintiff's counsel in his opening statement and closing argument to refer to the number of trials that had been had in the case and how they had resulted, and to state that the judgment on the first hearing had been reversed by a mere technicality. *Held*, that if the matter complained of was improper, it was not of so serious a character as to justify a reversal of a judgment in favor of the plaintiff. *Chicago & A. R. Co. v. Dillon*, 32 *Am. & Eng. R. Cas.* 1, 123 *Ill.* 570, 15 *N. E. Rep.* 181, 13 *West. Rep.* 286; *affirming* 24 *Ill. App.* 203.

A remark of counsel to an expert witness: "Remembering that you told us you expected your extra fee in this case, I hope you won't charge the poor railroad company anything extra," is not objectionable unless it appears that great injustice has been done to the party complaining of such remark. *Chicago, B. & Q. R. Co. v. Sullivan*, (Ill.) 17 *N. E. Rep.* 460.

It appeared that the attorney for the company in his argument to the jury used improper language, which provoked plaintiff's attorney to also use very improper language, which was assigned as error by the defendant. *Held*, that the court would not attempt to justify a wrong by the second attorney by way of retaliation, still the judgment will not be reversed on that ground where there is nothing in the verdict to indicate that the jury were misled by such remarks. *Gulf, C. & S. F. R. Co. v. Witte*, 68 *Tex.* 295, 4 *S. W. Rep.* 490.

Plaintiff's counsel in his closing arguments said: "I do not agree with my co-counsel that \$10,000 is enough. Ten thousand dollars is a small sum compared with

\* See also *ante*, 27, 39; *post*, 97.

the injuries my client has received. I feel as deep an interest in this case as any I ever tried. It is true that I have a pecuniary interest in the result myself, but the interest I feel on this account is insignificant when compared with the great interest I feel for my client." *Held*, that since it did not appear that the remarks prejudiced the jury or worked injury to the defendant, a verdict for the plaintiff should not be disturbed on account of such talk. *Missouri Pac. R. Co. v. White*, 48 *Am. & Eng. R. Cas.* 206, 80 *Tex.* 202, 15 *S. W. Rep.* 808.

A female passenger sued for being carried past her station and being put off at a lonely place unprotected in the night-time. In his argument to the jury her counsel used, among other words, the following: "I want you to understand, gentlemen of the jury, that your verdict in this case will be remembered as an evidence of the estimate of the rights of women of the country, and your families, as to the respect and protection due them at the hands of the railroad, and as you estimate them and their rights, so find by your verdict." *Held*, conceding that the language was reprehensible, yet a verdict will not be set aside in favor of the plaintiff where it is clearly supported by the evidence. *Texas & P. R. Co. v. Pollard*, 2 *Tex. App. (Civ. Cas.)* 424.

A verdict for \$30,000 had been set aside. On the second trial counsel for the plaintiff, in an argument to the court in the presence of the jury, referred to the former verdict, claiming that in view of additional facts shown the damages then awarded would not now be excessive. *Held*, that these remarks were not so outside of the case as to justify a reversal of the judgment, especially as the second verdict was for only \$18,500. *Heddles v. Chicago & N. W. R. Co.*, 77 *Wis.* 228, 46 *N. W. Rep.* 115.

Plaintiff's counsel, in addressing the jury, said that "the defendant can bring experts from one end of the world to the other to defeat [the plaintiff]. They have money enough to do it;" but in the closing argument for plaintiff this remark was expressly discountenanced. It not appearing affirmatively that defendant was prejudiced, an exception to the remark was overruled. *Dugan v. Chicago, St. P., M. & O. R. Co.*, 85 *Wis.* 609, 55 *N. W. Rep.* 894.

**70. Improper instructions, generally.\***—Where the instructions given

cover the law of a case, an omission to particularize more fully is not ground for reversal, unless the trial court is asked to give special instructions. *Gulf, C. & S. F. R. Co. v. Shearer*, 1 *Tex. Civ. App.* 343, 21 *S. W. Rep.* 133.

Where the negligence of the defendant company, if any, has been slight, and that of the plaintiff, gross, and where, had the verdict been different, the court must have set it aside, the court will not reverse the judgment and remand the cause, even though there are errors in some of the instructions. *Foster v. Chicago & A. R. Co.*, 94 *Ill.* 164, 16 *Am. Ry. Rep.* 452.

Where a claim for damages is based upon two acts of negligence, a judgment based upon a general verdict for the damages sustained from both causes will not be reversed for an error of the trial court in instructing as to one of the acts of negligence. *Cady v. Chicago, M. & S. P. R. Co.*, 5 *Dak.* 97, 37 *N. W. Rep.* 221.

**71. Instructions favorable to appellant.**—In an action by an infant to recover for a personal injury from negligence, the court, on behalf of the plaintiff, gave an instruction which tacitly assumed that under proper circumstances the rule of imputed negligence might apply, which accorded with the defendant's contention. *Held*, that the error was one of which the defendant could not complain. *Chicago City R. Co. v. Wilcox*, 50 *Am. & Eng. R. Cas.* 464, 138 *Ill.* 370, 27 *N. E. Rep.* 899; *affirming* 33 *Ill. App.* 450.

**72. Non-prejudicial or harmless instructions.**—If the undisputed facts establish a state of case which entitles plaintiff to recover for the defendant's negligence, the latter cannot complain that the court's charge imposed a higher degree of care than the law justifies. *Fordyce v. Jackson*, 56 *Ark.* 594, 20 *S. W. Rep.* 528, 597.

While the trial court committed error in permitting the jury to construe written rules of a railroad company, yet the judgment will not, on that account, be reversed, where such instruction did the company no harm. *Smith v. Wabash, St. L. & P. R. Co.*, 31 *Am. & Eng. R. Cas.* 331, 92 *Mo.* 359, 4 *S. W. Rep.* 129.

It is not proper in instructions to the jury to refer them to the sections of the statute; but where such reference is to the section on which, from the undisputed facts, the action is founded, the error may be regarded

\* See also *ante*, 40-53.

as harmless. *Lane v. Chicago, R. I. & P. R. Co.*, 35 Mo. App. 567.

That street cars are easily and readily stopped is a matter of common knowledge which a jury might probably consider without evidence; so it is not prejudicial error for a court to declare such to be a fact in instructing the jury. *Swain v. Fourteenth St. R. Co.*, 93 Cal. 179, 28 Pac. Rep. 829.

An instruction that contracts with common carriers are generally drawn up by themselves, and should therefore be construed most strongly against them, is erroneous, but will not work a reversal when the proof shows that the plaintiff was entitled to the general affirmative charge. *Louisville & N. R. Co. v. Towart*, 97 Ala. 514.

Where a statute gives conductors the powers of a "constable" as to preserving order on trains, an inadvertent mistake of the trial court in saying that they have the powers of "trial justices" in instructing a jury is not ground for reversal where it appears that it did no harm. *Moore v. Columbia & G. R. Co.*, 38 So. Car. 1, 16 S. E. Rep. 781.

An instruction "that if the right of way was not clear of dry weeds and combustible materials, but that the fire took on said right of way in consequence of such combustible material being there, and was thus communicated to the plaintiff's property," then, in the law, the defendant would be liable, without regard to the engine, should properly have used the word "dangerous" before the words "combustible materials;" but as the only combustible materials shown to have been upon the right of way were dead grass and dry weeds, the omission of that word was harmless error. *Chicago & E. I. R. Co. v. Goyette*, 43 Am. & Eng. R. Cas. 36, 133 Ill. 21, 24 N. E. Rep. 549; *affirming* 32 Ill. App. 574.

**73. — In actions for personal injuries.**—It is unnecessary to charge as to common-law negligence, where there are no facts proved to which such charge could be applicable. But reversal will not be had upon this ground unless the court could see that the jury were misled thereby and an erroneous result reached. *Louisville & N. R. Co. v. Howard*, 90 Tenn. 144, 19 S. W. Rep. 116.

An instruction that if neither party was guilty of negligence, and the injury was the result of an accident, no recovery can be had, cannot be to the defendant's prejudice.

*Gulf, C. & S. F. R. Co. v. Greenlee*, 35 Am. & Eng. R. Cas. 425, 70 Tex. 553, 8 S. W. Rep. 129.

An instruction which does not injure the complaining party is not ground for reversal. So *held*, where a street-car company was sued for injuring a child on the track, and it did not appear that the child was seen by the driver, but the court instructed as to the degree of care required where a person is seen on the track. *Giraldo v. Coney Island & B. R. Co.*, 16 N. Y. Supp. 774, 62 Hun 620, 42 N. Y. S. R. 915; *affirmed* in 135 N. Y. 648, *mem.*; 48 N. Y. S. R. 931.

A railroad company being bound to exercise the highest degree of care that human foresight can provide in carrying passengers to their journey's end, an instruction that if the employés of the company, i.e., the fireman and brakeman, moved or "permitted the engine to be moved, without the consent of the engineer, whether within the scope of their employment or not," the company would be liable for injuries arising therefrom, will not be a ground for reversal, if the circumstances are such that the company would be liable for the acts of the fireman and brakeman in any event. *Lakin v. Oregon & P. R. Co.*, 34 Am. & Eng. R. Cas. 500, 15 Oreg. 220, 15 Pac. Rep. 641.

The accident in which the plaintiff was injured having been caused by the spreading of the rails, the defendant asked two instructions, to the effect that the fact that the switch at which the car left the track was not locked did not constitute negligence, if the purpose of the lock was not to prevent spreading of the rails. These instructions the court modified by adding the words, "if the defendant used due care and diligence, as herein expressed, to otherwise fasten and secure the switch." *Held*, that as the verdict would have been for the defendant if the jury had found that the defendant had used due care to fasten and secure the switch, the modification of the instruction was without prejudice to the defendant. *Flanagan v. Baltimore & O. R. Co.*, 83 Iowa 639, 50 N. W. Rep. 60.

**74. Instructions which did not mislead the jury.**\*—Where the court, in charging the jury, defines the different degrees of negligence, and instructs the jury that the only question for them to determine

\*See also *ante*, 50.

is the negligence of the respective parties, and that if they find from the evidence that the defendant had done "wrong" and caused the injury, the *prima-facie* case for compensation was made out, the use of the word "wrong" instead of the word "negligence" is not so misleading as to be cause for reversal. *Union Pac. R. Co. v. Henry*, 36 Kan. 565, 14 Pac. Rep. 1.—QUOTING Kansas Pac. R. Co. v. Pointer, 14 Kan. 50.

In an action under chapter 94 of the Kansas laws of 1874, to recover for stock killed, in which it was claimed that the fence over which the stock passed onto the railroad track was defective and insufficient, the court quoted in its instructions §§ 2561, 2562, and 2563, Comp. Laws 1879. *Held*, that although some parts of those sections may not have been applicable to a fence of the kind and materials disclosed by the testimony, there can be no reason to believe that the jury were misled in the least thereby. *Kansas City, Ft. S. & G. R. Co. v. Hay*, 13 Am. & Eng. R. Cas. 600, 31 Kan. 177, 1 Pac. Rep. 766.

An elevated railway was sued to recover for personal injuries received by plaintiff while a passenger during what is known as the great New York blizzard of March 12, 1888. After the court had charged as to the liability of the company for results produced by unexpected and unforeseen storms, that it was not liable for injuries resulting from such storms as could not be guarded against by due care, and that the company was not bound to anticipate and provide against such storms as had never been known within practical experience in the locality; it then added that "the railroad and its servants and agents must exercise the care which is necessary under those circumstances to prevent accidents." *Held*, that this latter qualification was error, but as it appeared from the entire charge that the jury could not have been misled, it was not ground for reversal. *Connelly v. Manhattan El. R. Co.*, 52 N. Y. S. R. 462.

In an action to recover damages sustained by falling from a platform while boarding a railroad car, the charge to the jury called attention to the height of the platform as an element of danger, although the evidence did not show that the height in any way contributed to the accident. *Held*, not material, as the jury were not misled. *Gulf, C. & S. F. R. Co. v. Fox*, (Tex.) 33 Am. & Eng. R. Cas. 543, 6 S. W. Rep. 569.

**75. Repetition of abstract principles.**—While the giving of undue prominence in a charge to some special feature of the case may sometimes be so calculated to influence a verdict as to afford cause for reversal, the mere repetition in a charge, in a suit for personal injuries, of the abstract principles that the jury might consider the physical and mental suffering the plaintiff had endured, in estimating damages, cannot be regarded as calculated to affect a jury of ordinary intelligence, and will afford no ground for reversal. *Houston & T. C. R. Co. v. Larkin*, 64 Tex. 454.

The court in its charge repeated several times that a great degree of care was required of the conductor of a train in expelling an insane woman from a car. *Held*, that the repetition of the statement could do no harm unless it induced the jury to believe that the court thought there was evidence showing a want of the requisite care. The repetition was not of a character to thus mislead the jury, and occurred only when it was necessary to qualify the principles applicable to the different phases of the case. *International & G. N. R. Co. v. Leak*, 64 Tex. 654.

**76. Instructions on the weight of evidence.**—A trial judge may express his opinion freely on the weight and value of evidence, and when he does so without misleading or controlling the jury in the disposition of the facts there is no ground for reversal. *Fredericks v. Northern C. R. Co.*, 157 Pa. St. 103.—QUOTING *Leibig v. Steiner*, 94 Pa. St. 466; *Spear v. Philadelphia, W. & B. R. Co.*, 119 Pa. St. 61; *Kilpatrick v. Com.*, 31 Pa. St. 216.

A charge which, taken together, means that the train had the right of way, but that it was the duty of the trainmen to keep a lookout for persons on the track, and to take steps to avoid injuring them if discovered, is not erroneous as being upon the weight of evidence. *McDonald v. International & G. N. R. Co.*, (Tex.) 55 Am. & Eng. R. Cas. 280, 20 S. W. Rep. 847.

**77. Instructions as to expert testimony.**—Where several physicians testified as experts as to the plaintiff's physical condition, the nature and extent of her injuries, their probable consequences, etc., and the court thereupon instructed the jury, *ex mero motu*, "that the opinion of expert witnesses should not be substituted for such opinion as the jury may form from the

whole facts and whole evidence in the case; "that these opinions should be weighed along with all the other facts in the case;" "that in no case should the jury accept the opinion of an expert as true, unless it agrees with their conclusions as based on all the facts in the case, and such opinion should be considered in connection with all the other facts in making up their conclusion upon each fact it bears upon." *Held*, that these several expressions, all being construed together, involved no reversible error. *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, 9 So. Rep. 722.

**78. Instructions assuming facts as proven.**—An assumption in the charge that there was a collision, where the fact of the collision was not controverted, was not a reversible error. *Chicago, St. L. & P. R. Co. v. Spilker*, (Ind.) 55 Am. & Eng. R. Cas. 200, 33 N. E. Rep. 280.

Where the gravamen of the complaint is that the plaintiff got off defendant's east-bound train at the junction crossing, and attempted to cross its track to reach the junction sidewalk, when defendant negligently caused one of its western-bound trains to reach said junction and crossing, before plaintiff had crossed over said track and before the said east-bound train had pulled out from the said junction, whereby plaintiff was injured, etc., it is harmless error that an instruction assumes that the defendant was transporting plaintiff over its line, or that he was alighting from one of its cars at the time of the injury. *Burbridge v. Kansas City Cable R. Co.*, 36 Mo. App. 669.

In an action for negligence in failing to safely carry and deliver property, all the witnesses testifying to some loss, and the only conflict in the testimony being as to the amount of the loss—*held*, not error for the court to assume that there was some damage or loss, and to instruct the jury that the only question upon that part of the case was as to the amount of the loss sustained by plaintiffs, and this the jury were to find. *Bush v. Northern Pac. R. Co.*, 18 Am. & Eng. R. Cas. 559, 3 Dak. 444, 22 N. W. Rep. 508.

A brakeman sued for a personal injury caused by having his foot caught in a defective frog. In instructing the jury the court assumed that the maintaining of the frog was negligence *per se*. *Held*, that such assumption was of a fact which might have been submitted to the jury, but was not

ground for reversal when not excepted to by the defendant. *Union Pac. R. Co. v. James*, 56 Fed. Rep. 1001.

**79. Instructions as to contributory negligence.**—Where suit is brought for an injury received while on a station platform, an instruction to the effect that plaintiff's want of ordinary care while on the platform must have contributed to his injury, in order to be a bar to a recovery, will not warrant a reversal of a judgment in his favor where there is another instruction to the effect that he must prove by a preponderance of evidence that he was free from negligence. *Ohio & M. R. Co. v. Hecht*, 34 Am. & Eng. R. Cas. 447, 115 Ind. 443, 15 West. Rep. 122, 17 N. E. Rep. 297.

Where suit was brought against an Alabama railway corporation by a passenger who was injured by leaping from its train in that state, and the facts in evidence made a clear case, not only of contributory, but of gross negligence on his part, provided the jury believed that the conductor did not prompt the plaintiff to jump from the train, and that question was fairly submitted to the jury, and under the charge of the court the whole case was made to turn upon it, and a verdict was found for the defendant, the effect of contributory negligence, whether tested by the Alabama law or that of this state, would not and ought not to change the result; and there was no error in refusing to grant a new trial because the court charged that, according to the laws of Alabama, if the plaintiff contributed to the injury he could not recover. *Dixon v. Mobile & G. R. Co.*, 80 Ga. 212, 5 S. E. Rep. 496.

Where the evidence shows a company grossly negligent in injuring a passenger, an instruction to the effect that if the jury found the defendant guilty of gross negligence it will be liable, notwithstanding contributory negligence on the part of the plaintiff, though not strictly correct, is not ground for reversal where there is no evidence tending to show plaintiff guilty of contributory negligence. *Wilson v. Fourteenth St. R. Co.*, 90 Cal. 319, 27 Pac. Rep. 210.

An instruction which held, in substance, that if the plaintiff showed what his acts were, and they did not appear to be negligent, the jury would be justified in finding that he was free from negligence, while not correct as an abstract statement of the rule,



was not erroneous where it was clear that plaintiff was not guilty of contributory negligence, unless it was by reason of something which he did. *Raymond v. Burlington, C. R. & N. R. Co.*, 18 *Am. & Eng. R. Cas.* 217, 13 *Am. & Eng. R. Cas.* 6, 65 *Iowa* 152, 17 *N. W. Rep.* 923, 21 *N. W. Rep.* 495.

Where the defense of contributory negligence is relied on, it is not error for the court to give an instruction, at the instance of the plaintiff, which bases his right of recovery on the negligence of the defendant, without mention of his contributory negligence, where the law of contributory negligence is fully given to the jury in instructions given at the request of the company. *Louisville & N. R. Co. v. Connelly*, (Ky.) 7 *S. W. Rep.* 914.

The claim and proof of the passenger was that the car was started while she was in the act of alighting. The company claimed and gave evidence tending to prove that the car had started, that the passenger started to get off while the car was in motion, and it did not appear that there was any evidence or claim that the company could have avoided the accident after the car had started. It further appeared that the verdict of the jury must have been arrived at solely upon consideration of the question whether plaintiff was in the act of alighting before the car started, and whether with due care the gripman could have known that before he started the car. *Held*, that an erroneous instruction defining contributory negligence was harmless error. *Tobin v. Omnibus Cable Co.*, (Cal.) 58 *Am. & Eng. R. Cas.* 223.—*FOLLOWING Craven v. Central Pac. R. Co.*, 72 *Cal.* 345.

When the requirement of ordinary care on the part of the plaintiff is correctly stated in a subsequent instruction for the plaintiff and in several instructions for the defendant, thus supplementing and explaining a defective instruction, and there is no conflict in the series of instructions, which, as a whole, stated the law fully and fairly, and the attention of the jury is called by a special interrogatory to the question of the plaintiff's exercise of ordinary care, the error will not be such as to require a reversal. *Lake Erie & W. R. Co. v. Morain*, 140 *Ill.* 117; *affirming* 36 *Ill. App.* 632, 29 *N. E. Rep.* 869.

Where no instructions were asked or given to the jury concerning the rules of contributory negligence as affecting the plaintiff's

right to recover, but the petition alleged the exercise of care on the part of the plaintiff, and it clearly appeared from the evidence that the defendant was negligent, and that the plaintiff was free from negligence—*held*, that the omission in the instructions was without prejudice to the defendant. *Flanagan v. Baltimore & O. R. Co.*, 83 *Iowa* 639, 50 *N. W. Rep.* 60.

In an action for an injury at a crossing, plaintiff's evidence tended to show that he stopped and listened for trains, including that of the company, and that the whistle was blown and the bell rung. Upon this state of facts the court instructed the jury to decide the case upon the evidence. *Held*, that a failure of the court to instruct that contributory negligence was a matter of defense, which must be shown by a preponderance of evidence, was not reversible error. *Whitton v. Richmond & D. R. Co.*, 57 *Fed. Rep.* 551.

In an action by a passenger for personal injuries, the court instructed the jury that unless an act contributed to the injury directly or indirectly it should not be considered. *Held*, that the words "or indirectly" did not technically express the law, but was harmless error where there was no proof of any secondary or indirect injury. *Kansas City, Ft. S. & M. R. Co. v. Stoner*, 49 *Fed. Rep.* 209, 4 *U. S. App.* 109, 1 *C. C. A.* 231.

**80. Instructions as to comparative negligence.**—In an action for injuries occasioned by the alleged negligence of defendant, the court, at the instance of plaintiff, instructed the jury incorrectly in regard to the rule of comparative negligence. *Held*, as the evidence showed no negligence on the part of plaintiff to compare with that of defendant, the latter could not be heard to complain of the erroneous instruction. *Chicago, B. & Q. R. Co. v. Dickson*, 63 *Ill.* 151, 7 *Am. Ry. Rep.* 45.

**81. Instructions as to elements of, or measure of damages.**—An instruction that the question of damages "is wholly and entirely in the province of the jury" is not ground for reversal if the trial judge follow the general phrase complained of immediately and in the same sentence by a specific enumeration of the items of damages, and concludes with the direction that "all these taken together would be the amount that the plaintiff is entitled to re-

\* See also *ante*, 48.

cover." *McCloskey v. Bell Gap R. Co.*, 156 Pa. St. 254, 27 Atl. Rep. 246.

Where the court, in charging the jury as to the allowance of future damages, has told them that only damages can be allowed for such injuries as seem "reasonably certain to be permanent," it is not reversible error that the court should inadvertently use the expression "liable to be permanent." *Weiler v. Manhattan R. Co.*, 6 N. Y. Supp. 320.

Although the charge on the subject of the measure of damages is not as clear as it might have been, and dwells somewhat upon the subject of annuities, yet there is no error which injured the defendant where the court subsequently gives clearly the correct rule as to the measure of damages. *Georgia R. Co. v. Pittman*, 26 Am. & Eng. R. Cas. 474, 73 Ga. 325.

In an action for personal injuries it is not an appropriate expression to charge the jury that money is an adequate recompense for pain, but it is not reversible error where the jury are further instructed that pain is an element of damages, and that if they find for the plaintiff her recovery must be confined to compensatory damages, or such a sum as would compensate for the injuries suffered, which must be determined by the judgment and sound discretion of the jury, and must be for such measure as they should dispassionately allow. *Morgan v. Southern Pac. R. Co.*, 95 Cal. 501, 30 Pac. Rep. 601.

An instruction in a personal injury case, which tells the jury that the limit of the recovery that can be had is the amount claimed in the complaint, is objectionable, as tending to lead the jury to infer that they may find that amount; yet it is not reversible error where the claim was for \$5000 and the verdict for only \$1200. *Gulf, C. & S. F. R. Co. v. Killebrew*, (Tex.) 20 S. W. Rep. 182.

Where the amount of damages claimed in a petition is fixed at \$1,000, a judgment upon a verdict for \$1250 will not be reversed as excessive because the judge in instructing the jury told them several times that they must not exceed the amount claimed in the petition. *Eddy v. Still*, 3 Tex. Civ. App. 346, 22 S. W. Rep. 525.

Error of the court in charging the jury that the widow in this case could recover her actual damages, not exceeding \$5000, is immaterial where she is entitled to recover, if anything, the fixed sum of \$5000. *Schler-*

*eth v. Missouri Pac. R. Co.*, 115 Mo. 87, 21 S. W. Rep. 1110.

Where a party is not entitled to damages for land taken by a railroad, a verdict for the company will not be disturbed for any error made by the court as to the measure of damages. *Dryden v. St. Joseph & D. C. R. Co.*, 23 Kan. 525.—QUOTING *St. Joseph & D. C. R. Co. v. Dryden*, 17 Kan. 282.

The error of giving an instruction submitting elements of damages of which no definite evidence has been given is not ground for the reversal of the judgment where the plaintiff has remitted enough of the verdict to cover all damages which could have been thus improperly found. *Crowley v. St. Louis, I. M. & S. R. Co.*, 24 Mo. App. 119.

Where, in an action against a railroad company for personal injuries, plaintiff introduces testimony as to loss of earnings without objection, it is not error to instruct that the jury may award damages for such loss, although there is no special averment in the petition claiming the same. *Mellor v. Missouri Pac. R. Co.*, 47 Am. & Eng. R. Cas. 450, 105 Mo. 455, 16 S. W. Rep. 849.

The court authorized a finding of damages for "sums paid out" by the plaintiff for medical services. He had paid none, but had become liable to the amount of fifty dollars. *Held*, that the error did not affect the substantial rights of defendant upon the merits, and was not a ground for a reversal. *Gorham v. Kansas City & S. R. Co.*, 113 Mo. 408, 20 S. W. Rep. 1060.

**82. Instructions as to punitive damages.\***—It is error for the trial judge to charge upon the subject of vindictive damages in a personal injury case, when the facts are clearly insufficient to justify the allowance of such damages. But for this error the court will not reverse if it clearly appears that no injury has resulted therefrom. *East Tenn., V. & G. R. Co. v. Lee*, 90 Tenn. 570, 18 S. W. Rep. 268.

In damage suits a practice of instructing juries that they may award damages in any amount not exceeding that claimed in the petition should be condemned, but such a charge will not be regarded as reversible error, where the verdict, under the evidence, is not excessive. *Texas & P. R. Co. v. Wills*, 2 Tex. App. (Civ. Cas.) 700.

\* See also *ante*, 49.

**83. Refusals to instruct.\***—In suits for personal injuries, a refusal to grant instructions, correct in themselves, is not reversible error where the trial judge states the case fairly to the jury and includes in a general charge all the points contained in the instructions refused. *Gleeson v. Virginia Midland R. Co.*, 1 App. Cas. (D. Col.) 185.

Thus the refusal to give an instruction to the effect that, if the jury believed that deceased was not a passenger on the car they are to find for the defendant, is not reversible error when instructions to the same effect were given. *Muehlhausen v. St. Louis R. Co.*, 28 Am. & Eng. R. Cas. 157, 91 Mo. 332, 2 S. W. Rep. 315.

Where a plaintiff in an action for personal injuries claims both actual and exemplary damages, the company cannot complain of a refusal of the court to instruct the jury touching exemplary damages, where the verdict of the jury is for actual damages only. *Texas & P. R. Co. v. Watts*, (Tex.) 18 S. W. Rep. 312.

Where a railroad company is sued for the negligence of its employes it cannot complain of the refusal of the trial court to give an instruction which it asks for, imposing a higher degree of care upon such employes than that imposed by the instruction which the court gave. *Fl. Worth & D. C. R. Co. v. Mackney*, 83 Tex. 410, 18 S. W. Rep. 949.

It may be error to refuse to charge that a railway company is required to exercise more than the usual amount of care in running its trains through populous towns, because of the greater peril; still in an action for personal injuries such error is cured by a finding that the injury sued for was sustained through the negligence of the company. *McAdoo v. Richmond & D. R. Co.*, 41 Am. & Eng. R. Cas. 524, 105 N. Car. 140, 11 S. E. Rep. 316.

In the absence of proof that plaintiff was in charge of the car at the time of the injury, except so far as implied in his service as brakeman, or had any duty of inspecting it, there was no error in refusing to charge that it was his duty to observe any defect in it, and to avoid it, if dangerous, and that his failure to do so would prevent a recovery. *Wedgwood v. Chicago & N. W. R. Co.*, 44 Wis. 44, 19 Am. Ry. Rep. 393.

In an action for injuries caused by colliding with a street car, the company requested

an instruction that if plaintiff "wilfully" obstructed the passage of the car he was guilty of contributory negligence. The court had already instructed as to plaintiff's duty to turn off the track, and that a failure to do so would constitute contributory negligence. *Held*, that a denial of the request was no ground for the reversal of a judgment. *Quinn v. Atlantic Ave. R. Co.*, 12 N. Y. Supp. 223.—FOLLOWED IN *Witte v. Brooklyn City R. Co.*, 4 Misc. (N. Y.) 286.

A passenger sued an elevated railway company for injuries received, caused by the train starting before he had time to alight. The issue was whether an employe of the company or a stranger pulled the bell-cord and caused the train to start. The court fully instructed the jury as to the liability of the company in either case. *Held*, that after this a refusal to charge that there was no proof that the company's service was faulty, or that the bell-cord was improperly located, was not prejudicial to the defendant. *Ferry v. Manhattan R. Co.*, 44 Am. & Eng. R. Cas. 331, 118 N. Y. 497, 23 N. E. Rep. 822, 29 N. Y. S. R. 933; *affirming* 22 J. & S. 325, 6 N. Y. S. R. 821.

In an action for personal injuries there was positive evidence by plaintiff's physician that he would never recover from his injuries. *Held*, that a refusal to charge that there was no evidence to justify an allowance for future damages or for permanent disability was not error. *Johnson v. Broadway & S. A. R. Co.*, 2 Sivo. Sup. Ct. 532.

Plaintiff, a passenger, sued two railroad companies for a personal injury received by his train colliding with a freight train on the other road, at a point where the two tracks crossed. It appeared that the freight train was running "wild." *Held*, that, as defendant's liability was fixed by conclusive evidence showing negligence at the crossing, the refusal of the court to instruct as to whether a statute requiring trains to run on schedule time was applicable to such case or not was harmless error. *Kansas City, Ft. S. & M. R. Co. v. Stoner*, 52 Am. & Eng. R. Cas. 462, 51 Fed. Rep. 649, 4 U. S. App. 109, 2 C. C. A. 437.—FOLLOWING *Iron S. M. Co. v. Mike & S. G. & S. M. Co.*, 143 U. S. 394, 12 Sup. Ct. Rep. 543. QUOTING *Smith v. Shoemaker*, 17 Wall. (U. S.) 630.

**84. Refusal to direct verdict.\***—A case may be presented in which the re-

\* See also *ante*, 18, 53.

\* See also *post*, 101.

refusal to direct a verdict for the defendant at the close of plaintiff's testimony will be a good ground for the reversal of a judgment in favor of the plaintiff if defendant rests his case on such testimony and introduces none on his own behalf; but where a railroad company is sued for personal injuries to a fireman, and the company goes on with its defense and puts in testimony after such refusal; and the jury, under proper instructions, find against the company on the whole evidence, a judgment will not be reversed, in the absence of defendant's testimony, on account of the original refusal, even though it would not have been wrong to give the instruction at the time it was asked. *Grand Trunk R. Co. v. Cummings*, 106 U. S. 709, 1 Sup. Ct. Rep. 493.

**85. Errors cured by other parts of the charge.**—(1) *General rules.*—Every charge of a court to a jury must be tested by the facts to which it is applicable; the announcement, therefore, of a general principle in a charge, which in the abstract may be wrong, will not be cause for reversal if it was so modified by the charge, in view of the facts of the case, that it could not affect the rights of the party complaining. *Texas & P. R. Co. v. Wright*, 23 Am. & Eng. R. Cas. 304, 62 Tex. 515.

Although one part of a charge, when taken alone, may be inaccurate or seem to intimate an opinion on the evidence, yet if the whole charge, taken together, lays down the law correctly, and is sufficiently clear to be understood by jurors of ordinary capacity and understanding, it is sufficient, and a reversal will not be granted. *Georgia R. Co. v. Thomas*, 73 Ga. 350.

An error of law in instructing for the appellee is no ground for reversal where the same proposition of law is given in an instruction for the appellant. *Crutchfield v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 255, 17 Am. Ry. Rep. 200.—**DISTINGUISHED IN** *Lincoln v. St. Louis, I. M. & S. R. Co.*, 75 Mo. 27.

Where an instruction for plaintiff is faulty in omitting the requirement of proper care on the part of plaintiff, the error will be harmless when that requirement is prominently set forth as an essential element to a recovery in other instructions on both sides. *Chicago & A. R. Co. v. Johnson*, 116 Ill. 206, 4 N. E. Rep. 381. *Dougherty v. Missouri R. Co.*, 34 Am. & Eng. R. Cas. 488, 97 Mo. 647, 11 S. W. Rep. 251.—**FOLLOWING**

*Owens v. Kansas City, St. J. & C. B. R. Co.*, 95 Mo. 169. **OVERRULING** *Sullivan v. Hannibal & St. J. R. Co.*, 88 Mo. 169.

An instruction which might be construed as wrongfully placing the burden of proof on defendant is no cause for a reversal where other parts of the charge clearly place the burden on plaintiff. *Neville v. Chicago & N. W. R. Co.*, 79 Iowa 232, 44 N. W. Rep. 367.

An instruction to the effect that a carrier of passengers is liable to the same extent as a carrier of goods is error, but is immaterial where the case is finally submitted on the single question as to whether the defendant's employes were negligent. *Caldwell v. Murphy*, 1 Duer (N. Y.) 233.

In an action by a passenger for personal injuries, an instruction that before defendant can excuse itself it must show by a preponderance of testimony that its track, machinery, and appliances were the best of the kind and in perfect condition, does not correctly state the law, but is not ground for reversal where the law is correctly stated in another instruction. *Eureka Springs R. Co. v. Timmons*, 40 Am. & Eng. R. Cas. 698, 51 Ark. 459, 11 S. W. Rep. 690.

An instruction as to the statutory duty of the company in respect to sounding the whistle before crossing a highway, in a case where the plaintiff has sufficient notice of an approaching train, is not material error where the court distinctly charges that the failure to give the signal will not create a liability against the company unless the injury was the result of such failure. *Atchison, T. & S. F. R. Co. v. Wals*, 40 Kan. 433, 19 Pac. Rep. 787.

Where an employé sues, an error in instructing as to the law of fellow-servants is not ground for reversal where another instruction properly states the law. *Texas C. R. Co. v. Rowland*, 3 Tex. Civ. App. 158, 22 S. W. Rep. 134.

The modification of an instruction as to the amount of care required of railroad companies to anticipate and provide against unusual storms, which does not correctly state the law as modified, is not ground for reversal where substantially the same law as requested had been given in the general charge. *Connelly v. Manhattan R. Co.*, 23 N. Y. Supp. 88, 68 Hun 456, 52 N. Y. S. R. 462.

Where a railroad company is sued for personal injuries, an exception that the

court erred in its instruction to the jury on the question of exemplary damages becomes immaterial where the question of exemplary damages is subsequently withdrawn from the jury and a verdict for actual damages only is returned. *Texas & P. R. Co. v. Volk*, 151 U. S. 73.

(2) *Illustrations.*—The court charged that it was the duty of plaintiff on getting on defendant's car to use reasonable care to put himself into as safe a place as he could procure. *Held*, that if it was error to so charge, the error was cured by a charge that if there was room on the front platform it was plaintiff's duty to take his position there. *Bruno v. Brooklyn City R. Co.*, 5 Misc. 327, 25 N. Y. Supp. 507, 55 N. Y. S. R. 215.

An instruction that a railway company is under no obligation to its employés to provide the best and safest appliances for its freight cars, etc., was modified by inserting the word "very" before "best" and adding the words "that could be produced." *Held*, that while the modification was improper, the giving of other instructions for both parties, which stated the defendant's duty in this regard in positive terms, will cure the error. *Chicago, B. & Q. R. Co. v. Warner*, 123 Ill. 38, 14 N. E. Rep. 206; *affirming* 23 Ill. App. 462.

In an action by a brakeman to recover for personal injuries while coupling cars, the allegation was that he was injured by his foot being caught in a frog which had never been blocked. *Held*, that an instruction to the effect that the issue was whether the frog was blocked at the time of the injury is not reversible error where the court further instructed that plaintiff could not recover if the frog had been originally properly blocked and had become defective by use or accident. *Union Pac. R. Co. v. James*, 56 Fed. Rep. 1001.

In an action for the injury of a brakeman on the ground of negligence in the construction of a bridge of the defendant, evidence that the bridge was lower than usual with other companies is inadmissible against the defendant, and an instruction making the defendant's liability for the injury depend on the fact that such bridge was lower than the usual height of bridges is erroneous. But such error may be rendered harmless by an instruction for the defendant to the effect that the law fixes no exact height or standard for such bridges, but only

requires them to be of such height that the employés can perform their duties with reasonable safety to themselves. *Cleveland, C., C. & St. L. R. Co. v. Walter*, 147 Ill. 60, 35 N. E. Rep. 529.

**86. Verdict not influenced by erroneous charge.**—Though a charge of the court may be in some respects incorrect, or present some issues not raised by the pleadings, yet if it appear affirmatively from the record that the finding of the jury was not influenced by such erroneous charge, the case will not ordinarily be reversed. *Houston, E. & W. T. R. Co. v. Hardy*, 61 Tex. 230.

When the record shows that the verdict was warranted by the pleadings, and was not outside the issues made, abstract error in the charge not appearing to have affected the verdict is no ground for reversal. *Hill v. Gulf, C. & S. F. R. Co.*, 80 Tex. 431, 15 S. W. Rep. 1099.

An erroneous charge will not be ground for reversal when, under the evidence adduced, no other conclusion than that reached could have been legally and correctly arrived at. *Dargan v. Pullman Palace Car Co.*, (Tex. App.) 26 Am. & Eng. R. Cas. 149.

The appellate court will not reverse a judgment where the verdict is in accordance with the law and the weight of evidence, though there may have been some inaccuracies in the charge of the trial court, but not on any controlling question. *Boston v. Georgia R. Co.*, 63 Ga. 164.

The law does not presume that a jury in a negligence case, which found a verdict for the plaintiff notwithstanding erroneous instructions by the court upon the law of negligence, were prejudiced thereby in their assessment of damages. *Kalembach v. Michigan C. R. Co.*, 50 Am. & Eng. R. Cas. 15, 87 Mich. 509, 49 N. W. Rep. 1082.

Where by a special verdict the jury find that an accident was caused by the defendant's neglect, and that the plaintiff was not guilty of any contributory negligence, the error, if any, in an instruction from which the jury might possibly have inferred that the plaintiff might recover even if guilty of contributory negligence, is immaterial. *Hinton v. Cream City R. Co.*, 65 Wis. 323, 27 N. W. Rep. 147.

Where an adjoining landowner sues a railroad company for damages to his land caused by flooding it, and the verdict is for a sum less than the evidence shows him

clearly entitled to for the flooding alone, it will not be disturbed because the court improperly submitted other issues to the jury, such as damages by tramping his land, etc. *Texas C. R. Co. v. Clifton*, 2 *Tex. App. (Civ. Cas.)* 433.

**87. Errors cured by verdict.**—Where in an action for killing cattle the complaint alleged that the defendant had failed to fence its road as required by law, so that the cattle in question could and did stray upon the railroad, but failed to allege that said cattle were killed by a train of cars on defendant's road. *Held*, that even if the complaint was defective (as to which point *quere*) the defect was cured by verdict and judgment, and could not be taken advantage of on appeal. *Baltimore, O. & C. R. Co. v. Kreiger*, 13 *Am. & Eng. R. Cas.* 602, 90 *Ind.* 380.

**88. Informal verdict or findings.**—Where a company is sued in two counts, one for negligently killing a horse and the other for destroying property by fire, it is not reversible error for the jury to return a verdict for the plaintiff without showing under which count it is. *Chicago & A. R. Co. v. Elmore*, 32 *Ill. App.* 418.

Where a complaint charges a railroad company as liable for goods lost as a common carrier, a verdict showing that it is liable as a warehouseman, if supported by the evidence, will not be set aside. *Hoyt v. Nevada County N. G. R. Co.*, 68 *Cal.* 644, 10 *Pac. Rep.* 187.

In an action by an abutting owner against an elevated railway, the trial court found as a fact that the construction and operation of the road had caused a diminution in the rental value of plaintiff's property, causing damages to the amount of \$5198. The appellate court found that this conclusion was sustained by the evidence. At the request of the defendant the trial court also found that the evidence did not establish any definite amount of damage for which any judgment could be rendered. The defendant claimed that the two findings were inconsistent, and that therefore the judgment should be reversed. *Held*, that as the first finding was supported by the evidence, and the second was a mere naked conclusion of law not supported, it was not ground for reversal. *Welsh v. Metropolitan El. R. Co.*, 25 *J. & S. (N. Y.)* 408, 8 *N. Y. Supp.* 492, 29 *N. Y. S. R.* 511.—*QUOTED IN Knox v. Metropolitan El. R. Co.*, 58 *Hun*

(*N. Y.*) 517, 36 *N. Y. S. R.* 2, 12 *N. Y. Supp.* 848.

**89. Cases where, on the whole, justice has been done.**—Errors in charging the jury are no ground for reversing a judgment which is clearly right. *Taylor v. Danville, O. & O. R. Co.*, 10 *Ill. App.* 311.

The fact that the trial court did not emphasize the rule as to the highest degree of care, skill, and prudence required on the part of the company did not furnish a ground for reversal, as, in view of the uncontradicted testimony in the case as to the injury having been caused by the criminal act of a stranger, it was only necessary to inquire whether defendant had rebutted the presumption of negligence which arose from the fact of the injury. *Fredericks v. North. & C. R. Co.*, (*Pa.*) 58 *Am. & Eng. R. Cas.* 41.—*QUOTING Spear v. Philadelphia, W. & B. R. Co.*, 119 *Pa. St.* 61.

Nor did the fact that the court expressed its opinion that the precautions taken by the defendant were sufficient to relieve it of the charge of negligence, constitute reversible error where the jury were distinctly told that the question was for their decision, and they were left entirely free to act upon their own judgment. *Fredericks v. Northern C. R. Co.*, (*Pa.*) 58 *Am. & Eng. R. Cas.* 91.

Where the verdict against a railway company for killing stock by the careless running of a train is satisfactory to the trial judge, and is also satisfactory to this court upon the substantial merits of the controversy, tested by the evidence adduced by the company itself, the case will not be remanded for a new trial on account of mistakes or inaccuracies in the charge of the court to the jury. *East Tenn., V. & G. R. Co. v. Burney*, 85 *Ga.* 635, 11 *S. E. Rep.* 1028.

If the trial judge pronounces judgment against a railway company for personal injuries inflicted by its common-law negligence, this court will not reverse, though deeming the judgment erroneous upon the reason stated, if the company was liable for non-observance of the statutory precautions. *Little Rock & M. R. Co. v. Wilson*, 90 *Tenn.* 271, 16 *S. W. Rep.* 613.

While the testimony of a witness that he had fallen off the wall where the plaintiff was injured was of doubtful admissibility, unless the testimony went further and showed that some responsible officer of the company had notice of the fall, and perhaps then it



would have been admissible only to show, not that the witness fell and hurt himself, but that it was a dangerous place and the company had notice of it; yet, as there is no doubt that it was a dangerous place and that the company ought to have known it, the admission of such testimony was not sufficient to work a reversal. *Central R. & B. Co. v. Smith*, 34 *Am. & Eng. R. Cas.* 456, 80 *Ga.* 526, 5 *S. E. Rep.* 772.

#### 4. Objections not properly taken below.

#### 90. Objections to the jurisdiction.

—Whether a city can sue a railroad company at law for the collection of taxes is not a jurisdictional question which can be raised at any time; it must be raised in the court below by demurrer or otherwise. *Davenport v. Chicago, R. I. & P. R. Co.*, 38 *Iowa* 633.

Suit was brought before a justice against a company for killing stock for a sum which exceeded the jurisdiction of the justice, and without objection the case was tried there and taken on appeal to the circuit court, which had jurisdiction of such cases, and was there tried on the merits without objection. *Held*, that the want of jurisdiction of the justice could not be urged on appeal. *South & N. Ala. R. Co. v. Brown*, 53 *Ala.* 651, 13 *Am. Ry. Rep.* 166.

**91. Objections to process.**—Process issued against a railroad company was returned as served upon "— Bush, a conductor." By leave of the court the return was amended by inserting the Christian name of the conductor in the blank, and a motion to quash the return was overruled. On appeal it was urged that the amended return was defective because it did not show service by copy, and because it did not show service upon a conductor of defendant's road. *Held*, that, as the objection made in the court below only called attention to the uncertainty as to the person on whom it was served, and not to the mode of service, such objections could not be made on appeal. *Evansville & C. R. Co. v. Lawrence*, 29 *Ind.* 622.

**92. Objections relating to pleadings.**—Where the sufficiency of a complaint is tested for the first time in the appellate court, it will be upheld if it contains facts enough to bar another action for the same cause. *Citizens' St. R. Co. v. Willcoy*, (*Ind.*) 58 *Am. & Eng. R. Cas.* 485.

A complaint against the "Wichita &

Southwestern Company," as a corporation, omitting the word "railroad," but subsequently describing the corporation by its full name, is not ground for reversing a judgment where no objection is made in the trial court. *Atchison, T. & S. F. R. Co. v. English*, 38 *Kan.* 110, 16 *Pac. Rep.* 82.

In an action against common carriers, an objection that the declaration does not allege that the defendants were common carriers should be made in the court below, or it is not open on a bill of exceptions. *Sanford v. Housatonic R. Co.*, 11 *Cush. (Mass.)* 155.

Under N. Y. act of 1850, p. 232, an objection, where a passenger, who holds a check for lost baggage sues, that the complaint does not allege that he was a passenger, cannot be raised for the first time on appeal. *Davis v. Cayuga & S. R. Co.*, 10 *How. Pr. (N. Y.)* 330.

Where there are four counts in an action against a railroad for killing stock, all similar except as to the description of the stock killed, the supreme court will not reverse the cause because a general judgment on all the counts was rendered for plaintiff, when such question was not brought before the lower court in the motion for a new trial. *Fickle v. St. Louis, K. C. & N. R. Co.*, 54 *Mo.* 219, 12 *Am. Ry. Rep.* 376.—*QUOTED IN Sweet v. Maupin*, 65 *Mo.* 65.

After a trial on the merits it is too late for the defendant then to object that the question whether it had placed a competent man in charge of the work was not raised by the pleadings. Where pleadings would have been amendable of course in the court below, the amendment will be considered as having been made. *Trainor v. Philadelphia & R. R. Co.*, 137 *Pa. St.* 148, 20 *Atl. Rep.* 632.

It was objected that an action against a railroad company for killing stock was tried and presented to the jury upon issues not raised in the pleadings. There were special exceptions, but none as to this objection. *Held*, that the making of specific exceptions in the court below must be regarded as a waiver of others not urged. *Price v. Burlington, C. R. & M. R. Co.*, 42 *Iowa* 16.

In an action against a railroad company for trespass in constructing and operating its railroad upon a public street in a city, between the centre thereof and plaintiff's adjacent lots, the complaint properly de-

scribed the lots, and alleged that the trespass was committed thereon, but did not allege plaintiff's ownership of the fee to the centre of the street in front of the lots. The answer admitted, and the evidence at the trial proved, that the road was constructed in the street, but no objection was taken in the court below on the ground that the complaint failed to describe properly the *locus in quo*, and it appeared that the defendant had not been misled or prejudiced by the description in the complaint. *Held*, that an objection to such description could not be taken for the first time in the appellate court. *Hartz v. St. Paul & S. C. R. Co.*, 21 Minn. 358, 18 Am. Ry. Rep. 430.

**93. Objections to competency of jurors.**—In an action against a railroad to recover damages to real estate caused by the location and building of its road, objections to the competency of jurors on account of bias in favor of the landowner must be assigned in the motion for a new trial, to be available in the supreme court. *Hastings & G. I. R. Co. v. Ingalls*, 15 Neb. 123.—FOLLOWED IN *Weir v. Burlington & M. R. R. Co.*, 19 Neb. 212.

**94. Objections to competency of evidence.**—(1) *General rules.*—General objections to the admission of evidence are sufficient on appeal if it appears that the ground for objection could not have been misunderstood, and, if it had been specified, the objection could not have been obviated. *Toser v. New York C. & H. R. R. Co.*, 8 N. Y. S. R. 56, 105 N. Y. 659, 1 Silv. App. 450.

Where a case is tried by the court without a jury, and there is abundant evidence, which is not objected to, to support the findings, an appellate court will sustain a judgment where the objections to evidence do not sufficiently point out error to enable the complaining party to raise the point intended. *Bohlen v. Metropolitan El. R. Co.*, 39 N. Y. S. R. 151, 14 N. Y. Supp. 378, 27 J. & S. 565; reversed in 133 N. Y. 677, *mem.*; 31 N. E. Rep. 626, 45 N. Y. S. R. 931.—DISTINGUISHING *McGean v. Manhattan R. Co.*, 117 N. Y. 219, 27 N. Y. S. R. 337; *Avery v. New York C. R. & H. R. R. Co.*, 121 N. Y. 31, 30 N. Y. S. R. 471.

When on the trial no objection was made to any evidence on which the plaintiff relied to sustain his claim for damages,

and a verdict for the plaintiff showed the special grounds on which the jury rested their verdict, the pleadings being sufficient to authorize such verdict, in support of which there was some evidence, the judgment was not reversed on appeal. *Houston, E. & W. T. R. Co. v. Hardy*, 61 Tex. 230.

Where the question was a proper one to put to the witness it is no ground for a new trial that the answer was objectionable, when no motion was made in the court below to strike out the answer. *Woodiey v. Baltimore & P. R. Co.*, 8 Mackey (D. C.) 542.

Whether it be error or not to allow a husband to testify for his wife in an action brought by her to recover damages, the question cannot be raised for the first time on appeal. *Texas & P. R. Co. v. Casey*, 52 Tex. 112.

Where in an action against two defendants jointly evidence was introduced tending to establish a joint liability, it is too late to raise the objection for the first time in this court that evidence was suffered to go to the jury tending to prove negligence on the part of one defendant only. *Tierney v. Minneapolis & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 545, 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. Rep. 229.

Where a railroad, without objection, permits the introduction of evidence to show that the company had not afforded an employé a safe place to work and had not properly protected him against the carelessness of fellow-servants, the complaint charging that he was injured by reason of the careless management of the company's train, without fault on his part, it cannot be objected after a verdict that the evidence was improperly admitted as showing negligence not charged in the complaint. *St. Louis, A. & T. R. Co. v. Triplett*, 54 Ark. 289, 16 S. W. Rep. 266, 15 S. W. Rep. 831.—QUOTING *St. Louis, I. M. & S. R. Co. v. Harper*, 44 Ark. 527.

Where evidence in relation to certain damage is admitted without objection or exception at the trial, the propriety of including such damage, if any, in the assessment cannot be questioned on appeal. *Colorado Midland R. Co. v. Brown*, 47 Am. & Eng. R. Cas. 164, 15 Colo. 193, 25 Pac. Rep. 87.

(2) *Illustrations.*—A company when sued for negligently causing the death of a minor pleaded as a defense a release of damages by the plaintiff. Plaintiff did not

deny the execution of the release in the manner required by Cal. Code of Civ. Proc. § 448, but was permitted to prove, without objection, that at the time the release was executed he was not competent to contract. The verdict being for plaintiff, defendant objected that there was no issue as to the execution of the release, and that by failing to make the affidavit required by said section the execution of the release was admitted. *Held*, that the question could not be raised in the supreme court, and that it was not tenable. *Crowley v. City R. Co.*, 60 Cal. 628.

A witness was permitted to testify to the condition of a roadbed of a railroad a year after an accident there. He was on the train derailed, and assisted the party injured and the other passengers out of the wreck, and testified that he then saw pieces of broken rail and some rotten ties, but his attention was not particularly directed to them, and estimated the number of rotten ties on the roadbed at one out of every five. It turned out on cross-examination that the estimate was, in part at least, based upon an examination of the ties and track made by him shortly before the trial. No objection was made on the trial to this evidence or motion to exclude the same. *Held*, that the objection came too late on appeal. *Chicago, P. & St. L. R. Co. v. Lewis*, 145 Ill. 67, 33 N. E. Rep. 960.

A plaintiff in a suit for personal injuries called two witnesses, who testified that they were not present when he was injured. *Held*, that after this he could not ask them, for the purpose of impeaching their credibility, whether they had stated otherwise to certain persons; and having stated at the time that his object was to impeach them, the admissibility of the evidence for the purpose of refreshing their memories cannot be considered on appeal. *Moore v. Chicago, St. L. & N. O. R. Co.*, 9 Am. & Eng. R. Cas. 401, 59 Miss. 243.

In an action for personal injuries plaintiff was asked how much he had earned in his business during the year just preceding the accident, which the defendant objected to as immaterial, irrelevant, and incompetent, as not pleaded, and too speculative and remote, which was overruled and excepted to, but no motion was made to strike out the answer. The court limited the recovery to pain and injury. *Held*, that the exception was not well taken. *Wilson v. Brooklyn*

*El. R. Co.*, 30 N. Y. S. R. 240, 9 N. Y. Supp. 277; affirmed in 130 N. Y. 675, mem.; 29 N. E. Rep. 1034, 41 N. Y. S. R. 952.

**95. Objections to sufficiency of evidence.**—The court having ruled upon the sufficiency of the evidence, on a motion that a verdict be directed for the defendant, the sufficiency of the evidence to sustain the verdict may be reviewed on an appeal from the judgment, although no motion for a new trial had been made. *Hefferen v. Northern Pac. R. Co.*, 45 Minn. 471, 48 N. W. Rep. 1, 526.

The defendant cannot complain on appeal of the failure of proof that the animal entered on the track at a point where it was required by law to fence, where it did not demur to the evidence and the attention of the trial court was not called to such alleged failure of evidence. *Ringo v. St. Louis, I. M. & S. R. Co.*, 91 Mo. 667, 10 West. Rep. 268, 4 S. W. Rep. 396.

Where an individual is sued as being in possession of, and operating a railroad, for killing stock, and the case is tried as if it was taken for granted that he was possessed of the road and operating it, without proof of such facts, an objection that there was no proof that defendant operated the road, not taken at the trial, cannot be urged for the first time on a motion for a new trial. *Bennett v. Covert*, 13 U. C. C. P. 555.

**96. Objections for variance.**—Where the question is made on appeal that there was a variance between the declaration and the evidence, but there was no objection made at the trial, and it appears that the variance was such that an amendment would have been allowed, if asked for, so as to conform the pleadings to the evidence, the matter will be considered as waived after verdict. *Illinois C. R. Co. v. Cathey*, 70 Miss. 332, 12 So. Rep. 253.

**97. Objections to counsel's address to the jury.**—When objectionable language is used by counsel in argument, which it is believed may improperly affect the jury, objection should be made by the opposing counsel at the time; failing in this, he cannot ask a reversal of the judgment for that cause, unless the language was plainly prejudicial to an impartial trial. *Gulf, C. & S. F. R. Co. v. Greenlee*, 35 Am. & Eng. R. Cas. 425, 70 Tex. 553, 8 S. W. Rep. 129.

\* See also *ante*, 27, 39, 69.

The failure of counsel to call the attention of the court to the effect which improper remarks of counsel were intended to have upon the jury, with a request that they be cautioned against allowing the remarks to influence their verdict, and the fact, as shown by the record, that the remarks seem to have passed entirely from the minds of the jury, render the making of the same non-prejudicial error. *Kirchner v. Detroit City R. Co.*, 91 *Mich.* 400, 51 *N. W. Rep.* 1059.

Objections to testimony must be made at the trial; and an objection that argument of counsel was based on incompetent testimony cannot be raised on appeal for the first time. *Sears v. Seattle Con. St. R. Co.*, 6 *Wash.* 227, 33 *Pac. Rep.* 389, 1081.

Where in the closing argument of the second trial of a case plaintiff's attorney referred to and commented upon the testimony of witnesses as shown by the transcript of their testimony given on the former trial, he is not guilty of such misconduct as justifies a reversal of the judgment, although such testimony was not formally offered on the second trial, if he supposed that it had been and so treated it, and defendant's attorney knew that he was so treating it, but made no objection. *Pence v. Chicago, R. I. & P. R. Co.*, 42 *Am. & Eng. R. Cas.* 126, 79 *Iowa* 389, 44 *N. W. Rep.* 686.

Where the bill of exceptions recites that at the trial plaintiff's counsel asserted that the locality which was exempted from the operation of the ordinance regulating the speed of moving trains was some distance from the place of the accident, and this was not denied by defendant's counsel, who seemed to acquiesce in the statement, the fact that the accident did not occur in the exempted locality will be taken to have been conceded at the trial. *Walsh v. Missouri Pac. R. Co.*, 102 *Mo.* 582, 14 *S. W. Rep.* 873, 15 *S. W. Rep.* 757.

**98. Objections to instructions.**—A verdict found on conflicting evidence will not be disturbed on appeal, where no objection is made to the charge of the court. *Morgan v. New York C. & H. R. R. Co.*, 23 *N. Y. Supp.* 197.

Where a defendant submits the question of negligence to the jury by an instruction, he will be estopped, on appeal or error, from claiming that there was no proof of negligence. *Consolidated Coal Co. v. Haenni*, 146 *Ill.* 614, 35 *N. E. Rep.* 162.

1 D. R. D.—27.

Where the defendant's attorney, upon the trial, submitted to an alleged error in the charge, and encouraged it by preparing and submitting requests to charge upon the point, in which he recognized the propriety of its consideration as an element of damage, it is too late on appeal to urge error in this particular. *Redmond v. St. Paul, M. & M. R. Co.*, 39 *Minn.* 248, 40 *N. W. Rep.* 64.

When an exception is reserved to a charge which contains two or more distinct or separable propositions, the attention of the court should be directed to the precise point of objection. An exception "to this charge and to each part thereof, separately and successively," will be construed as a general exception to the entire charge. *South & N. Ala. R. Co. v. Jones*, 56 *Ala.* 507.—QUOTED IN *Mobile & M. R. Co. v. Jurey*, 111 *U. S.* 584.

Where suit is brought to recover for injuries to a team, and no claim is made in the complaint for injury to the harness, and the evidence relating thereto is stricken out on motion of defendant, an instruction that the jury should allow for the harness, not objected to at the time, is not reversible error. *Leak v. Rio Grande W. R. Co.*, 9 *Utah* 246, 33 *Pac. Rep.* 1045.

**99. Objections to prayer for instructions.**—The plaintiff, while going over a railroad crossing, had his foot fastened in a hole in a culvert which covered a little drain that ran along the side of the track. While in this condition an engine backed down upon him and cut off his foot. At the trial the plaintiff offered ten prayers, which were all granted by the court. The defendants made objections. *Held*, that where prayers of the opposite party are excepted to only on the ground of want of evidence to support them, the objection that they are incorrect as legal propositions is deemed waived, and will not be considered on appeal. *Baltimore & O. R. Co. v. Mali*, 28 *Am. & Eng. R. Cas.* 628, 66 *Md.* 53, 5 *Atl. Rep.* 87.

**100. Necessity of request to charge.**—(1) *General rules.*—When the statement of the cause of action and of the defense made by the court in its charge is correct as far as it goes, it is the duty of a party desiring further instructions to ask for them, otherwise he cannot complain that they are not given. *San Antonio St. R. Co. v. Helm*, 19 *Am. & Eng. R. Cas.* 158, 64 *Tex.* 147.

In the absence of a request for a more

specific charge, a judgment, in an action against a street-car company to recover for personal injuries to a passenger, will not be reversed on the ground that no sufficient instruction was given the jury by which to determine the damages. *Pederson v. Seattle Con. St. R. Co.*, 6 Wash. 202, 33 Pac. Rep. 351, 34 Pac. Rep. 665.

Where a passenger sues for being ejected from the cars after he had surrendered a ticket, as he claimed, and the defense is made that he was ejected because he never had or surrendered a ticket, and that he was intoxicated and used unbecoming language, the want of an instruction in relation to the right of the conductor to remove the plaintiff, if intoxicated, or using improper language, is not the subject of exception where no request was made for such instruction. *Moore v. Filchburg R. Co.*, 4 Gray (Mass.) 465.

Where a company is sued to recover for personal injuries, and relies on contributory negligence as a defense, after the court has properly instructed the jury as to the "ordinary care" that the company should use to prevent injuries, it is not ground for exception that the court fails to instruct as to the effect of contributory negligence, where no request is made for such additional instruction. *Baltimore & O. R. Co. v. Bahrs*, 28 Md. 647. *Hart v. Charlotte, C. & A. R. Co.*, 33 So. Car. 427, 12 S. E. Rep. 9.

The failure of the court to define "unfitness, gross negligence, and carelessness," which it instructed the jury would authorize a recovery by plaintiff, is not reversible error when defendant's counsel requested no definition of such terms. *Galveston, H. & S. A. R. Co. v. Arispe*, 48 Am. & Eng. R. Cas. 350, 81 Tex. 517, 17 S. W. Rep. 47.

Error cannot be predicated upon the omission of the court to define the terms "diligence," "negligence," and "extraordinary care" employed in instructions to the jury in an action for personal injuries, when the party complaining of such omission has failed to ask the court to define the terms. *Cogswell v. West St. & N. E. Elect. R. Co.*, 52 Am. & Eng. R. Cas. 500, 5 Wash. 46, 31 Pac. Rep. 411.

Instructions to the jury, defining negligence as "failure to exercise that degree of care which persons ordinarily exercise under like circumstances," and ordinary care as "such care and prudence as may reasonably be expected of a woman of the age plaintiff

was under the circumstances in which she was placed," are held, though somewhat meagre, not to be erroneous, in the absence of any request to make them more full. *Patry v. Chicago, St. P., M. & O. R. Co.*, 82 Wis. 408, 52 N. W. Rep. 312.

(2) *Illustrations.*—The court below, at the request of the plaintiff, instructed the jury upon four separate and distinct propositions, the first two containing only statements of facts not disputed, the last two propositions of law conceded to be correct. *Held*, on appeal, that if the defendants claimed that, in considering the last two propositions the jury had no right to take into account the facts stated in the first two, and claimed that the jury might have been led to do so by the fact that the court stated those facts, they should have asked the court to give such instruction as would guard against it; and, not having done so, they could not insist upon the objection in the appellate court. *Hartson v. First Div. St. P. & P. R. Co.*, 21 Minn. 517.

The plaintiff, a coal-handler, was injured while employed about an appliance for the storage of coal, dangerous and unfamiliar to him, and placed in the charge of a fellow-employee during the temporary absence of the regular foreman, the appliance being supplied by a contractor who was to "erect and operate it" at his own expense. *Held*, that the question whether the temporary foreman was competent to manage the appliance having been fairly raised by the evidence, and the trial judge having correctly stated who were fellow-servants, error cannot be assigned to the omission of specific instructions as to the relation of the foreman to the plaintiff, where no request for them was made. *Trainor v. Philadelphia & R. R. Co.*, 137 Pa. St. 148, 20 Atl. Rep. 632.

Suit was prosecuted against a company by parents for negligently causing the death of their son, who was an employee of defendant. The court instructed the jury that if the death was caused by the "unfitness, gross negligence, and carelessness" of the officers of the company, then they must find for the plaintiff. *Held*, that, in the absence of any request by the defendant for a definition of these terms, a failure to so define them was not ground for reversal. *Galveston, H. & S. A. R. Co. v. Arispe*, 48 Am. & Eng. R. Cas. 350, 81 Tex. 517, 17 S. W. Rep. 47.



**101. Necessity of motion to direct verdict.\***—In the absence of a request for a direction to find for the defendant, on the trial of an action for personal injuries, it cannot be alleged that the case should have been taken from the jury, on the ground of contributory negligence and that the injury was received under a risk apparent and assumed by the plaintiff as incident to his employment. *Bentley v. Cranmer*, 137 Pa. St. 244, 20 Atl. Rep. 709.

**102. Objections to findings of fact.**—If the conclusions of fact by the court are not sufficiently full and specific, the attention of the court should be called to the defect by motion, exceptions, or in some other proper method, otherwise it will not be considered on appeal. The findings of fact by the court stand on the same footing, in this respect, as the verdict of a jury. *Gulf, C. & S. F. R. Co. v. Fossett*, 66 Tex. 338, 1 S. W. Rep. 259.—FOLLOWING International & G. N. R. Co. v. Smith, 62 Tex. 252; *Belo v. Wren*, 63 Tex. 727; *Mochring v. Hall*, 66 Tex. 240.

The referee found that defendant "received into its care the said plaintiff and his baggage, consisting of one trunk containing his personal effects," and that the value thereof was \$554. These findings were excepted to. It was claimed by defendant, on appeal, that certain of the articles contained in the trunk, and included in the findings, were not in fact baggage. *Held*, that the exception was not available to present the question; that it should have pointed out and designated the specific articles claimed not to have been properly included. *Ledoux v. Grand Trunk R. Co.*, 61 N. Y. 613.

**103. Objections to the judgment.**—An objection that a judgment is for a greater amount than the sum claimed in the complaint cannot be raised for the first time on appeal. *Government St. R. Co. v. Haxlon*, 53 Ala. 70.

An objection that a judgment against a railroad company for destroying grain by fire included some grown on the company's right of way cannot be raised for the first time on appeal. *Slossen v. Burlington, C. R. & N. R. Co.*, 7 Am. & Eng. R. Cas. 509, 10 N. W. Rep. 860.

**104. Objections waived below.**—Where a railroad company is sued for per-

sonal injuries to an employé, and after plaintiff's evidence is in, moves for a compulsory nonsuit, which is overruled and excepted to, the company waives the benefit of the exception by proceeding with its defense and introducing evidence. *Union Pac. R. Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. Rep. 756.

In an action against a company for killing a brakeman, where negligence, consisting in running the train at too great a rate of speed, is expressly waived at the trial, it cannot be urged, upon appeal, as a circumstance of negligence, that the omission of the defendant to place a signal "caused the increased rate of speed." *Moran v. New York C. & H. R. R. Co.*, 67 Barb. (N. Y.) 96, 3 T. & C. 770.

The defendant's point, that the animal was abandoned by the plaintiff owner without proper care or attention, which might have lessened the amount of the injury, is not proper to be considered for a reversal, when no evidence was offered to show that the damages could have been mitigated by such care and attention, and the matter was not brought to the attention of the trial court by instruction offered or otherwise. *Jackson v. St. Louis, I. M. & S. R. Co.*, 36 Mo. App. 170.

**105. Necessity of motion for new trial below.**—The objection that there is no evidence to support the verdict cannot be raised in the supreme court where there has been no motion for a new trial in the lower court. *Byrne v. Minneapolis & St. L. R. Co.*, 29 Minn. 200, 12 N. W. Rep. 698.

The fact that the damages may be excessive is no ground for reversal of a judgment when not made the ground of a motion for a new trial, nor assigned as error on appeal. *Chicago & A. R. Co. v. Glinny*, 19 Ill. App. 639, *Ottawa, O. & F. R. V. R. Co. v. McMath*, 1 Ill. App. 429. *Webster v. Cedar Rapids & St. P. R. Co.*, 27 Iowa 315, *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270, 13 S. W. Rep. 889, 14 S. W. Rep. 760. *Chicago, S. F. & C. R. Co. v. Vivian*, 33 Mo. App. 583.

In an action by a person injured by a moving train at a street crossing, where contributory negligence was relied upon as a defense, and the issue was so made that the plaintiff might have shown wilful negligence upon the part of the company, and thus have avoided the effect of his own contributory negligence, the court on its own

\* See also ante, 84.



motion so instructed the jury, and submitted special findings so as to leave to their consideration only the questions of negligence of the company on the one hand, and of contributory negligence of the plaintiff on the other, which was excepted to, but not made the basis of a motion for a new trial. *Held*, that the error of the court in thus narrowing the issue as submitted to the jury was waived by not including it in the motion for a new trial. *Gaffney v. Pennsylvania R. Co.*, (Ky.) 1 S. W. Rep. 677.

**106. What objections may be first made on appeal.**—The question of the jurisdiction of the district court of an action against a railroad company for violation of a city ordinance may be raised for the first time in the supreme court. *Lansing v. Chicago, M. & St. P. R. Co.*, 85 Iowa 215, 52 N. W. Rep. 195.

Where a landowner sues a railroad company for the value of land taken for right of way, and the value of rocks taken therefrom, an objection that the petition does not state facts constituting a cause of action may be raised on appeal for the first time. *Childs v. Kansas City, St. J. & C. B. R. Co.*, (Mo.) 17 S. W. Rep. 954.

**107. Various applications of the rule.**—Where a record shows that a railroad company appeared by attorney in the court below, and consented to the foreclosure of a mortgage on its road, on appeal such appearance and consent must be taken as facts; if the attorney was not authorized to so appear and consent, his want of authority can only be taken advantage of in the court below. *Pacific R. Co. v. Ketchum*, 101 U. S. 289.

Where the question of the joint liability of two railway companies is not raised in the trial court by exception to the ruling of the court in relation to the exclusion or admission of evidence, by an instruction to the jury, either given or asked, or by any points made in the defendants' motion for a new trial, it cannot be considered by this court. *Chicago, M. & St. P. R. Co. v. Darke*, 148 Ill. 226, 35 N. E. Rep. 750.

The question whether the plaintiff was negligent, in placing her property on the front platform of the car, and the point that she did not in fact part with the custody of the box, and so cannot charge the defendants with her loss, are not open to the defendants upon these exceptions, for it does not appear that any such question was

raised or point made at the trial. *Levi v. Lynn & B. R. Co.*, 11 Allen (Mass.) 300.

The supreme court has no jurisdiction of a cause on the ground that it involves the construction of the constitution of the United States or of this state, unless the record as it existed when the case was appealed shows that the constitutional question was fairly and directly raised in the trial court by some of the methods recognized by the practice and procedure of the court. *Bennett v. Missouri Pac. R. Co.*, 105 Mo. 642, 16 S. W. Rep. 947.

The question whether it was the custom of the company to deliver cars at any earlier hour than the one at which they were furnished cannot be raised for the first time on appeal. *McGrew v. Missouri Pac. R. Co.*, 109 Mo. 582, 19 S. W. Rep. 53.

The position (if the facts would sustain it) that the managers of the train were running it in accordance with the regulations of the defendants, and that negligence was not therefore to be imputed to the managers but to their principals, could not be urged on appeal, it not having been presented to the judge on the trial, or passed upon by him. *Coon v. Syracuse & U. R. Co.*, 5 N. Y. 492; *affirming* 6 Barb. 231.

Where an action to recover for the alleged impairment of an easement of light, air, and access appurtenant to plaintiff's land from the construction and operation of an elevated railway was tried upon the assumption that plaintiff had either a fee or an easement in the street, and the litigation was confined to the question of damages, and the point that plaintiff did not own the fee or an easement was not taken on the trial, it is too late to raise the point on appeal. *Drucker v. Manhattan R. Co.*, 30 Am. & Eng. R. Cas. 418, 106 N. Y. 157, 12 N. E. Rep. 568, 8 N. Y. S. R. 599; *affirming* 19 J. & S. 429.

In the absence of any exception taken in the trial court, a judgment in favor of an abutting owner against an elevated railway company, awarding in one action damages for which two actions might properly have been brought, will not be reversed and justice thereby delayed. *Mitchell v. Met.ropolitan El. R. Co.*, 4 Silv. App. (N. Y.) 82.

Where an infant passenger is injured and sues for damages, the question of his right to recover for a diminished power to earn money during minority cannot be raised on

appeal for the first time. *Richmond v. Second Ave. R. Co.*, 27 N. Y. Supp. 780.

When there is a mistrial of a cause and the jury is discharged, the cause may be again tried at the same term, and no objection on account of such second trial can be considered on appeal, unless a motion was made in the court below to continue for the term or postpone to a later day in the term. *Texas & P. R. Co. v. Garcia*, 21 Am. & Eng. R. Cas. 384, 62 Tex. 285.

Where a party does not insist on his right to arbitrate, but goes to trial on the merits, the error in refusing an arbitration cannot be raised on appeal. *London, C. & D. R. Co. v. South Eastern R. Co.*, 40 Ch. D. 100.

A suit to recover damages to adjacent property, caused by the location and operation of a railroad, was tried by both parties on the theory that plaintiff was entitled to recover any diminution in the value of his property caused by such location and operation. *Held*, that, if the suit was not tried on the correct theory, neither party could take advantage of it on appeal. *Chicago & G. W. R. Co. v. Wedel*, 44 Ill. App. 215.

In an action to recover damages to plaintiff's premises caused by the maintenance and operation of defendant's road, the defendant claimed upon appeal to this court that the premises being in the possession of tenants under plaintiff, he could not maintain the action. No such defense was pleaded, nor was the question in any manner raised upon the trial. *Held*, that the point could not be considered in the court of appeals. *Post v. Manhattan R. Co.*, 125 125 N. Y. 697, 26 N. E. Rep. 14, 3 Silv. App. 274, 34 N. Y. S. R. 590; *affirming* 23 N. Y. S. R. 1007.

Where, under N. C. Rev. Code, ch. 17, § 7, in a proceeding by a warrant, upon an appeal to the superior court, a verdict was taken for the value of an animal killed on a railroad—*held*, that it was too late to take the objection in the appellate court that the judgment of the justice of the peace was rendered without a valuation of the animal by freeholders. *Aycock v. Wilmington & W. R. Co.*, 6 Jones (N. Car.) 231.

##### 5. Matters not apparent on the record.

**108. The general rule.**—The supreme court cannot revise the action of the courts below on account of facts not included in the case. *Chicago, M. & St. P. R. Co. v.*

*Wilson*, 42 Am. & Eng. R. Cas. 153, 133 Ill. 55, 24 N. E. Rep. 555; *affirming* 35 Ill. App. 346.

The appellate court will not entertain an appeal, in an action against a carrier for injuries to a horse while in transit, where the abstract does not contain the substance of the record as to the parts assigned as error. *Chicago & G. T. R. Co. v. Crolie*, 33 Ill. App. 17.

**109. Sufficiency of the record, generally.**—Courts will take judicial notice of the public laws of the state, and they need not be specially pleaded or inserted in the record on appeal, and this is so of a public act incorporating a railroad company. *Cincinnati, H. & I. R. Co. v. Clifford*, 33 Am. & Eng. R. Cas. 81, 113 Ind. 460, 13 West. Rep. 384, 15 N. E. Rep. 524.

Where the record shows the filing of a demurrer to certain paragraphs of an answer, but does not show any ruling of the court thereon, or that any reply was filed, no question arises as to the sufficiency of the answer, and the presumption is that the defendant waived a reply. *Jeffersonville, M. & I. R. Co. v. Irvin*, 46 Ind. 180.

The supreme court cannot pass on the effect of misconduct of counsel below, when the only reference thereto in the record is in the form of a statement contained in the motion for a new trial. *Gray v. Chicago, M. & St. P. R. Co.*, 75 Iowa 100, 39 N. W. Rep. 213.

That the attention of the court, on a motion for a new trial, was called to the fact that defendant had accepted the provisions of the act of April 4, 1868, P. L. 58, limiting the liability of railroad companies to \$5000 in case of death caused by their negligence, it not having been offered in evidence on the trial, does not put it upon the record. In such case the supreme court will not pass upon the effect of Article III, § 3, of the constitution, on the acceptance of said act by defendant. *Philadelphia, W. & B. R. Co. v. Conway*, 112 Pa. St. 511, 4 Atl. Rep. 362.—EXPLAINING *Langdon v. Pennsylvania R. Co.*, 92 Pa. St. 21.

**110. — or of recitals therein.**—Where a railroad company and another are sued, a record of the trial court reciting that "the defendants were severally duly called, but came not, nor either of them," is sufficient to show that the company was not present by attorney or otherwise. *Union Pac. R. Co. v. Horney*, 5 Kan. 340.

In an action to recover damages for flooding plaintiff's land, a judgment entry, "General demurrer to plaintiff's trial amendment, overruled. Special exceptions, except the one of injury to the cattle, overruled," is too indefinite to show what exception was sustained, if any, where several were made relating to the same subject-matter. *Broussard v. Sabine & E. T. R. Co.*, 75 Tex. 702, 13 S. W. Rep. 68.

**111. What must appear in the record, generally.**—The court of appeals will review upon appeal the determination of the courts below, even upon a discretionary order, where it appears that the decision was based on the ground of the want of power to grant the application; and where the order is not intelligible without reading the opinion filed below, and it constitutes a part of the record, the court will look to it, where it is referred to in the order, and shows that the motion was denied upon the ground stated in such opinion. *Tolman v. Syracuse, B. & N. Y. R. Co.*, 92 N. Y. 353; reversing 29 Hun 143.

Improper language of counsel in his argument to the jury will not be considered when only shown by affidavits. The objectionable language should be in the record. *Rayburn v. Central Iowa R. Co.*, 74 Iowa 637.—FOLLOWED IN *Fowler v. Strawberry Hill*, 74 Iowa 644.

An objection that municipal bonds sued on were not stamped as required by the United States revenue laws cannot be considered when the bill of exceptions in the case is silent as to whether they were stamped or not. *Chambers County v. Clews*, 21 Wall (U. S.) 317.

Error of the court in refusing to dismiss an action of trespass on the ground that the same elements of damage were passed upon and paid for in a proceeding to condemn the land, cannot be urged upon appeal unless so much of the proceedings of the suit for condemnation are brought up as is necessary to show that the grounds upon which recoveries were had in the two suits were identical. *Downs v. Seattle & M. R. Co.*, 5 Wash. 778, 32 Pac. Rep. 745, 33 Pac. Rep. 973.

Where witnesses in testifying refer to a map used on the trial, and without which their testimony is unintelligible, if an appellant desires this court to consider the weight of such evidence, the map should be returned, with the places and objects to

which the witnesses referred identified, so as to make the evidence intelligible. *Larson v. Northern Pac. R. Co.*, 33 Minn. 20, 21 N. W. Rep. 836.

Plaintiff sued for the killing of a horse in two paragraphs or counts, and a demurrer was sustained to the first, but damages were assessed and judgment rendered for plaintiff. Held, that it was the right of the defendant to ask the court to instruct the jury to assess damages only under the good paragraph; but where the record on appeal is silent on that point, the court will presume that such course was taken, and will therefore sustain the judgment. *Indianapolis, P. & C. R. Co. v. Taffe*, 11 Ind. 458.—FOLLOWED IN *Indianapolis, P. & C. R. Co. v. Keeley*, 23 Ind. 133.

In an action by a conductor of a street car to recover for injuries received by colliding with a truck, the nature of the relation between the driver of the truck and the conductor was not shown, but it appeared that the latter, by means of signals to the former, stopped the car to let off and take on passengers, but there was nothing to show whether the driver was otherwise subject to the orders of the conductor or under his control. Held, that the court, on appeal, could not take judicial notice of their relations for the purpose of reversing a judgment. *Seaman v. Koehler*, 3 Silv. App. (N. Y.) 127.

**112. Record must show grounds of decision below.**—The Missouri supreme court has not appellate jurisdiction in a common-law action for damages in the sum of \$100, where the petition alleges the delivery of certain goods to the defendant for shipment as a common carrier to another state, the subsequent loss thereof, and the defendant's failure to deliver to plaintiff at their destination; and the answer alleges a contract of shipment to the end of defendant's line within the state and to forward the goods by connecting lines, and avers full performance on its part, the record not disclosing the grounds upon which the trial court based its finding. *Nall v. Wabash, St. L. & P. R. Co.*, 97 Mo. 68, 10 S. W. Rep. 610.—REVIEWED IN *Wabash W. R. Co. v. Siefert*, 41 Mo. App. 35.

**113. When the evidence must appear in the record.**—Where a writ of error is taken upon a judgment on a verdict, the paper-book of plaintiff in error should contain the whole of the evidence properly

certified; and where it contains only disputed and uncertified extracts from the testimony, the judgment will be affirmed. *Oakland R. Co. v. Thomas, 1 Pennyp. (Pa.) 435.*

Where the case is tried before the court and a jury, and the jury render a general verdict and make special findings, and the special findings appear to be slightly ambiguous, but do not appear to be in conflict with the general verdict, and the court renders judgment in accordance with the general verdict, in the absence of the evidence in the supreme court the judgment of the court below will not be reversed. *St. Louis, Ft. S. & W. R. Co. v. Noble, 43 Kan. 310, 23 Pac. Rep. 438.*

Where the demand is not liquidated, or where the law does not fix the measure of damages, a writ of inquiry must be executed and the damages sustained must be shown by proof, and this must appear upon the record on appeal. *Snider v. St. Louis, I. M. & S. R. Co., 7 Am. & Eng. R. Cas. 558, 73 Mo. 465.*—FOLLOWED AND DISTINGUISHED IN *Boswell v. St. Louis, I. M. & S. R. Co., 73 Mo. 470.*

Under § 242 of the Montana Code of Civil Procedure, a direction to the jury to find for the defendant, on the ground of plaintiff's contributory negligence, is a nonsuit, and if an appeal be taken by plaintiff from the direction of the court he must incorporate his evidence in the record. *McKay v. Montana Union R. Co., (Mont.) 31 Pac. Rep. 999.*

The failure of a jury to determine the question of contributory negligence, where the same is made an issue, is only ground for the reversal of a judgment where the record contains evidence tending to show such contributory negligence. *McNarra v. Chicago & N. W. R. Co., 41 Wis. 69.*

Although the refusal, at the close of plaintiff's testimony, in a suit against a railroad for personal injuries, to direct a verdict for defendants would justify a reversal of a judgment against them, yet if they proceed with their defense and introduce testimony which is not in the record, the judgment on the verdict which the jury, under proper instructions, find against them will not be reversed on account of that refusal. *Grand Trunk R. Co. v. Cummings, 11 Am. & Eng. R. Cas. 254, 12 Am. & Eng. R. Cas. 204, 106 U. S. 700, 1 Sup. Ct. Rep. 493.*

Where a company was enjoined from laying its track over certain lands, but the in-

junction was subject to be dissolved on paying certain damages awarded to the landowner, and the case is appealed, the supreme court has a right to hear evidence outside of the record, to show that such award has been paid and the case settled; and it appearing by such evidence that the matters in dispute had been settled, and that the road is already constructed and in operation, the appeal will be dismissed. *Atlanta & F. R. Co. v. Blanton, 80 Ga. 563, 6 S. E. Rep. 584.*—QUOTING *Dakota County v. Glidden, 113 U. S. 222.*

**114. — or bill of exceptions.**—Where a diagram of a locality, showing where stock was killed, is offered in evidence and rejected, it must be set out in a bill of exceptions, in order to reserve the question on the ruling. *Indianapolis, P. & C. R. Co. v. Irish, 40 Ind. 277.*

A bill of exceptions may contain all the evidence, although it appear that the jury were allowed to inspect the place where the matters referred to in the pleadings occurred. *Jeffersonville, M. & I. R. Co. v. Bowen, 40 Ind. 545.*—OVERRULING *Evansville, I. & C. S. L. R. Co. v. Cochran, 10 Ind. 560.*

A contractor sued to recover for work done under a contract providing that the estimates of the engineer were to be final, but charging fraud and collusion between the engineer and the defendant company in making the estimates. The court instructed the jury that the estimates of the engineer were conclusive if honestly made, but on appeal the bill of exceptions did not contain the contract nor any of the evidence to which the instruction related. *Held*, that the supreme court had nothing before it by which it could determine whether there was error in the ruling or not. *Hinkle v. San Francisco & N. P. R. Co., 55 Cal. 627.*

#### 6. Reviewing the Evidence or the Facts.

**115. How far reviewable, generally.**—(1) *Rule of non-interference.*—It is the uniform practice of the supreme court not to disturb the verdict of a jury or the finding of a court on questions of fact when the verdict or finding is not clearly wrong on the evidence. *Ft. Wayne, M. & C. R. Co. v. Grove, 47 Ind. 133.*

Where there are circumstances strongly supporting the verdict of a jury, the supreme court will not disturb such verdict. *Indianapolis, P. & C. R. Co. v. Collingwood, 71 Ind.*

476.—DISTINGUISHING *Ohio & M. R. Co. v. Cole*, 41 Ind. 331.

The verdict of a jury upon questions of fact properly submitted to it will not be disturbed on appeal in the absence of error in the record. *Fisher v. Delaware & H. C. Co.*, 153 Pa. St. 379, 26 Atl. Rep. 18.

In all judicial proceedings in this state facts are for the jury, and there being evidence enough to support the verdict, and the true facts as found by the jury making a case recoverable under the common law as generally understood and ruled wherever that system prevails, and not at variance with the latest adjudications in South Carolina, where the accident occurred; and the presiding judge having approved the finding of the jury, this court will not interfere except in cases of abuse of discretion. *Atlanta & C. A. L. R. Co. v. Tanner*, 68 Ga. 384.

No repetition by courts of review, that certain evidence does or does not sustain the verdict finding care or negligence in the particular case, makes the conclusions of fact arrived at by such courts, and the language in which they express such conclusions, doctrines of law for other cases. *Chicago & N. W. R. Co. v. Bouck*, 33 Ill. App. 123.

The questions where and how a crossing should be built, and whether under or over defendant's tracks, were questions of fact for the trial court, and there being evidence to sustain its findings in these respects, and it appearing that it had fairly exercised its discretion, its determination could not be disturbed here. *Buffalo S. & C. Co. v. Delaware, L. & W. R. Co.*, 130 N. Y. 152, 29 N. E. Rep. 121, 41 N. Y. S. R. 259; affirming 27 N. Y. S. R. 216, 7 N. Y. Supp. 604.

Where judgment was entered upon the award of a referee in a submission under Pa. act June 16, 1836, P. L. 718, § 6 (in this case an action *ex delicto* against a railroad company for unlawful discriminations), the specifications of error, relating chiefly to the referee's findings of fact, being approved by the court, and the testimony not being fully presented, the findings cannot be reviewed, even if it were proper under the act. *Borda v. Philadelphia & R. R. Co.*, 141 Pa. St. 484, 21 Atl. Rep. 665.

Where real estate has been condemned for the purpose of a railroad, and damages have been awarded to a landowner by a jury, and the only error assigned in the supreme court is that the verdict is excessive, the court ordinarily will not vacate or modify it

if based upon the evidence of witnesses acquainted with the land and capable of making a fair estimate. *Omaha Belt R. Co. v. Johnson*, 24 Neb. 707, 40 N. W. Rep. 134.—FOLLOWED IN *Fremont, E. & M. V. R. Co. v. Meeker*, 28 Neb. 94.

Where the jury believe that an injury to an employé was occasioned by the conductor's negligence, and without fault on plaintiff's part, and the trial judge refuses to grant a new trial, the court will let the verdict stand unless there was some abuse of his discretion. *Georgia R. & B. Co. v. Goldwire*, 56 Ga. 196.

The supreme court will not disturb the finding of the jury on the question whether the servant at the time of the accident was engaged in the prudent and careful discharge of his duties in his employment. *Gutridge v. Missouri Pac. R. Co.*, 105 Mo. 520, 16 S. W. Rep. 943.

Where the proof shows that a cow was found on her back in the ditch at the side of the track dead, with the body bloated and blood oozing from her nose, a verdict finding that she was killed by a train will not be disturbed on appeal, though the court may have doubts as to its correctness. *Chicago & N. W. R. Co. v. Dement*, 44 Ill. 74.—DISTINGUISHED IN *Moore v. Burlington & W. R. Co.*, 31 Am. & Eng. R. Cas. 572, 72 Iowa 75, 33 N. W. Rep. 371. QUOTED IN *Ohio & M. R. Co. v. Atteberry*, 43 Ill. App. 80.

Where in an action for injury to cattle at a farm crossing, where the railway ran through plaintiff's yard, the jury twice found for the plaintiff, acquitting him of all blame, and found the company guilty of negligence in not keeping a sufficient lookout on rounding the curve before coming to the crossing, the court refused to interfere. *Bender v. Canada S. R. Co.*, 37 U. C. Q. B. 25.—APPLIED IN *Bennett v. Grand Trunk R. Co.*, 3 Ont. 446.

An animal was killed by a train where a small town was built up and used as a station. The road had been fenced at the place, but a gap had been opened by some one in front of the town. It was not distinctly shown whether the town was laid out up to and along the railroad or not. *Held*, that the court on appeal would not find, in opposition to the trial court, that the company was not in fault in not closing up the fence. *Indianapolis & C. R. Co. v. Snelling*, 16 Ind. 435.



While always disposed to give to verdicts of juries all proper weight, the law of Louisiana imposes on the court the duty of reviewing their findings on the facts as well as on the law, and when, upon the evidence before them, it appears that a verdict is manifestly erroneous, they are bound to reverse it. *Olivier v. Louisville & N. R. Co.*, 47 Am. & Eng. R. Cas. 576, 43 La. Ann. 804, 9 So. Rep. 431.

(2) *Question of contributory negligence.*—Where a railroad company is sued for negligently causing an injury, and contributory negligence is relied upon as a defense, and the case is submitted to the jury on proper instructions as to the law of both negligence and contributory negligence, with direction to the jury to determine the case upon their own recollection of the evidence, a verdict for the plaintiff will not be disturbed. *Akersloot v. Second Ave. R. Co.*, 40 N. Y. S. R. 231, 27 J. & S. 555, 15 N. Y. Supp. 864. *Kentucky & I. B. Co. v. Quinkert*, 2 Ind. App. 244, 28 N. E. Rep. 338.

Where the evidence of contributory negligence, in an action for damages, is insufficient to authorize the court in taking the case from the jury, and the jury made a finding upon the facts, the appellate courts will not weigh the evidence. *Shepard v. St. Louis, I. M. & S. R. Co.*, 3 Mo. App. 550. *Buenemann v. St. Paul, M. & M. R. Co.*, 18 Am. & Eng. R. Cas. 153, 32 Minn. 390, 20 N. W. Rep. 379.

Where plaintiff is injured while attempting to drive across a place where defendant company was constructing its track, it is a question for the jury to determine whether the injury might have been avoided by a greater degree of care on plaintiff's part; and their findings upon the questions of both negligence and contributory negligence cannot be disturbed by the court of appeals. *Rembe v. New York, O. & W. R. Co.*, 1 Stiv. App. 154, 102 N. Y. 721, mem.; 7 N. E. Rep. 797, 2 N. Y. S. R. 498; affirming 32 Hun. 68, mem.

The supreme court will not reverse the finding of the trial court that the plaintiff was not negligent (as a matter of law) in approaching and crossing a railroad track, unless no other conclusion is fairly deducible from the evidence, giving him the benefit of every reasonable inference that may be drawn from it. *Kenney v. Hannibal & St. J. R. Co.*, 105 Mo. 270, 15 S. W. Rep. 983, 16 S. W. Rep. 837.

(3) *Illustrations.*—Whether any notice was given of the dividing of the freight train in a particular manner, or whether any warning was given of a sudden movement of the train (the immediate cause of the injury), or whether the party thereby injured or killed was at the time using due care for his safety, or whether he was a fellow-servant with others to whom the negligent acts were attributed, are questions of fact not subject to review on the evidence in this court, except so far as they may have a bearing upon the instructions given or refused. *Chicago, B. & Q. R. Co. v. Bell*, 112 Ill. 360.

The issue was made as to whether the action was barred under the statute limiting the time in which to commence another suit after a reversal, and was correctly submitted to the jury upon evidence sufficient to support their verdict. *Held*, that judgment based upon such verdict should not be disturbed. *Chisholm v. Chicago & N. R. Co.*, 2 Ill. App. 174.

The jury found as a fact that the defendant was guilty of negligence in two or more particulars causing the injuries complained of. *Held*, that the supreme court cannot, under the evidence and as a matter of law, say that the finding of the jury is erroneous. *St. Louis & S. F. R. Co. v. Weaver*, 28 Am. & Eng. R. Cas. 341, 35 Kan. 412, 11 Pac. Rep. 408.

A brakeman sued for injuries received while passing through a tunnel by striking an arch which was but 4 feet and 7 inches above the top of the car. At the first trial he testified that he was sitting down when he entered the tunnel, and a judgment in his favor was reversed on the ground that, if sitting on the top of the car it was impossible for him to come in contact with the arch. At a second trial he testified that he was sitting down, but rose up as he entered the tunnel, and that he was not asked on the first trial whether he stood up. *Held*, that a verdict in his favor would not be disturbed on appeal. *Hunter v. New York, O. & W. R. Co.*, 10 N. Y. Supp. 795.

In an action for the non-delivery of a carload of lumber, where the evidence shows that the car was placed on a side-track in the presence of the agents of the consignee, and that he or some of his employes jumped on the car and, pulling out a piece of the lumber, said, "This is the lumber we have been waiting for," a judgment for the de-



fendant will not be disturbed on appeal. *Armistead L. Co. v. Louisville, N. O. & T. R. Co.*, (Miss.) 11 So. Rep. 472.

A company was sued to recover for a house which was washed away, as alleged, by the negligent construction of a railroad embankment. The evidence showed that the embankment did raise the water, but it was not shown that the increased depth of water contributed to the destruction of the house. *Held*, that a finding that it did not do so will not be disturbed on appeal. *Ilfrey v. Sabine & E. T. R. Co.*, 76 Tex. 63, 13 S. W. Rep. 165.

**116. — on appeal from intermediate appellate court.**—The affirmance of a judgment for the plaintiff by the Illinois appellate court, in an action for negligence, must be taken as settling all questions of fact necessary to a recovery, in favor of the plaintiff below, and as holding the evidence sufficient to sustain the finding of the jury under the issues made by the pleadings. *Lake Shore & M. S. R. Co. v. Brown*, 31 Am. & Eng. R. Cas. 61, 123 Ill. 162, 14 N. E. Rep. 197. *Indianapolis & St. L. R. Co. v. Morgenstern*, 12 Am. & Eng. R. Cas. 228, 106 Ill. 216. *Lake Erie & W. R. Co. v. Zoffinger*, 15 Am. & Eng. R. Cas. 371, 107 Ill. 199. *Chicago, R. I. & P. R. Co. v. Lewis*, 19 Am. & Eng. R. Cas. 224, 109 Ill. 120; *affirming* 13 Ill. App. 166. *Pennsylvania Co. v. Ellett*, 42 Am. & Eng. R. Cas. 64, 132 Ill. 654, 24 N. E. Rep. 559.

Where the liability of a defendant company depends upon the existence of negligence, a verdict for the plaintiff, supported by some evidence, and approved by the New York general term, cannot be reviewed by the court of appeals as being against the weight of evidence. *Downs v. New York C. R. Co.*, 56 N. Y. 664; *affirming* 1 T. & C. add. 20.

Where a verdict is rendered upon conflicting testimony, and is approved by the trial judge and the general term, the court of appeals has no jurisdiction to review it. *New Jersey Steamboat Co. v. Mayor, &c.*, of N. Y., 2 Silv. App. 23, 109 N. Y. 621, mem.; 15 N. E. Rep. 877, 14 N. Y. S. R. 57; *affirming* 39 Hun 657, mem.

**117. Conflict of evidence.**—(1) *The general rule.*—A judgment supported by evidence, although conflicting, will not be disturbed on the ground of insufficiency of proof. *Denver & R. G. R. Co. v. Morrison*, 3 Colo. App. 194. *Atlanta & W. P. R. Co.*

*v. Smith*, 81 Ga. 620, 8 S. E. Rep. 446. *Northeastern R. Co. v. Barnett*, 89 Ga. 399, 15 S. E. Rep. 492. *Pittsburgh, C. & St. L. R. Co. v. Hume*, 34 Ind. 326. *Bohan v. St. Paul & D. R. Co.*, 49 Minn. 488, 52 N. W. Rep. 133. *Doty v. Chicago, St. P. & K. C. R. Co.*, 49 Minn. 499, 52 N. W. Rep. 135. *Cousins v. Third Ave. R. Co.*, 25 N. Y. S. R. 341, 53 Hun 634, 6 N. Y. Supp. 950. *Texas Pac. R. Co. v. Davidson*, 68 Tex. 370, 4 S. W. Rep. 636. *Gulf, C. & S. F. R. Co. v. Holt*, (Tex.) 11 Am. & Eng. R. Cas. 72. *Hurd v. Union Pac. R. Co.*, 8 Utah 241, 30 Pac. Rep. 982. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 58 Am. & Eng. R. Cas. 642, 57 Fed. Rep. 441.

Where the liability of a defendant depends upon proof of negligence, and the evidence is conflicting as to the negligence, the appellate court will not disturb the verdict where the case has been properly submitted to the jury under instructions stating the law correctly. *Donaldson v. Mississippi & M. R. Co.*, 18 Iowa 280.

Where there is a conflict in the evidence, and there is no ground for a holding that the finding of the jury is not the honest and intelligent exercise of judgment upon the facts of the case, the judgment will not be disturbed on appeal. *Moody v. St. Paul & S. C. R. Co.*, 41 Iowa 284. *Frandsen v. Chicago, R. I. & P. R. Co.*, 36 Iowa 372.

A verdict will not be disturbed where the evidence is not of such a character as to bring the mind irresistibly to the conclusion that the verdict was not the result of a free, sound, and unbiassed exercise of judgment on the part of the jury, and that manifest injustice will result if the verdict is permitted to stand. *Allison v. Chicago & N. W. R. Co.*, 42 Iowa 274. *Wilson v. Burlington & M. R. Co.*, 33 Iowa 591.

The evidence being conflicting and the trial judge being satisfied with the verdict, the appellate court will not interfere with his discretion in refusing a new trial. *Georgia Pac. R. Co. v. Rigden*, 85 Ga. 867, 11 S. E. Rep. 603. *Georgia Pac. R. Co. v. Weaver*, 85 Ga. 869, 11 S. E. Rep. 614. *Western & A. R. Co. v. Denmead*, 83 Ga. 351, 9 S. E. Rep. 683. *Richmond & D. R. Co. v. Davis*, 86 Ga. 76, 12 S. E. Rep. 266; *Missouri Pac. R. Co. v. Holley*, 30 Kan. 465, 1 Pac. Rep. 130, 554.

An appellate court is not authorized to set aside a verdict when the evidence is conflicting; it is only when there is no evi-

dence to support a verdict, or when the verdict is palpably against the weight of evidence, that the appellate court can disturb the findings of the jury. *Texas & N. O. R. Co. v. Ludtke*, 3 *Tex. Civ. App.* 308, 23 *S. W. Rep.* 82. *Chicago, M. & St. P. R. Co. v. Krueger*, 23 *Ill. App.* 639; *affirmed in part* 124 *Ill.* 457.

Where suit is brought to recover for personal injuries alleged to have been caused by negligence, and the evidence of plaintiff, if believed, is sufficient to make out a case, and the evidence of the defendant is sufficient to relieve it from liability, if believed, it is proper to submit the case to the jury, and a court will presume that the jury disbelieved the evidence of one party and believed the evidence of the one for whom the verdict is, and will not disturb the verdict on that account. *Styler v. Long Island R. Co.*, 75 *Hun (N. Y.)* 547, 27 *N. Y. Supp.* 1113.

(2) *Illustrations.*—The decision of the trial court upon a motion for a new trial for alleged misconduct of jurors, made upon conflicting affidavits, will not be reversed unless clearly erroneous. *Tierney v. Minneapolis & St. L. R. Co.*, 21 *Am. & Eng. R. Cas.* 545, 33 *Minn.* 311, 53 *Am. Rep.* 35, 23 *N. W. Rep.* 229.

The evidence being in conflict upon a question as to whether or not a car would or could, when "kicked" by a locomotive, spring or jump forward, a judgment rendered upon the verdict of the jury will not be disturbed unless the appellate court knows judicially that the verdict stated that which was physically an impossibility. *Chicago, St. L. & P. R. Co. v. Champion*, (*Ind.*) 32 *N. E. Rep.* 874.

A conductor sued his company for a balance of salary, and the company set up the defense that he was not to receive his pay until he had accounted for all fares collected, which he had failed to do. There was the evidence of private detectives that he had received two fares for which he had not accounted, but which was denied by plaintiff. *Held*, that a verdict for plaintiff would not be disturbed where it also appeared that his salary had been paid, and that he had not been discharged, for two months after the company had knowledge of the facts as testified to by the detectives. *Rand v. Rome, W. & O. R. Co.*, 32 *N. Y. S. R.* 426, 10 *N. Y. Supp.* 300, 56 *Hun* 645.

(3) *Rule applied to cases of injuries to*

*passengers.*—Where a passenger sues a street railway for personal injuries caused by being thrown down by the sudden starting of the car, and his evidence shows such to be the facts, and witnesses for the defense do not fully agree as to the manner of the injury, a verdict in favor of the plaintiff will not be disturbed on appeal. *Ganley v. Brooklyn City R. Co.*, 28 *N. Y. S. R.* 94, 5 *Sib. Sup.* 319, 7 *N. Y. Supp.* 854, 55 *Hun* 605.

In an action by a passenger to recover for personal injuries received while about to get on his car, after having stopped for a meal, the complaint charged negligence both in starting the car too soon and in starting it with a sudden jerk as he was about to step on. There was a conflict of evidence, both as to the negligence of the company and as to whether plaintiff was free from negligence or not, but the preponderance of evidence tended to show that the company was not at fault. *Held*, that a verdict for plaintiff would not be disturbed, though the supreme court was of opinion that the trial court should have granted a new trial on the ground that the verdict was against the weight of evidence. *Union Pac. R. Co. v. Diehl*, 21 *Am. & Eng. R. Cas.* 350, 33 *Kan.* 422, 6 *Pac. Rep.* 566.

A passenger sued to recover damages received while alighting from a train. The evidence showed that he was young and active, and unencumbered with baggage, and that the train stopped long enough to allow him to alight with safety. There was some evidence tending to show that the station and platform were not sufficiently lighted, but it was not shown that this contributed directly to the injury. *Held*, that a verdict finding the railroad company negligent as to lighting its station, and that this caused the injury, would not be disturbed on appeal where the case was submitted on proper instructions. *St. Louis, I. M. & S. R. Co. v. White*, 30 *Am. & Eng. R. Cas.* 545, 48 *Ark.* 495, 4 *S. W. Rep.* 52.

(4) — *injuries to persons at crossings.*—Where a company is sued for causing an injury at a crossing, and there is a conflict of evidence as to the negligence of those in charge of the train, a verdict finding the company negligent will not be disturbed on appeal. *Purinton v. Maine C. R. Co.*, 78 *Me.* 569, 7 *Atl. Rep.* 707.

Where a company is sued for an injury at a crossing alleged to have been caused by the

defective condition of the planking at the crossing, and there is a conflict of evidence as to whether the planking had been removed on each side of the rails, the appellate court will not disturb a verdict for plaintiff. *Currier v. Ogdenburg & L. C. R. Co.*, 6 N. Y. Supp. 615.

(5) — *injuries to employes.*—When in an action by an employé for an injury alleged to have been caused by the negligence of the defendant the plaintiff obtains a verdict, the supreme court will not, because there is contradictory evidence on some points, interfere with the conclusions of the jury, supported by the action of the trial court, overruling a motion for a new trial. *Lake Erie & W. R. Co. v. Everett*, 11 Am. & Eng. R. Cas. 221, 86 Ind. 229.

Where a plaintiff's evidence is all clear and consistent to the point that his injury resulted from "a defective brake," and defendant company's evidence is in conflict therewith, and defendant moves that the verdict be set aside as contrary to the evidence, which is certified, and defendant excepts to the overruling of the motion, this court is precluded from comparing and weighing the conflicting testimony, and must affirm the ruling. *Richmond & D. R. Co. v. Burnett*, 88 Va. 538, 14 S. E. Rep. 372.

The owner of a railway was sued for the death of an engineer, caused by a bridge giving way which was charged to have been defective. The evidence showed that the engineer was employed by one who acted as assistant superintendent of the line, and that the owner knew that the bridge was defective; but the evidence was conflicting as to whether the engineer knew or had reasonable notice of its condition. *Held*, that a verdict for plaintiff should not be disturbed on appeal. *Davis v. Button*, 78 Cal. 247, 20 Pac. Rep. 545, 18 Pac. Rep. 133.

(6) — *fires caused by sparks.*—A verdict for plaintiff in an action against a railroad for damages caused by sparks from its locomotive will not be disturbed on appeal where there is a conflict of evidence as to whether the locomotive was supplied with proper appliances for preventing fire, and whether it was in good order. *Missouri Pac. R. Co. v. Platzer*, (Tex.) 15 S. W. Rep. 577.

Proof that fire from an engine destroyed plaintiff's property raises a presumption of negligence on the part of the company. This presumption, supported by the testimony of

an expert that "the engine starting the fire was out of repair," is sufficient to support a verdict against the company, though there be other evidence tending to show that there was no negligence; and the verdict will not be disturbed unless the evidence for the defense negatives the idea of negligence in a most complete and convincing manner. *Dean v. Chicago, M. & St. P. R. Co.*, 39 Minn. 413, 40 N. W. Rep. 270.—EXPLAINED IN *Greenfield v. Chicago & N. W. R. Co.*, 83 Iowa 270.

[ On a claim that a verdict for the value of certain property destroyed by fire was excessive, there was evidence that its value was greater, and again, that it was less than found by the jury. *Held*, the verdict could not be disturbed. *Pielke v. Chicago, M. & St. P. R. Co.*, 6 Dak. 444, 43 N. W. Rep. 813.

(7) — *flooding lands.*—Where a company is sued for damages to land caused by flooding it, a verdict in favor of the plaintiff will not be disturbed where there is some conflict of evidence. *Chicago & A. R. Co. v. Glinny*, 19 Ill. App. 639.

In an action for damages for flooding lands, plaintiff's evidence was ample to establish the fact that the injuries were caused by the negligent manner in which the company's track was constructed. The company introduced considerable evidence to contradict this. *Held*, that the fact of a conflict of evidence would not authorize the supreme court to disturb a verdict in favor of the plaintiff. *Sabine & E. T. R. Co. v. Johnson*, (Tex.) 7 S. W. Rep. 378; *former appeal*, 65 Tex. 389.

(8) — *killing stock.*—The appellate court will not interfere in an action against a railroad for killing stock where the record presents only questions of fact arising upon a conflict of evidence. *Indiana, B. & W. R. Co. v. Hinshaw*, 21 Ill. App. 335. *Harmon v. Charleston & S. R. Co.*, 88 Ga. 261, 14 S. E. Rep. 574. *Jacksonville, T. & K. W. R. Co. v. Wellman*, 26 Fla. 344, 7 So. Rep. 845.

A verdict awarding damages for stock killed will not be disturbed on appeal where the evidence is conflicting, unless the facts and circumstances show that the jury were influenced by passion or malice. *Louisville, E. & St. L. R. Co. v. Lewis*, 31 Ill. App. 281.

In an action to recover for stock killed by the alleged failure of the company to

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maintain a sufficient fence, where the evidence is conflicting, a finding of a referee that the fence was insufficient will not be disturbed. *Archibald v. New York C. & H. R. R. Co.*, 38 N. Y. S. R. 790, 60 Hun 581, 14 N. Y. Supp. 801.

Where the issue is made as to the time that stock were killed, and a witness for plaintiff swears that it occurred at 6 A.M., and the engineer swears that it occurred at half-past 12 P.M., the case may be submitted to the jury to determine the time of killing, and in such case their finding will not be disturbed on appeal. *Texas & N. O. R. Co. v. Ludtke*, 3 Tex. Civ. App. 308, 23 S. W. Rep. 82.

If all the evidence can be harmonized by the exercise of reason and in accord with the probabilities arising from the nature of the case, it is not what the law regards as a conflict of evidence; and where, when so considered, the testimony showed without conflict that the stock in question were injured upon the highway crossing, the verdict for damages was not sustained by the evidence, and should have been set aside. *Sullivan v. Wabash St. L. & P. R. Co.*, 58 Iowa 602, 12 N. W. Rep. 620.

Where suit was brought against a railroad company for negligently killing a cow of the plaintiff, and the evidence was conflicting as to the distance at which the cow could have been seen by the agents of the defendant, and the court below refused to disturb the verdict of the jury in favor of the plaintiff, this court will not control his discretion thus legally exercised. *Georgia R. Co. v. Sigman*, 77 Ga. 71.

Where suit is brought to recover for cattle killed at or near a highway crossing, the appellate court will not interfere with a verdict found on conflicting evidence as to whether the cattle were on the crossing or not. *Chicago & A. R. Co. v. Kemp*, 25 Ill. App. 39.

Proof that stock were killed by a railroad company raises a presumption of negligence on its part, and this presumption, supported by evidence, though the evidence is conflicting, is sufficient to support a verdict against the company, and the appellate court will not disturb a judgment based thereon where the trial court was satisfied with the finding. *Georgia R. & B. Co. v. Cox*, 64 Ga. 619.

Where the evidence, tending to show a demand for the killing of stock under the provisions of ch. 94 of the laws of Kansas, 1874,

is conflicting, and sufficient evidence is given on the trial to sustain the demand, the finding of the trial court that a demand was made will be upheld. *Kansas City, Ft. S. & G. R. Co. v. McHenry*, 24 Kan. 501.

The plaintiff sued the defendant railway company to recover the value of a horse killed by the company; the evidence as to whether the horse was killed through the carelessness of the defendant was conflicting, but there was evidence to support the verdict, and the verdict not being clearly against the weight of the evidence, it will not be disturbed. *Jacksonville, T. & K. W. R. Co. v. Hunter*, 26 Fla. 308, 8 So. Rep. 450.

In an action for killing a horse it appeared that the track had been fenced, but that the company had burned a portion of it, and it was conceded that the company was liable if the horse went upon the track through the burned portion. The specific question as to whether the horse did go upon the track through the opening was submitted to the jury, who found that he did. *Held*, that as the question was fairly submitted on conflicting evidence, a verdict for plaintiff should not be disturbed. *Hungerford v. Syracuse, B. & N. Y. R. Co.*, 19 N. Y. S. R. 47, 50 Hun 602, 4 N. Y. Supp. 643.

**118. Weight of evidence.**—The supreme court will not disturb a verdict on the mere weight of the evidence. *Ft. Wayne, J. & S. R. Co. v. Husselman*, 65 Ind. 73.—CRITICISING Toledo & W. R. Co. v. Goddard, 25 Ind. 183.—*Evansville & C. R. Co. v. Smith*, 65 Ind. 92. *Lake Erie & W. R. Co. v. Mattix*, 4 Ind. App. 176, 30 N. E. Rep. 811.

The special findings of a jury, like a general verdict, cannot be disturbed upon the ground that they are against the weight of the evidence, unless they are flagrantly so. *Louisville & N. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. Rep. 706.

There being some evidence in support of the verdict, an order of the district court refusing to set it aside as against evidence will be affirmed. *Cleland v. Minneapolis & St. L. R. Co.*, 7 Am. & Eng. R. Cas. 589, 29 Minn. 170, 12 N. W. Rep. 461. *Van Gent v. Chicago, M. & St. P. R. Co.*, 80 Iowa 526, 45 N. W. Rep. 913.

Where the questions of negligence and contributory negligence have both been submitted to and passed upon by the jury, the court will not reverse the judgment on the

weight of the evidence. *Pittsburgh, C. & St. L. R. Co. v. Martin*, 8 Am. & Eng. R. Cas. 253, 82 Ind. 476.

Where the defense of contributory negligence is made and submitted to the jury on proper instructions, their finding should not be set aside by an appellate court on its own views of the evidence. *O'Donnell v. New York & H. R. Co.*, 8 *Daly* (N. Y.) 409; affirmed in 77 N. Y. 625, mem.—REVIEWING *Metz v. Second Ave. R. Co.*, 3 Abb. App. Dec. (N. Y.) 274.

Where the evidence and circumstances surrounding a case tend to prove the existence of a given fact or state of facts, and have been passed upon by a jury in a civil suit, their finding, unless set aside by the trial judge or appellate court, is conclusive upon the supreme court, and it is wholly immaterial whether that court think such finding is in accordance with the weight of evidence or not. *Illinois C. R. Co. v. Haskins*, 22 Am. & Eng. R. Cas. 343, 115 Ill. 300, 2 N. E. Rep. 654.

Though the appellate court may doubt the correctness of a verdict against a company for killing stock, still the verdict will not be disturbed where the question of the company's negligence was fairly submitted to the jury, and their finding is not without evidence to support it, and where the trial court has overruled a motion for a new trial. *Yazoo & M. V. R. Co. v. Williams*, 67 Miss. 18, 7 So. Rep. 279.

The weight of the evidence and the degree of negligence it tends to prove are questions of fact for the jury in the first instance, and for the appellate court in the last; it is also a question of fact whether the proof establishes negligence that may be the subject of comparison. *Chicago, B. & Q. R. Co. v. Warner*, 123 Ill. 38, 14 N. E. Rep. 206; affirming 22 Ill. App. 462.

Whether the bell of a locomotive was ringing is, in a case of conflicting evidence, a question for the jury, and the supreme court will not disturb its finding thereon, even where it appears to be against the weight of the evidence. *Dickson v. Missouri Pac. R. Co.*, 104 Mo. 491, 16 S. W. Rep. 381.

When an animal is seen alive during an afternoon in the vicinity of a railroad track, and the next morning the tracks of the animal are traced upon an open bridge, and along that bridge for the space of twenty or twenty-five feet appear blood and bunches of hair of a color corresponding with that of

the animal, and the animal, showing marks of violence, is found dead some time thereafter in the water below the bridge, and a witness testifies that during the night after the animal was seen alive he heard a train whistle as it approached the bridge and then heard something fall into the water and swimming therein—held, that a verdict of the jury that the animal was killed by the railroad company in the operation of its railroad will not be set aside as against the evidence. *Union Pac. R. Co. v. Harris*, 11 Am. & Eng. R. Cas. 431, 28 Kan. 206.—DISTINGUISHING *Atchison, T. & S. F. R. Co. v. Seeley*, 24 Kan. 265.

Where the plaintiff's testimony simply shows that the animals were killed some time between 6 o'clock P.M. and 8 o'clock of the next morning, and is absolutely silent as to the hour at which they were killed, and it is conceded that the night herd law was in force, and the testimony of the defendant from unimpeached witnesses shows that they were killed about the hour of midnight, which testimony is contradicted neither directly nor indirectly by any witness, and is supported by every fact appearing in the case, a verdict for the plaintiff will be set aside as against the evidence, although it was coupled with a special finding that the jury did not know the hour at which the animal were injured. *Union Pac. R. Co. v. Dyke*, 28 Kan. 200.

**119. Preponderance of evidence.**—Though the preponderance of evidence seems to be against the verdict, if there is enough to support it the refusal to grant a second new trial is not an abuse of discretion. *City & S. R. Co. v. Waldhaur*, 84 Ga. 706, 11 S. E. Rep. 452. *Kansas City, Ft. S. & M. R. Co. v. Grimes*, 50 Kan. 655, 32 Pac. Rep. 376. *Louisville & N. R. Co. v. Adams*, (Ky.) 10 S. W. Rep. 425.

Where in an action for injuries alleged to have been occasioned by negligence the jury have by their verdict found that there was such negligence, and also that the plaintiff was free from contributory negligence, the court cannot set the verdict aside upon the mere preponderance of the testimony. *Evansville, R. & E. R. Co. v. Harrington*, 8 Am. & Eng. R. Cas. 395, 82 Ind. 534.

Where the verdict of a jury is not sustained by sufficient evidence to make out a *prima facie* case in favor of such verdict, the judgment founded thereon should in all cases be reversed. But where the verdict is



sustained by evidence sufficient to make out a *prima-facie* case, and all the evidence against the verdict is merely in parol, the judgment founded upon such verdict should not be reversed unless some ground for reversal is found other than merely that the preponderance of the evidence is against the verdict. *Kansas Pac. R. Co. v. Brady*, 17 Kan. 380.—QUOTING *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 369.—QUOTED IN *Kansas City, Ft. S. & G. R. Co. v. Foster*, 39 Kan. 329.

It is the province of the jury to pass upon the credibility of the witnesses and upon the consideration and weight which shall be given to the testimony, and when they have passed upon it and the trial court refuses to grant a new trial, upon the ground that the verdict is against the clear preponderance of the evidence, this court will not reverse the judgment on that ground when there is any evidence to support it. *Pool v. Chicago, M. & St. P. R. Co.*, 8 Am. & Eng. R. Cas. 360, 56 Wis. 227, 14 N. W. Rep. 46.

A preponderance of the evidence must be manifestly and palpably in favor of the verdict to justify an appellate court in reversing an order of the trial court setting it aside. *Ayers v. Minneapolis, St. P. & S. St. M. R. Co.*, 46 Minn. 134, 48 N. W. Rep. 683.

Plaintiff sued for the value of a mare which was found lying about six feet from a cattle-guard on defendant's road so seriously injured that she died the next day. The jury found that she was struck by a train or frightened by an engine so that she ran into the cattle-guard, and so was injured. The evidence to sustain such finding was all circumstantial, while defendant's employes testified that no such accident occurred. *Held*, that while the preponderance of the evidence seemed to be against the finding of the jury, yet the court cannot say that the jury were not warranted in so finding, nor that the trial judge erred in overruling a motion for a new trial, since they saw and heard the witnesses, and were better able to judge of the weight that should be given to their testimony. *Cox v. Burlington & W. R. Co.*, 77 Iowa 478, 42 N. W. Rep. 429.

**120. Credibility of witnesses.**—Where a railroad company is sued for killing stock, and five witnesses testify as to the condition of the animals when found, tending to show that they were killed by a train, a verdict for plaintiff will not be disturbed on appeal because the fireman and

engineer testify positively that they were not so killed. *Rosecrans v. Wabash, St. L. & P. R. Co.*, 83 Mo. 678.

Plaintiff sued for personal injuries received by being struck by a moving train when about to cross a track on a street. He and several other witnesses testified that no bell was rung nor signal given, but that the train approached silently at a point where the view was obstructed; while several witnesses for the defendant testified positively to the ringing of the bell, the witnesses for the defendant having a preponderance in numbers. *Held*, that it was a question for the jury as to the belief of the witnesses, and for them to consider all the surrounding circumstances, and their verdict will not be disturbed by the general term. *Anderson v. New York, L. E. & W. R. Co.*, 2 *Sitv. Sup. Ct. (N. Y.)* 9.

**121. Insufficiency of evidence.**—(1) *General rules.*—The claim that if the evidence "tends to support" the verdict the court could not reverse the judgment of the evidence is not strictly correct. The true rule is that if the verdict was not supported by sufficient evidence it may be reversed, although the evidence "tends to support" the verdict. The court cannot weigh conflicting evidence, but may decide the question of the sufficiency of evidence. *Cleveland, C. C. & I. R. Co. v. Wynant*, (Ind.) 55 Am. & Eng. R. Cas. 80, 34 N. E. Rep. 569.

A verdict will only be set aside on appeal for insufficiency of evidence when the court can say that the evidence did not tend to support the verdict. *Moore v. Missouri Pac. R. Co.*, 7 Am. & Eng. R. Cas. 568, 73 Mo. 438.—FOLLOWED IN *Williams v. Missouri Pac. R. Co.*, 74 Mo. 453; *Terry v. Missouri Pac. R. Co.*, 77 Mo. 254.

An appellate court will not disturb a verdict on the ground of insufficient evidence where the testimony was conflicting and the greater number of witnesses testified in accordance with the verdict. *Hughes v. Chicago, St. P. & K. C. R. Co.*, (Iowa) 55 N. W. Rep. 470.

Where the question of negligence is one of fact, the supreme court will, so far as the demurrer to the evidence is concerned, only look to see if there is sufficient evidence to support the verdict. *Winters v. Kansas City Cable R. Co.*, 40 Am. & Eng. R. Cas. 261, 99 Mo. 509, 12 S. W. Rep. 652, 6 L. R. A. 536.



A judgment in an action to recover for an injury resulting from negligence will not be reversed on the ground of variance in the allegation of the negligence, and the proof or failure of the evidence to sustain the allegation, if there is evidence tending to prove such allegation. *Lake Shore & M. S. R. Co. v. Hundt*, 140 Ill. 525, 30 N. E. Rep. 458; affirming 41 Ill. App. 220.

Where a railroad company is sued for personal injuries caused by negligence, and there is evidence by plaintiff tending to prove all the elements of such a cause of action, a verdict for plaintiff will not be disturbed. *Chicago, M. & St. P. R. Co. v. Yando*, 26 Ill. App. 601. See also to same effect *Savannah, D. & W. S. L. R. Co. v. Schieffelin*, 80 Ga. 576, 5 S. E. Rep. 781. *Central R. & B. Co. v. Dodd*, 83 Ga. 507, 10 S. E. Rep. 206. *Louisville, N. A. & C. R. Co. v. Diamond State I. Co.*, 25 Ill. App. 536. *Fogerty v. Minneapolis & St. L. R. Co.*, 30 Minn. 185, 14 N. W. Rep. 878.

Where plaintiff makes out a *prima-facie* case under the statute, in an action for killing stock, the appellate court will not disturb a verdict in favor of plaintiff. *Ohio & M. R. Co. v. O'Donnell*, 26 Ill. App. 348.

In an action for killing stock, where the evidence is unsatisfactory and conflicting, the appellate court will not disturb a verdict for that cause alone. *Peoria, D. & E. R. Co. v. Powell*, 32 Ill. App. 53.

(2) *Illustrations*.—Where a company is sued to recover for the value of cross-ties taken from land, proof showing that the company took 274 ties is insufficient to support a verdict for the value of 1000 ties. *Jacksonville, T. & K. W. R. Co. v. Roberts*, 22 Fla. 324.

Where on the trial of an action for a personal injury on the ground of negligence in operating the road, it is practically conceded by both parties that the defendant was in the possession of the road and operating it, and that the men in charge of the road and its machinery were servants of the defendant, the objection that such facts are not proven will be devoid of merit. *Lake Erie, & W. R. Co. v. Wills*, 140 Ill. 614, 31 N. E. Rep. 122; affirming 39 Ill. App. 649.

Suit was brought to recover the value of a mare alleged to have been killed by defendant's train, and the proof showed that she was found in a cattle-guard so injured that she afterwards died; but the evidence failed to show that she was thrown or driven into

the cattle-guard or injured by a train, but rather compelled a contradictory inference. *Held*, that a verdict for plaintiff should have been set aside as without evidence to support it. *Brockert v. Central Iowa R. Co.*, 75 Iowa 529, 39 N. W. Rep. 871.—DISTINGUISHED IN *Van Slyke v. Chicago, St. P. & K. C. R. Co.*, 80 Iowa 620.

A bill of exceptions allowed to the ruling of a judge that three defendant railroads, which were sued jointly for the loss of goods, were liable, if either was liable, omitted to state the facts on which the ruling was based. It appeared that the three roads formed a continuous line; that the goods lost were delivered to one of the companies without any written contract, and were lost while in the hands of another of the companies; and no agreement was shown between the companies for the through transportation of goods. There was conflicting evidence as to the terms of the plaintiff's contract for the transportation of his goods and as to the arrangement between the three companies. *Held*, that the exceptions must be sustained. *Pratt v. Ogdensburg & L. C. R. Co.*, 102 Mass. 557.

In an action for personal injuries plaintiff offered no evidence except his own, which was quite contradictory; and which was contradicted also by credible witnesses for defendant. There was also evidence tending to prove that his memory was affected by the injuries. *Held*, that the evidence was too unreliable to sustain a verdict in his favor. *Kenney v. Ocean Steamship Co.*, 11 N. Y. Supp. 412.

In an action for damages to stock at a public crossing, by reason of the failure to sound the whistle eighty rods from the crossing, and the further reason that the speed of the train was not slackened, where there is some evidence to show that the signal was not given and that the train did not slow up, and that the injury might have been prevented if the signal for the crossing had been given or the train slackened, the verdict, otherwise supported by evidence, will not be disturbed. *Southern Kansas R. Co. v. Schmidt*, 45 Am. & Eng. R. Cas. 489, 44 Kan. 374, 24 Pac. Rep. 496.

Plaintiff commenced an action before a justice of the peace to recover for a colt killed by the defendant railroad company, and obtained a judgment, which was reversed in the county court. There was no evidence that any engine or cars had passed

over the road during the time after the colt was last seen alive and before it was found dead, or that the company had any notice that its fence, over which the colt went onto the track, was defective. *Held*, that for these reasons there was a doubt as to whether plaintiff had introduced proof enough to entitle him to recover, but the judgment should only be reversed and so modified as to allow a new trial before the justice. *Hathaway v. Fitchburg R. Co.*, 49 *N. Y. S. R.* 466, 66 *Hun* 628, 20 *N. Y. Supp.* 917.

### 122. Entire absence of evidence.

—Where the question is one purely of fact, yet if there is a total failure of proof to sustain the verdict of the jury, the supreme court will set aside the judgment and remand the cause for a new trial. *Atchison, T. & S. F. R. Co. v. Seeley*, 24 *Kan.* 265.—DISTINGUISHED IN *Union Pac. R. Co. v. Harris*, 11 *Am. & Eng. R. Cas.* 431, 28 *Kan.* 206.—*Indianapolis & C. R. Co. v. Williams*, 14 *Ind.* 521.

A decree entered in a suit against a railroad company to enforce a contractor's lien, which is not supported by the evidence in some respects, should be reversed. *Illinois W. E. R. Co. v. Gay*, 7 *Ill. App.* 404.

Where two railroad companies are sued, a joint judgment against both, which is entirely unsupported by the evidence as to one, will be reversed. *Chicago, B. & Q. R. Co. v. Coleman*, 18 *Ill.* 297.

Where it is claimed that there is no evidence of a fact, such as negligence in operating a train of cars, upon which to base an instruction, and the alleged error in giving the instruction depends upon there being no evidence tending to prove the fact, the supreme court will examine the evidence to see if it does prove, or tend to prove, such fact. *Union R. & T. Co. v. Shacklet*, 28 *Am. & Eng. R. Cas.* 193, 119 *Ill.* 232, 10 *N. E. Rep.* 896.

Where plaintiff sues to recover for stock killed through an alleged defect in a cattle-guard, a verdict for plaintiff cannot be supported where there is no evidence of negligence on the part of the company in either constructing or repairing the cattle-guard. *Chicago & N. W. R. Co. v. Hart*, 13 *Ill. App.* 186. *Chicago & A. R. Co. v. Rice*, 71 *Ill.* 567.

In an action against a railroad company, under the statute, for killing stock in running and operating a railroad alleged to belong to the defendant, where, though there

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is no evidence given as to the ownership of such railroad, there is no evidence to the contrary, yet if the defendant appear and contest the cause, the supreme court on appeal will not set aside a verdict for the plaintiff on account of the mere absence of such affirmative evidence. *Evansville & C. R. Co. v. Snapp*, 61 *Ind.* 303.—DISTINGUISHED IN *Wabash R. Co. v. Forshee*, 77 *Ind.* 158. FOLLOWED IN *Evansville & C. R. Co. v. Haddon*, 62 *Ind.* 209; *Evansville & C. R. Co. v. Beard*, 62 *Ind.* 210.

Where in an action against a railroad company, under the statute, for killing stock there is evidence that at the time of the killing the defendant owned and operated the railroad upon which the stock were killed, the court trying the case might reasonably infer therefrom, in the absence of evidence to the contrary, that the locomotive and cars which struck and killed the stock were the property of the defendant; and in such case the supreme court will not disturb a finding for the plaintiff merely for want of direct evidence of such ownership. *Evansville & C. R. Co. v. Smith*, 65 *Ind.* 92.—DISTINGUISHED IN *Wabash R. Co. v. Forshee*, 77 *Ind.* 158.

Upon an examination and consideration of the evidence in an action brought to recover damages for injuries alleged to have been caused, first, by the negligence of a co-employé in overloading a hand-car in which plaintiff, a section-hand, rode to his work; and, second, by the negligence of another co-employé in pushing plaintiff from the car—*held*, that there was no evidence which would have justified the jurors in finding that the hand-car was overloaded, and that therefore the court erred in refusing to so instruct the jury. *Steffenson v. Chicago, M. & St. P. R. Co.*, 48 *Minn.* 285, 51 *N. W. Rep.* 610; (*former appeal*, 45 *Minn.* 355).

**123. Reviewing findings on trial by the court.**—Although there was conflict in the evidence before the trial court, the findings of fact in that court, sitting as a court of chancery, are conclusive in the appellate court unless they are so manifestly erroneous as to demonstrate some oversight or mistake. *Dooly Block v. Salt Lake R. T. Co.*, 56 *Am. & Eng. R. Cas.* 513, 9 *Utah* 31, 33 *Pac. Rep.* 229.

The findings of fact of the court sitting as a master on the question of the reasonable practicability of an overhead crossing

will not be set aside on appeal, except on the ground of palpable error. *Baltimore & C. V. R. E. Co.'s Appeal*, (Pa.) 3 *Am. & Eng. R. Cas.* 242.

Where the issue in a case presents a question of negligence as the foundation of the plaintiff's right of recovery, and—the intervention of a jury being waived—the court have found for the plaintiff on the issue made, and judgment has been entered thereon, and the cause comes up on a petition in error, founded on an agreed statement of the facts, but omitting a statement whether there was negligence or not, the supreme court cannot find that fact contrary to the finding of the court below, the question whether there was negligence or not being not a question of law merely, but a question of fact to be found from the testimony. *Cleveland & T. R. Co. v. Johnson*, 10 *Ohio St.* 591.

Where a case is tried before the court without a jury, its findings of fact should be given the same effect as the verdict of a jury. So where suit is brought for killing a cow, and is so tried, on evidence showing that the cow was killed by a "wild" engine, and that it was not seen until the engine was within 100 feet of it, when the whistle was blown, but it was found impossible to avoid the accident, and there was a conflict of evidence as to whether the statutory signals were given, a judgment for plaintiff should not be disturbed on appeal. *Jacksonville, S. E. R. Co. v. Carlsen*, 29 *Ill. App.* 230.

Plaintiff had his team standing with others near a station at a place designed for the purpose, waiting the arrival of a train. While so waiting he left his team in charge of the hackman next him and went into the station to get lunch. While he was absent the engineer of a switcher ran it down to a point close by the teams and blew with the whistle several excessively loud and shrill blasts to call in the flagman. All the horses became frightened, but the engineer, seeing this, continued to blow the whistle in the same manner, and the plaintiff's horses ran away and were injured. The court below found that the company was guilty of negligence and that the plaintiff was not guilty of contributory negligence. *Held*, that the finding upon both points was one of fact that could not be reviewed. *Fritts v. New York & N. E. R. Co.*, 62 *Conn.* 503, 26 *Atl. Rep.* 347.—APPLY-

ING *Nolan v. New York, N. H. & H. R. Co.*, 53 *Conn.* 461; *Farrell v. Waterbury Horse R. Co.*, 60 *Conn.* 239. QUOTING *Isbell v. New York & N. H. R. Co.*, 27 *Conn.* 404.

#### 7. Reviewing the amount awarded.

**124. In general.**—In a case involving vindictive damages the supreme court would set aside a verdict if it had reason to suspect that such verdict was the result of bias in favor of one class of suitors or prejudice against another class. *Augusta & S. R. Co. v. Dorsey*, 68 *Ga.* 228.

The court will be more reluctant to interfere with a verdict, as awarding excessive damages, where the point was not distinctly made in the court below, but was brought up under the general exception that the verdict was contrary to law and evidence. *Georgia Southern R. Co. v. Neel*, 68 *Ga.* 609.

Whether damages found by a jury are excessive or not does not present a question of law. If no improper testimony affecting the subject of damages has been admitted, and the court has given to the jury proper instructions to guide them in reaching a conclusion, the amount of damages awarded is beyond the reach of a writ of error. *Hunn v. Michigan C. R. Co.*, 41 *Am. & Eng. R. Cas.* 452, 78 *Mich.* 513, 7 *L. R. A.* 500, 44 *N. W. Rep.* 502.

Where a verdict is the evident result of prejudice, partiality, or mistake, and not of that calm and considerate weighing of the facts in evidence which should always characterize the deliberations of a jury, the appellate court will not hesitate to interfere. *Duggan v. Wabash W. R. Co.*, 46 *Mo. App.* 266.—FOLLOWING *Spohn v. Missouri Pac. R. Co.*, 87 *Mo.* 74; *Jackson v. St. Louis, I. M. & S. R. Co.*, 29 *Mo. App.* 500.—*McKinley v. Chicago & N. W. R. Co.*, 44 *Iowa* 314.

While courts may review the finding of juries in actions for personal injuries, still, when only the amount of the verdict is objected to, they interfere with much caution and hesitation, and only reverse where the verdict is plainly and palpably excessive. *Dalzell v. Long Island R. Co.*, 1 *Silv. Sup. Ct. (N. Y.)* 582.

Where the verdict of a jury is excessive it is the duty of the *nisi prius* court to set it aside; but its refusal to do so cannot be reviewed by this court. *Nelson v. Oregon R. & N. Co.*, 13 *Oreg.* 141, 9 *Pac. Rep.* 321.

Where a verdict is for a gross sum, an objection that it included interest will not be

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reviewed on appeal. *Wilson v. Atlanta & C. A. L. R. Co.*, 16 So. Car. 587.

The supreme court of South Carolina cannot review a judgment on the ground that the damages awarded are excessive. *Bowen v. Atlantic & F. B. V. R. Co.*, 14 Am. & Eng. R. Cas. 332, 17 So. Car. 574.—APPLYING *Brickman v. South Carolina R. Co.*, 8 So. Car. 173; *Steele v. Charlotte, C. & A. R. Co.*, 11 So. Car. 589.

An appellate court can grant relief on the ground that a verdict in a suit for personal injuries inflicted by the negligence of another is excessive, only when the amount is so disproportionate to the injuries inflicted as to evidence a wrong motive on the part of the jury. *Gulf, C. & S. F. R. Co. v. Greenlee*, 23 Am. & Eng. R. Cas. 322, 62 Tex. 344.

Where a party sues a railroad company for putting him off the cars with force, at a place not authorized by law, and he recovers damages grossly in excess of the injuries received, the verdict of the jury should be set aside by the court trying the cause, and, failing to do so, the judgment will be reversed that a new trial may be had. *Chicago & N. W. R. Co. v. Peacock*, 48 Ill. 253.

Where a company is sued for a horse fatally injured while in the hands of a common carrier, a verdict for a much larger sum than is warranted by the evidence will be set aside on appeal, though the evidence as to the value of the horse is conflicting. *Harris v. Panama R. Co.*, 5 Bosw. (N. Y.) 312.

Where the value of stock killed by a railroad is laid, under a *videlicet*, at \$200, and there is also an averment that each is of the value of \$19.50, and the verdict is for a sum less than \$200 but more than the separate values added—*held*, that the verdict might be sustained by treating the averment of separate values as surplusage. *Ohio & M. R. Co. v. Clutter*, 82 Ill. 123.

On a creditor's bill against a railroad company some of the debts proved are under \$500, but there is one for \$1117.60 proved before the commissioner, and the decree of the circuit court is in favor of all the creditors against the company. An appeal by the company brings up all of them, and the appellate court will pass upon all. *Winchester & S. R. Co. v. Colfelt*, 27 Gratt. (Va.) 777, 17 Am. Ry. Rep. 121.

**125. When the verdict will not be disturbed.**—(1) *In general.*—The court of

\* When appellate court will not disturb ver-

dict as excessive in personal injury cases. Various examples and instances, see note, 11 L. R. A. 47.

appeals has no jurisdiction to reverse a judgment in an action for negligence because of excessive damages. *Gale v. New York C. & H. R. R. Co.*, 76 N. Y. 594; *affirming* 53 How. Pr. 385; 13 Hun 1. *Maher v. Central Park, N. & E. R. R. Co.*, 67 N. Y. 52, 15 Am. Ry. Rep. 293; *affirming* 7 J. & S. 155.—FOLLOWED IN *Lax v. Forty-second & G. St. F. R. Co.*, 14 J. & S. (N. Y.) 448.

The question of the amount of the verdict is peculiarly one for the jury, and the supreme court will not interfere with it on the ground of excessiveness, unless it clearly appears that such verdict was the result of improper motives or conduct on the part of the jury. *Hanlon v. Missouri Pac. R. Co.*, 104 Mo. 381, 16 S. W. Rep. 233. *Louisville, N. A. & C. R. Co. v. Pedigo*, 27 Am. & Eng. R. Cas. 310, 108 Ind. 481, 8 N. E. Rep. 627. *Tierney v. Minneapolis & St. L. R. Co.*, 21 Am. & Eng. R. Cas. 545, 33 Minn. 311, 53 Am. Rep. 35, 23 N. W. Rep. 229. *Koch v. St. Paul City R. Co.*, 45 Minn. 407, 48 N. W. Rep. 191. *Pry v. Hannibal & St. J. R. Co.*, 73 Mo. 123. *Adams v. Midland R. Co.*, 31 L. J. Exch. 35, 10 W. R. 84. *Singleton v. Southwestern R. Co.*, 21 Am. & Eng. R. Cas. 226, 70 Ga. 464, 48 Am. Rep. 574.—QUOTING *Bryan v. Acee*, 27 Ga. 91.

It is not the province of the supreme court to determine on a writ of error whether a verdict is excessive, and the correction of that error, if there be any, is with the court below upon a motion for a new trial, the granting or refusal of which is not assignable as error. *New York, L. E. & W. R. Co. v. Winter*, 52 Am. & Eng. R. Cas. 328, 143 U. S. 60, 12 Sup. Ct. Rep. 356.—QUOTING *Ætna Life Ins. Co. v. Ward*, 140 U. S. 76.—FOLLOWED IN *Northern Pac. R. Co. v. Charles*, 51 Am. & Eng. R. Cas. 198, 51 Fed. Rep. 562, 7 U. S. App. 359, 2 C. C. A. 380.—*Northern Pac. R. Co. v. Charles*, 51 Am. & Eng. R. Cas. 198, 51 Fed. Rep. 562, 7 U. S. App. 359, 2 C. C. A. 380.—FOLLOWING *New York, L. E. & W. R. Co. v. Winter*, 143 U. S. 60, 12 Sup. Ct. Rep. 356.—*Olson v. St. Paul & D. R. Co.*, 47 Am. & Eng. R. Cas. 573, 45 Minn. 536, 48 N. W. Rep. 445. *Kumli v. Southern Pac. R. Co.*, 21 Ore. 505, 28 Pac. Rep. 637. *Houston & T. C. R. Co. v. Boehm*, 9 Am. & Eng. R. Cas. 366, 57 Tex. 152. *Ft. Worth & N. O. R. Co. v. Wallace*,

40 *Am. & Eng. R. Cas.* 248, 74 *Tex.* 581, 12 *S. W. Rep.* 227.

The supreme court will not reverse a case on the ground of excessive damages unless they are obviously outrageous and excessive. *Ohio & M. R. Co. v. Judy*, 120 *Ind.* 397, 22 *N. E. Rep.* 252.

The finding of a referee as to the value of an animal killed by a railroad not in excess of the market value, as shown by clear and uncontradicted evidence, will not be set aside on the ground that it is excessive. *Jacksonville, T. & K. W. R. Co. v. Garrison*, 30 *Fla.* 567, 11 *So. Rep.* 926. *Jacksonville, T. & K. W. R. Co. v. Garrison*, 30 *Fla.* 557, 11 *So. Rep.* 929.

In actions for damages the appellate court will not disturb a verdict for plaintiff where the evidence is conflicting and where the verdict does not exceed plaintiff's loss, if his evidence is true, though the court would have found a verdict for a less amount. *St. Louis, I. M. & S. R. Co. v. Spann*, (Ark.) 20 *S. W. Rep.* 914. *McClean v. Chicago, I. & D. R. Co.*, 67 *Iowa* 568, 25 *N. W. Rep.* 782.

The supreme court will not generally look closely into small matters of amounts of damage after the jury have passed upon them and the presiding judge had approved their finding. *Central R. Co. v. Russell*, 75 *Ga.* 810.

The jury having returned two verdicts for substantially the same amount, the court of appeals will not reverse upon the ground that the verdict is excessive. *Louisville & N. R. Co. v. Ballard*, 88 *Ky.* 159, 10 *S. W. Rep.* 429.

Plaintiff instituted suit against a company for damages and recovered a verdict for \$2538, which on appeal was held to be excessive, the court intimating that \$1200 was sufficient. On a second trial there was additional evidence as to plaintiff's damages, and he recovered \$1500. Held, on second appeal, that the verdict would not be disturbed. *Patten v. Chicago & N. W. R. Co.*, 36 *Wis.* 413.

(2) *Cases of personal injuries.*—A verdict awarding damages for injuries received by the negligence of a street-car company will not be reversed on appeal, on the ground that the damages are excessive, where it has been approved by the trial court, and where it appears to be the result of a fair and honest judgment of the jurors. *Swain v. Fourteenth St. R. Co.*, 93 *Cal.* 179, 28 *Pac. Rep.* 829.

Where it is apparent that the trial judge did not regard damages assessed as excessive, the appellate court will not interfere in the absence of anything to show that the jury acted from prejudice, partiality, or other improper motive. *Louisville, N. A. & C. R. Co. v. Miller*, (Ind.) 58 *Am. & Eng. R. Cas.* 304.

The jury are the proper judges of the quantum of damages for injuries received by passengers, and this court will not overrule the judge below in refusing a new trial for excessive damages, unless the excess be manifest and gross. *Georgia R. & B. Co. v. McCurdy*, 45 *Ga.* 288.

Where the verdict is not so excessive as to shock the moral sense the supreme court will not order a new trial. So held, where plaintiff recovered \$2433 for being pushed off a moving train near a station by the conductor, who had refused to stop the car at the station to allow plaintiff to get off. *East Tenn., V. & G. R. Co. v. Hyde*, 89 *Ga.* 721, 15 *S. E. Rep.* 621.

If the verdict of the jury in awarding damages against a street railroad company for the infliction of an injury through the gross negligence of a driver is sustained by the testimony in the record, as well for the amount given as for the liability, the supreme court will not enter into an examination of the question whether vindictive damages have any place in the law of Louisiana, where the principal is made liable only for the neglect of his agent. But in such a case the verdict of the jury, being sustained by the evidence in the record, will be affirmed on appeal. *Howell v. St. Charles S. R. Co.*, 22 *La. Ann.* 603.

Where the evidence tended to show that plaintiff was confined to his house for three weeks after the accident, that both of his sides were compressed, that pneumonia resulted, that up to the time of the trial he had been unable to work and had suffered continual pain, and also that the injury might be permanent, a verdict of \$5000 will not be set aside by the supreme court as excessive. *Hanlon v. Missouri Pac. R. Co.*, 104 *Mo.* 381, 16 *S. W. Rep.* 233.

In an action by one injured on a railway crossing by a passing train it appeared that he was a physician sixty years of age and earned about \$2500 a year, that his nose and three ribs were broken and his spine and hip were injured, and some of his teeth were broken and knocked out, and that he is permanently paralyzed on one side of his



face, and that he is an invalid for life, so that his earnings are much reduced. *Held*, that a verdict for \$10,175 will not be disturbed by the supreme court because excessive. *Gratiot v. Missouri Pac. R. Co.*, 55 *Am. & Eng. R. Cas.* 108, 116 *Mo.* 450, 21 *S. W. Rep.* 1094.—QUOTING *Griffith v. Missouri Pac. R. Co.*, 98 *Mo.* 168.

(3) *Eminent domain cases*.—Where a jury assesses damages for land taken for the purposes of a railroad upon uncontradicted evidence of unimpeachable witnesses, who appeared to be respectable and experienced men, the court cannot say that the jury acted corruptly, perversely, or erroneously because the damages are large, where they are justified by the evidence, if it is believed. *Doyle v. Main Shore Line R. Co.*, 80 *Me.* 136, 13 *Atl. Rep.* 275.

Where the evidence is conflicting as to value, and the jury have examined the premises in person, the court will not reverse on the ground alone that the damages assessed may be considered high, unless they are clearly excessive. *Chicago & E. R. Co. v. Jacobs*, 110 *Ill.* 414.

**120. Remitting excessive damages.**—(1) *General rules*.—Where the appellate court believes that the damages are excessive it may impose upon the successful party the alternative of a new trial or accepting a reduced amount. *Noel v. Dubuque, B. & M. R. Co.*, 44 *Iowa* 293. *St. Louis & S. F. R. Co. v. Trimble*, 54 *Ark.* 354, 15 *S. W. Rep.* 899. *Kennon v. Gilmer*, 5 *Mont.* 257, 5 *Pac. Rep.* 847. *Smith v. Wabash, St. L. & P. R. Co.*, 31 *Am. & Eng. R. Cas.* 331, 92 *Mo.* 359, 4 *S. W. Rep.* 129. *Missouri Pac. R. Co. v. Dwyer*, 36 *Kan.* 58, 12 *Pac. Rep.* 352. *Furnish v. Missouri Pac. R. Co.*, 102 *Mo.* 438, 13 *S. W. Rep.* 1044.—NOT FOLLOWING *Harrold v. New York El. R. Co.*, 24 *Hun* (N. Y.) 184; *Chicago & E. I. R. Co. v. Holland*, 18 *Ill. App.* 418, 122 *Ill.* 461; *Woodbury v. District of Columbia*, 5 *Mackey* (D. C.) 127.—*Waldhier v. Hannibal & St. J. R. Co.*, 87 *Mo.* 37.—DISTINGUISHED IN *Hawes v. Kansas City Stock Yards Co.*, 103 *Mo.* 60. REVIEWED AND QUOTED IN *Dougherty v. Missouri R. Co.*, 34 *Am. & Eng. R. Cas.* 488. See also 37 *Am. & Eng. R. Cas.* 206, 97 *Mo.* 647, 15 *West. Rep.* 235, 8 *S. W. Rep.* 900, 11 *S. W. Rep.* 251.

The practice of requiring the plaintiff to remit a portion of his damages and render-

ing judgment for the residue, when there is no ground for a new trial except that the damages awarded by the jury are excessive, is too well established in this state to be called in question. *Libby v. Scherman*, 146 *Ill.* 540, 34 *N. E. Rep.* 801.

In damage suits it is only where the findings of the jury may be separated into distinct parts, or where error is readily discernible and separable, and may have increased the finding, that the appellate court is justified in directing or permitting a *remittitur* of a part. *Woods v. Richmond & D. R. Co.*, 1 *App. Cas. (D. Col.)* 165.

Where a judgment against a railroad for killing stock is reversed on appeal as excessive, and before the end of the term the plaintiff files a *remittitur* of the excess of the judgment above the actual value of the stock killed, the court will set aside its judgment of reversal and affirm the judgment of the lower court as thus modified. *Gulf, C. & S. F. R. Co. v. Key*, 4 *Tex. App. (Civ. Cas.)* 448, 16 *S. W. Rep.* 543.

The supreme court will not, because the damages awarded by the verdict of a jury are excessive, indicate a sum to be remitted so that on such *remittitur* being entered judgment may be affirmed as to the residue. *Gurley v. Missouri Pac. R. Co.*, 104 *Mo.* 211, 16 *S. W. Rep.* 11.

Such excessive verdict will not be disturbed by the supreme court unless on its face it appears to be the result of passion or prejudice, and where it does so appear to be the result of passion or prejudice it will be set aside entirely. *Gurley v. Missouri Pac. R. Co.*, 104 *Mo.* 211, 16 *S. W. Rep.* 11.—CRITICISED IN *Holmes v. Atchison, T. & S. F. R. Co.*, 48 *Mo. App.* 79. REVIEWED IN *Zurfluh v. People's R. Co.*, 46 *Mo. App.* 636.

A verdict in an action for personal injuries, where the injury is permanent and recovery hopeless, will not be reduced if the trial judge is satisfied. *Britton v. South Wales R. Co.*, 27 *L. J. Exch.* 355.

(2) *Illustrations*.—Where, in addition to compensatory damages for plaintiff's expenses, loss of time, diminished capacity for labor, and suffering, the jury are erroneously instructed to consider the element of punitive damages, a *remittitur* of such excessive damages will not be allowed. *St. Louis, I. M. & S. R. Co. v. Hall*, 42 *Am. & Eng. R. Cas.* 208, 53 *Ark.* 7, 13 *S. W. Rep.* 138.—APPROVING *Blunt v. Little*, 3 *Mason* (U. S.)

\* See also *ante*, §.



102. **LIMITING** Little Rock & Ft. S. R. Co. v. Barker, 39 Ark. 491.

Where it appeared that plaintiff was left after an accident fully able to earn a livelihood, only needing proper treatment to effect a complete cure, and that the accident resulted in nothing more serious than inflammation of the hip, which caused great pain, some loss of time, and considerable expense for medical attendance, a verdict for \$25,000 was held excessive, and ordered to be reduced to \$500. *Peyton v. Texas & P. R. Co.*, 41 Am. & Eng. R. Cas. 550, 41 La. Ann. 861, 6 So. Rep. 690.

A verdict of \$10,000 in favor of a married woman, 43 years old, for injuries which caused nervous prostration and other pain and inconvenience, but which did not prevent her from walking about, held to be excessive and ground for a new trial, unless she stipulated to accept \$4000. *Lockwood v. Twenty-third St. R. Co.*, 15 Daly (N. Y.) 374; 7 N. Y. Supp. 663; 28 N. Y. S. R. 16.

Plaintiff was at the time of the accident thirty-six years of age, with an earning capacity of eight dollars a week. The jury gave him a verdict of \$20,000. Held, excessive, and reduced to \$15,000. *Pfeffer v. Buffalo R. Co.*, 4 Misc. (N. Y.) 465.

A judgment for \$10,000 for the loss of a hand to a man who was earning \$75 per month and who had fully recovered, except the loss of the hand, held to be excessive, but affirmed upon remission of all above \$4000. *Brown v. Southern Pac. R. Co.*, 7 Utah 288, 26 Pac. Rep. 579.

**127. Setting aside verdict for inadequate damages.**—If the owner of stock killed is entitled to recover at all, he is entitled to the full value of the stock, and a judgment for one-fourth of the value, as proved, will be set aside as inconsistent. *Smedley v. Chicago & N. W. R. Co.*, 45 Ill. App. 426.

Where in an action to recover damages for injury to property the cause of the injury is a matter of conjecture, a verdict in favor of the plaintiff will not be set aside at his instance because the verdict is not as large as it probably would have been had the cause of the injury been fully proved. *Benson v. Burlington & M. R. R. Co.*, 18 Neb. 659.

A passenger sued for being ejected from a train, and it appeared that the items of his damage were: (1) the cost of an additional ticket, fifty cents; (2) the loss of two

or three hours' time, value not proven; (3) the money equivalent for the indignity put upon him and for the injury to his feelings. He recovered a verdict for \$10. Held, that, as the last item may have been worthy of substantial compensation or not, which was for the jury, the court will not review the verdict on appeal as inadequate. *Phelan v. New York C. & H. R. R. Co.*, 12 N. Y. S. R. 413, 46 Hun 679.

A verdict of a jury in assessing damages will not be disturbed on appeal simply because the evidence would have warranted a much higher verdict. So held, in an action against a railroad company for causing a fire on a farm-land, where the suit was for \$1500 and the verdict was for \$164, and where the evidence left considerable doubt as to the amount of land burned over and the extent of the damage. *Witte v. Gulf, C. & S. F. R. Co.*, (Tex.) 6 S. W. Rep. 618.

**128. Increasing inadequate damages.**—Damages allowed by a jury will not be increased on appeal unless manifestly inadequate. *Moses v. Louisville, N. O. & T. R. Co.*, 30 Am. & Eng. R. Cas. 556, 39 La. Ann. 649, 2 So. Rep. 567.

Where a jury has failed to do justice in the awarding of damages, the court on appeal may give proper relief. So where it appeared that plaintiff was knocked senseless, had his ear cut through, received a severe gash on his head, had his face smashed and bruised and his leg severely sprained, and that after recovering consciousness he was seized with vomiting, was laid up for several days, suffering great pain, and incurred considerable expense for board and medical treatment, a verdict for \$100 was regarded as inadequate and was increased to \$500. *Sullivan v. Vicksburg, S. & P. R. Co.*, 30 Am. & Eng. R. Cas. 168, 39 La. Ann. 800, 2 So. Rep. 586.

### III. TAKING AND PERFECTING AN APPEAL.

**129. In general.**—When a statute gives a court jurisdiction to try an action upon appeal, the court does not obtain jurisdiction of the subject-matter of the action unless the appeal be taken in a proper case and in the manner prescribed by law. *Spaulding v. Milwaukee, L. S. & W. R. Co.*, 10 Am. & Eng. R. Cas. 509, 57 Wis. 304.

Where the president of a railroad company was informed that a suit was about to be brought against his company, before a

justice of the peace, and, believing that a recovery in such suit would be unjust, gave instructions to the most convenient station agent to attend the trial, and, in case of a recovery against the company, to appeal to court, and such agent was a diligent and faithful officer, but from ignorance of the law failed to procure security for the appeal—*held*, that there was no such laches on the part of the president as deprived the company of a right to a *recordari*. *North Carolina R. Co. v. Vinson*, 8 *Jones* (N. C.) 119.

**130. Time of taking.**—In proceedings to acquire title to land under Code Iowa, § 1254, the time for taking an appeal from the assessment of commissioners begins to run from the time the assessment is actually made and reduced to writing and made public, or in some legitimate manner brought to the notice of the parties interested. *Jamison v. Burlington & W. R. Co.*, 27 *Am. & Eng. R. Cas.* 413, 69 *Iowa* 670, 29 *N. W. Rep.* 774.

Where a party entitled to an appeal in eminent domain proceedings uses diligence in endeavoring to perfect the same, the law will not permit him to be deprived of it through the neglect of the officer whose duty it was to prepare the transcript. *Republican Valley R. Co. v. McPherson*, 12 *Neb.* 480, 11 *N. W. Rep.* 739.—DISTINGUISHED IN *Clinton v. Missouri Pac. R. Co.*, 122 *U. S.* 469. REVIEWED IN *Gifford v. Republican V. & K. R. Co.*, 20 *Neb.* 538.

A suit is suspended during the period between the death of a party and the order granting a continuance, and this period is not to be deemed any part of the time limited for taking an appeal. *McBride v. Northern Pac. R. Co.*, 42 *Am. & Eng. R. Cas.* 146, 19 *Oreg.* 64, 23 *Pac. Rep.* 814.

Where the depositions taken in support of a rule show that the justice of the peace has no jurisdiction of an action of trespass to recover for injuries to a car, and that the defendant was misled by the justice's statement, the district court will grant relief by allowing an appeal *nunc pro tunc*. *Hestonville Pass. R. Co. v. Boyle*, 1 *Pa. Dist.* 230.

A decree in a *quo warranto* proceeding to enforce a forfeiture against a railroad company will not be reviewed on appeal unless it be prosecuted at the term of the court in session, or, if not in session, at the first term to be held after judgment has

been rendered in a district court, as provided by statute. *International & G. N. R. Co. v. State*, 41 *Am. & Eng. R. Cas.* 611, 75 *Tex.* 356, 7 *R. R. & Corp. L. J.* 305, 12 *S. W. Rep.* 685.

Where an appeal is a matter of right, the efflux of the time within which it may be taken is stopped by the filing of the appeal bond; but where the appeal depends upon discretion or allowance, the time of limitation runs until the application or petition for appeal is presented. *Womer v. Ravenswood, S. & G. R. Co.*, 37 *W. Va.* 287, 16 *S. E. Rep.* 488.—QUOTING AND FOLLOWING *Long v. Ohio River R. Co.*, 35 *W. Va.* 333.

**131. Notice of appeal.**—The filing of proof of a legally effectual service of the notice of appeal is jurisdictional, and a failure to comply with the statute cannot be cured by amendment after the time to appeal has expired. *Stolt v. Chicago, M. & St. P. R. Co.*, 49 *Minn.* 353, 51 *N. W. Rep.* 1103.

Under N. Y. Code Civ. Proc. § 3046, authorizing the appellate court to allow an amendment upon such terms as justice requires, where the appellant has omitted to do any act necessary to perfect the appeal, the omission to subscribe a notice of appeal may be cured by amendment. *Gutbrecht v. Prospect Park & C. I. R. Co.*, 28 *Hun* (N. Y.) 497.

Notice of an appeal was required to be served on a railroad company, and also upon the clerk of the court, but in taking an appeal the citation was served upon the company, and afterward filed with the clerk, and its contents were made known to him. *Held*, that such service upon the clerk, though informal, was not ground for dismissing the appeal. *Black v. Chicago & N. W. R. Co.*, 18 *Wis.* 208.

By an obligation payable to a certain person or bearer, the maker, in consideration of one dollar, the receipt of which was therein confessed, and of the delivery to be made to him by a certain railroad company of a specified number of shares of its capital stock, acknowledged himself to be indebted in a certain sum, which he promised to pay in instalments as the construction of the roadbed progressed, in proportion to monthly estimates thereof, and that the whole should be paid on the completion of such roadbed. *Held*, that such company having been made a party defendant, but no judgment having been rendered against it

below, it need not be made a party to nor served with notice of an appeal; and that a failure to give notice to the company of such an appeal is ground for setting aside a submission of the cause on default, but not for a dismissal of the appeal. *Clark v. Continental Imp. Co.*, 57 Ind. 135, 18 Am. Ry. Rep. 505.

**132. Parties.**—Where a party claiming a right of way under a contract was not before the court below, and it is apparent that he has an interest in the subject-matter of the suit, he must be made a party before the court will determine his rights in the premises. *Koenig v. Chicago, E. & Q. R. Co.*, 27 Neb. 699, 43 N. W. Rep. 423.

In a suit by bondholders to foreclose a mortgage to secure the bonds, wherein the railroad company and the mortgage trustees are defendants, the company is the only real defendant, and may appeal alone. *Norwich & W. R. Co. v. Johnson*, 15 Wall. (U. S.) 8.

A judgment was obtained against the "Southern Pacific Railroad Company" in a suit filed Sept. 6, 1871. On July 10, 1873, a writ of error was directed to the "Texas & Pacific Railway Company." *Held*, that the acts of May 24, 1871, and May 2, 1873, clearly show a consolidation of the first-mentioned company under the name of the latter, and that therefore the writ was properly directed. *Stephenson v. Texas & P. R. Co.*, 42 Tex. 162.—APPROVED IN *Acres v. Moyné*, 59 Tex. 623. FOLLOWED IN *Texas & P. R. Co. v. Murphy*, 46 Tex. 356.

The Connecticut act of 1889 relating to grade crossings (Sess. Laws 1889, ch. 220) provides in effect that the directors of every company which operates a railroad in that state shall apply for the removal of at least one grade crossing each year for every sixty miles of road; \* \* \* and that if the directors of any company fail so to do the commissioners shall order such crossing or crossings removed, etc. *Held*, that the railroad commissioners were proper parties defendant to an appeal taken from an order made by them under the statute. *New York & N. E. R. Co.'s Appeal*, 55 Am. & Eng. R. Cas. 88, 62 Conn. 527, 26 Atl. Rep. 122.

Where a suit was instituted against a railway company and was prosecuted to a judgment in the lower court, and the rights and franchises of that company were transferred to another company thereafter, such

latter company cannot be made a party to the appeal by motion in the supreme court. If it is the successor of the defendant company it must have an opportunity to contest the pretension that it inherits the liabilities of that company, and the appellate court cannot assume as undisputed fact that it represents its predecessor in such sense as to be liable for that predecessor's obligations. *Ranger v. New Orleans, J. & G. N. R. Co., Mann. (La.)* 176.

W. filed his declaration in the county court, alleging that E., as superintendent and general manager of the Macon & Brunswick Railroad, and the Macon & Brunswick Railroad had damaged him the sum of eighty dollars, by reason of one of the railroad trains running over certain cows. The declaration closed with a prayer for process against E., as superintendent, and the railroad company. Service was perfected on the company, but not on E. Judgment was rendered for the plaintiff, and the company appealed. *Held*, that the company was a party to the suit and had a right to appeal whether the other party did so or not, and that a dismissal of such appeal, on motion, for want of proper parties thereto, was error. *Macon & B. R. Co. v. Washington*, 69 Ga. 764.

**133. Security.**—An instrument intended as an appeal bond, and purporting in the body thereof to bind a railroad company, but which is signed by a certain person as agent of the company, followed by a scrawl for a seal, is not a valid bond of the company. *Savannah, F. & W. R. Co. v. Clark*, 23 Fla. 308, 2 So. Rep. 667.

Where an appeal bond of a railway company is sued on, and there is no plea under oath denying that it is such bond as it purports on its face to be, and it is signed by the president and secretary, with the corporate seal attached, no other proof of its being the bond of the company is necessary. *Kriethsburg & E. R. Co. v. Henry*, 90 Ill. 255.

Where an appeal bond executed in the name of a railroad company has the seal of the corporation attached, the presumption is that the person using the seal had authority to do so. *Indianapolis & St. L. R. Co. v. Morganstern*, 9 Am. & Eng. R. Cas. 469, 103 Ill. 149.

Perfecting an appeal from a decree declaring the charter of a railroad company forfeited, by giving an appeal bond, suspends the decree of forfeiture and enables

the company to execute appeal or writ of error bonds to have other judgments against it reviewed; and the validity of such bonds will not be affected by a subsequent affirmation of the decree of forfeiture. *Texas Trunk R. Co. v. Jackson*, 85 Tex. 605, 22 S. W. Rep. 1030.

The decree ordered payment of a sum of money by a railway company, and in default that a receiver should be appointed; from it the company gave notice of appeal, and moved to stay the appointment of the receiver and the enforcement of the debt until after judgment on appeal. The court refused the application unless security were given for payment of the debt in case the decree should be affirmed; and in any event ordered defendants to pay the cost of the motion. *Fox v. Toronto & N. R. Co.*, 26 Grant Ch. (Ont.) 352.

On an appeal by a railroad company from a judgment rendered by a justice of the peace, to the circuit court, the appeal bond was executed by the company's attorneys only, notwithstanding a rule of the latter court prohibiting attorneys "from being received as security in such cases." *Held*, on motion to dismiss the appeal, that such attorneys, though probably liable for contempt of such rule, are liable on the bond, and that the bond is sufficient. *Ohio & M. R. Co. v. Hardy*, 64 Ind. 454. See also *Ohio & M. R. Co. v. Hay*, 64 Ind. 597.

Where a judgment is rendered in favor of A. against C., before a justice of the peace, on a similar award of damages for a right of way made by a board of county commissioners, and C., for the purpose of perfecting an appeal to the district court, gives a bond running to B., an entire stranger to the record and proceedings, and no special equities are shown—*held*, that the district court committed no error by refusing to permit the perfecting of an appeal by the giving of a new bond running to A. *Lovitt v. Wellington & W. R. Co.*, 26 Kan. 297.—QUOTED IN *Chicago, K. & W. R. Co. v. Abilene Town-Site Co.*, 42 Kan. 97, 104, 21 Pac. Rep. 1112.

A court entered a decree allowing the bondholders of a railroad company to purchase the road, or to reorganize it without a sale, and allowing the non-subscribing bondholders, who were largely in the minority, to participate in the purchase or reorganization if they chose to come in by a certain time. The road was in the hands

of a receiver and was paying but little more than expenses, but it appeared that, if it went into the hands of the purchasers at once, by making certain improvements it could be made much more profitable. *Held*, that a small minority of the stockholders, who were dissatisfied and wished to appeal, should give bond sufficient to secure the majority against loss for the time they would be out of possession of the road if they reorganized, or out of the use of the money if the road was sold, which bond was fixed at \$100,000. *Duncan v. Mobile & O. R. Co.*, 3 Woods (U. S.) 597.

**134. Abstract.**—An abstract of the pleadings, showing the grounds on which the damages were asked, not having been filed as required by the rules of court and the statute, and such abstract being necessary for the determination of the assigned errors, the appeal will be dismissed. *Cunningham v. Union Pac. R. Co.*, 110 Mo. 208, 19 S. W. Rep. 822.

**135. Assignment of errors.**—Where the trial court has required a *remittitur* of excessive damages, unless there be a distinct assignment of errors touching such procedure, the court on appeal will not inquire whether the *remittitur* ought to have been allowed or not. *Sabine & E. T. R. Co. v. Hadnot*, 30 Am. & Eng. R. Cas. 197, 67 Tex. 503, 4 S. W. Rep. 138.

Where a railroad company is sued for injuries resulting from an accident, an assignment of error that the court refused to allow evidence of the declarations of the conductor made after the accident is too general to be considered, where there is nothing to show what declarations are referred to. *Newsom v. Georgia R. Co.*, 62 Ga. 339.

In an action by a wife for the death of her husband at a railroad crossing, an assignment of error that immediately after the accident the little children of a witness came running down the road and told him what had happened, is not available where no evidence of the witness whose testimony is sought to be excluded appears in the record, and it is not stated in the motion for a new trial what were the sayings made by the children. *Chattanooga, R. & C. R. Co. v. Cloudis*, 90 Ga. 258.

An assignment that the court erred in overruling defendant's objection to the introduction of evidence, without specifying which of a large number of such rulings is

referred to, is insufficient. *American Exp. Co. v. Platt*, 51 Minn. 568, 53 N. W. Rep. 877.

In an action for personal injuries at a crossing, an assignment of error that the court erred in refusing to give the 3d, 4th, 5th, and 6th charge is too general to be considered. *Galveston, H. & S. A. R. Co. v. Matula*, (Tex.) 19 S. W. Rep. 376.

An assignment of error that "the verdict is against the law and evidence," without anything more specific, is too general to be considered, unless the assignment is fundamental, or the record shows that a reversal is absolutely necessary to prevent injustice. *Bonner v. Whitcomb*, 80 Tex. 178, 15 S. W. Rep. 899.

Amendments to the appellant's assignment of errors will be allowed in the supreme court where the appellee will not be prejudiced thereby, nor the submission of the cause delayed. *Hall v. Chicago, R. I. & P. R. Co.*, 84 Iowa 311, 51 N. W. Rep. 150.—QUOTING *Potter v. Chicago, R. I. & P. R. Co.*, 46 Iowa 399.

By an obligation payable to a certain person or bearer, the maker, in consideration of one dollar, the receipt of which was therein confessed, and of the delivery to be made to him by a certain railroad company of a specified number of shares of its capital stock, acknowledged himself to be indebted in a certain sum, which he promised to pay in instalments as the construction of roadbed progressed, in proportion to the monthly estimates thereof, and that the whole should be paid on the completion of such roadbed. *Held*, that, the company having been, by the assignment of errors, made an appellee instead of an appellant, such assignment is informal, but that a failure to object thereto is a waiver of such informality. *Clark v. Continental Imp. Co.*, 57 Ind. 135, 18 Am. Ry. Rep. 505.

**136. Bill of exceptions.**—A question raised by appellant upon a demurrer to evidence, where the matters relating to it have not been preserved in a bill of exceptions, cannot be considered on appeal. *Willisch v. Indianapolis & St. L. R. Co.*, 10 Ill. App. 402.

A bill will not be considered which is neither signed nor sealed by the trial judge, and which is otherwise irregular. *Wabash, St. L. & P. R. Co. v. Peterson*, 15 Ill. App. 149.

In an action against a railroad company

for failing to properly carry and deliver goods, if an appeal be taken, a bill of exceptions not signed and sealed by the trial judge will not be regarded as a part of the record, and the appellate court will presume that there was sufficient evidence to support the judgment. *Chicago & N. R. Co. v. Benham*, 25 Ill. App. 248.

An appeal by a railroad company in an action brought to recover from it for a personal injury alleged to have been occasioned through its negligence, for the reason that the bill of exceptions was not signed and sealed by the trial judge, will not be considered. *Chicago, B. & Q. R. Co. v. Johnson*, 34 Ill. App. 351.

A stipulation of parties that a certain document shall stand for a bill of exceptions does not meet the positive requirement of the law that a bill of exceptions shall be signed and sealed by the trial judge before it shall become a part of the record. *Illinois C. R. Co. v. Gilchrist*, 9 Ill. App. 135.

Where an amendment to a declaration is offered but is disallowed by the court, it does not constitute a part of the record; and in order to have this court review the ruling of the court below in rejecting such offered amendment, it should be set out in the bill of exceptions or annexed to the same as an exhibit properly authenticated. *Burnett v. East Tenn., V. & G. R. Co.*, 87 Ga. 766, 13 S. E. Rep. 904.—FOLLOWING *Sibley v. Mutual R. F. L. Assoc.*, 87 Ga. 738.

Recitals in a bill of exceptions, to the effect that "the plaintiff introduced evidence tending to prove his claim for damages," and that "the court found the issues for the plaintiff," are sufficient to show that the finding of the court as to the recovery was based upon evidence in the cause. *Boswell v. St. Louis, I. M. & S. R. Co.*, 7 Am. & Eng. R. Cas. 561, 73 Mo. 470.—FOLLOWING AND DISTINGUISHING *Snider v. St. Louis, I. M. & S. R. Co.*, 73 Mo. 465.

The supreme court has power, of its own motion, to correct any error or improvidence in the allowance of a writ of *mandamus*; and when it has, through oversight or inadvertence, issued an alternative writ to compel a circuit judge to settle and sign a bill of exceptions not containing all the facts deemed necessary by him, it will, on discovery of the mistake, set aside and vacate the writ and direct a bill to be prepared according to the facts and settled be-



fore the trial judge. *State ex rel. v. Clough*, 69 Wis. 369, 34 N. W. Rep. 399.

**137. Brief.**—Where no brief is filed by the appellee, the court will reverse the judgment *pro forma*, unless on examination the case seems to demand a decision on the merits. *Terre Haute, V. & I. R. Co. v. Goodwin*, 4 Ill. App. 165.

**138. Certificate of trial judge.**—Where, in an action in a justice's court, plaintiff demanded judgment for \$100 only, for stock killed by a railroad, and judgment was rendered for him for that amount and costs, and the judgment bore interest at six per cent., and the defendant appealed the cause to the circuit court, where judgment, as limited by the prayer of the petition, was again rendered for \$100 and costs—*held*, that this court had no jurisdiction to entertain an appeal from the circuit court without a certificate of the trial judge. *Hays v. Chicago, B. & Q. R. Co.*, 64 Iowa 593.—FOLLOWED IN *Arderly v. Chicago, B. & Q. R. Co.*, 65 Iowa 723.

**139. Statement of facts.**—It is a general principle that the appellate court will not review the action of the trial court in giving or refusing instructions where there is no statement of facts, but the following form exceptions to this rule: (1) Where the error is so glaring as to leave no doubt that the finding of the jury was controlled by the erroneous charge; (2) Where the charge and verdict are upon issues not made in the pleadings. *Hill v. Gulf, C. & S. F. R. Co.*, 80 Tex. 431, 15 S. W. Rep. 1099.

In appeals to the supreme court of Texas, in the absence of a statement of facts that court will consider the trial judge's conclusions of facts as correctly drawn; therefore, in an action against a railroad for personal injuries, in the absence of such statement of facts the conclusions of the judge that there was no negligence on the part of the plaintiff contributing to her injuries must be deemed correct. *Texas & P. R. Co. v. Cole*, (Tex.) 1 S. W. Rep. 631.—DISTINGUISHING *Texas & P. R. Co. v. Cole*, (Tex.) 1 S. W. Rep. 629.

**140. Filing the record.**—When a record is not filed in the appellate court within the first two days of the first term succeeding that at which the judgment was rendered, an appeal will be dismissed. *Chicago, B. & Q. R. Co. v. Aurora*, 5 Ill. App. 395. *Speck v. Hickman*, 5 Ill. App. 395.

Where the record of appeal is not filed within three judicial days after the return day, and no extension of time has been obtained, the appeal must be dismissed if required by the appellee. *New Orleans & C. R. Co. v. Hood*, 3 La. Ann. 226. See also *Baltimore & O. R. Co. v. Harris*, 7 Wall. (U. S.) 574.—FOLLOWED IN *Chicago, R. I. & P. R. Co. v. Grinnell*, 53 Iowa 55.

The filing of a transcript in the district court within sixty days after the assessment of damages, in an eminent domain proceeding, as provided by Neb. Comp. St. ch. 16, § 97, is essential to the validity of an appeal. *Gifford v. Republican V. & K. R. Co.*, 20 Neb. 538, 31 N. W. Rep. 11.—REVIEWING *Republican Valley R. Co. v. Linn*, 15 Neb. 234; *Nebraska R. Co. v. Van Dusen*, 6 Neb. 160; *Republican Valley R. Co. v. McPherson*, 12 Neb. 480.

#### IV. PROCEDURE IN APPELLATE COURT.

**141. In general.**—A ruling made on the first appeal of a cause will be adhered to on all subsequent appeals of the same cause, whether right or wrong. And so, the conclusion of this court, announced in the opinion on rehearing on a former appeal (see 62 Iowa 594), as to what constitutes a conflict of evidence as to negligence in an action against a railway company for damages for a fire caused by a locomotive, is adhered to on this appeal without reconsideration. *Babcock v. Chicago & N. W. R. Co.*, 72 Iowa 197, 28 N. W. Rep. 644, 33 N. W. Rep. 628.—FOLLOWING *Adams County v. Burlington & M. R. R. Co.*, 55 Iowa 94.

Where, on a former appeal, the supreme court held that, according to the statutes of Missouri, which were introduced in evidence to support the answer of the railroad company, the judgment of garnishment rendered in a justice's court in St. Louis was void, and constituted no defense to the cause of action set out in the complaint, such declaration continues to be the law of the case on a subsequent appeal to the appellate court. *Terre Haute & I. R. Co. v. Baker*, 4 Ind. App. 66, 30 N. E. Rep. 431.

A company was enjoined from constructing its road across a tract of land until payment of the damages that had been awarded, and pending an appeal it paid the damages under protest and entered upon the land. *Held*, that the appellate court could not enter judgment for the amount so paid,



or any part thereof, and that the fact of its being paid under protest would make no difference. *Atlanta & F. R. Co. v. Blanton*, 80 Ga. 563, 6 S. E. Rep. 584.

**142. Affirmance.**—(1) *When proper, generally.*—Where a bond is sued on and the damages equal or exceed the penalty, it is usual to allow interest after the date of the breach; but where a bond is given to secure the building of a railroad, in a penalty equal to the value of certain lands conveyed as a bonus to aid in the building of the road, and it appears that the lands were unproductive and the company derived no income therefrom, in an action upon the bond for a failure to build the road, the action of the court in refusing to find interest will not be disturbed on appeal. *Blewett v. Front St. C. R. Co.*, 51 Fed. Rep. 625, 7 U. S. App. 285, 2 C. C. A. 415; *affirming* 49 Fed. Rep. 126.

The sole question involved was the correctness of the trial court in directing a verdict on the ground that plaintiff was guilty of negligence; and it appearing that the exercise of even slight care on the part of the plaintiff would have enabled him to avoid the accident, the judgment is affirmed. *Gebhard v. Detroit, G. H. & M. R. Co.*, 79 Mich. 586, 44 N. W. Rep. 1045.

Where the pleadings upon which the cause was tried do not appear in the transcript of the record, all presumptions are in favor of the action of the trial court, and the judgment will be affirmed. *Central Sav. Bank v. Bellefontaine R. Co.*, 2 Mo. App. 601, *mem.*

Where a writ of *mandamus*, directed to a commissioner of public works in the city of New York, requiring him to issue a permit to the relator for the removal of a pavement, had been fully executed and the permit availed of by the relator, and thereafter the commissioner had gone out of office—*held*, on appeal to this court, that as there was no question of practical importance to be decided, the order granting the writ should be affirmed without considering the question as to whether the relator was entitled to the writ. *People v. Squire*, 110 N. Y. 666, 2 Silv. App. 113, 18 N. E. Rep. 362, 18 N. Y. S. R. 528; *affirming* 21 J. & S. 536.

Where two corporations are sued jointly, and there is a separate verdict against each, and the court on appeal finds reversible error as to one but not as to the other, a

judgment as to the one where there is no error will be affirmed on the plaintiff dismissing the suit as to the other; otherwise the entire case will be reversed and remanded. *Western Union Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608, 21 S. W. Rep. 638.

Where an appeal is taken from a judgment awarding damages for stock killed by a railroad company, and the error assigned is in allowing interest on the value of the animals, and the plaintiff files a *remittitur* of such interest, the judgment will be affirmed as thus corrected. *Galveston, H. & S. A. R. Co. v. Carter*, (Tex. App.) 18 S. W. Rep. 196.

Where an action by a passenger against a railroad company is appealed by the company, and the error assigned consisted in the introduction of improper testimony, which could only affect the verdict by increasing the damages, a rehearing will be allowed on application accompanied by an offer to remit the excessive damages; and the judgment, as thus reduced, will be affirmed. *Galveston, H. & S. A. R. Co. v. Wesch*, (Tex. Civ. App.) 21 S. W. Rep. 313; *affirmed* 21 S. W. Rep. 1014.

Where, on appeal, in an action by a father to recover damages for an injury to his daughter, alleged to have been caused by defendant's negligence, the record shows that the verdict for the plaintiff is sustained by a preponderance of evidence, and that the instructions to the jury were sufficiently favorable to the defendant, the judgment will be affirmed. *Larson v. Lake Superior, T. & T. R. Co.*, 79 Wis. 201, 48 N. W. Rep. 421.

(2) *Illustrations.*—Suit was brought against a company for negligently causing the death of a conductor. Two trials resulted in the same verdict. *Held*, in the appellate court, that a judgment based upon the second verdict should be affirmed, there being no substantial error in the record. *Chicago, M. & St. P. R. Co. v. Snyder*, 27 Ill. App. 476.

In an action by a female, who claimed to be a passenger, to recover for personal injuries caused by jumping from a car to avoid a collision, it appeared that she had no pass, but had money to pay her fare; but the conductor, without directly demanding a fare, was referred to her brother, who was a brakeman on the same train; but plaintiff was not permitted to testify as to previous con-

versations with her brother on the subject, but did testify that she had no previous arrangement by which she was to travel on a pass, and had purchased no ticket. *Held*, that a verdict and judgment in favor of plaintiff, based upon the fact that she had no pass and was a regular passenger, should not be disturbed. *Morris v. New York, O. & W. R. Co.*, 73 *Hun* (N. Y.) 560, 26 *N. Y. Supp.* 342, 56 *N. Y. S. R.* 231.

Two actions were brought against a railroad company to recover for personal injuries to a minor girl—one by the father, and the other by the girl herself. The action by the father was tried, resulting in a judgment in his favor, which was affirmed on appeal. When the second case came on for trial it was conceded that the plaintiff was entitled to recover unless the evidence varied materially from that in the former action. At the trial of the second case, an engineer, who had testified at the former trial that he did not whistle until plaintiff was struck, was not produced as a witness, and two other witnesses, whose evidence had supported the engineer at the former trial, did not give similar testimony, but there was evidence on the part of the defendant that the whistle was blown much earlier. Plaintiff's testimony was the same as that given by her at the former trial. *Held*, that a judgment for plaintiff should be affirmed. *Swift v. Staten Island R. T. R. Co.*, 44 *N. Y. S. R.* 747, 63 *Hun* 628, 17 *N. Y. Supp.* 654.

**143. Reversal.**—(1) *When proper, generally.*—Where the jurisdiction of a federal court depends upon diverse citizenship under the statute, which is not sufficiently shown by the record, the appellate court will reverse a judgment, though no exception to the jurisdiction was taken in the trial court; and no amendment will be allowed in the appellate court. *St. Louis, I. M. & S. R. Co. v. Newcom*, 56 *Fed. Rep.* 951.—*QUOTING Mansfield, C. & L. M. R. Co. v. Swan*, 111 *U. S.* 379, 4 *Sup. Ct. Rep.* 510.

Where two judgments in the same cause, awarding damages to the plaintiff, based upon the same evidence, have been reversed for want of evidence to sustain them, and a third judgment is obtained upon substantially the same evidence, such judgment will be reversed and the cause dismissed, since it is evident that the litigation can serve no legitimate end. *St. Louis, I. M. & S. R. Co. v. Morgart*, 56 *Ark.* 213, 19 *S. W. Rep.* 751.

Where, under any view which can be taken of the testimony of the witnesses who saw the conduct of plaintiff's decedent, it appears that he was not in the exercise of that care and caution which it was his duty to observe in approaching and crossing a railroad track, a judgment for his administrator will be reversed. *Apsey v. Detroit, L. & N. R. Co.*, 83 *Mich.* 432, 47 *N. W. Rep.* 319.

Where the proofs show a party entitled to nominal damages, which would entitle him to recovery of costs, a judgment for the opposite party will be reversed. *Moore v. New York El. R. Co.*, 23 *N. Y. Supp.* 863, 4 *Misc. (N. Y.)* 132.

Where, notwithstanding an omission of the defendant to move for a nonsuit or to ask for binding instructions to the jury, it is clear that the admitted facts fail to establish any negligence in the defendant, and that plaintiff, as matter of law, must always fail to recover, a judgment for the plaintiff will be reversed without a new venire. *Graham v. Pennsylvania Co.*, 47 *Am. & Eng. R. Cas.* 522, 139 *Pa. St.* 149, 21 *Atl. Rep.* 151.

(2) *Illustrations.*—Plaintiff sued to recover for stock killed, and filed a complaint in two counts, alleging the killing of different stock at different times and places. The evidence was sufficient to find the company guilty under one count, but not under the other. *Held*, that a judgment for plaintiff should be reversed as to one count only. *Kendrick v. Chicago & A. R. Co.*, 81 *Mo.* 521.

Plaintiff, a brakeman, was injured while passing through a tunnel. The entrance of the tunnel was 20 feet in height. Two hundred feet from the entrance a brick arch began, which reduced the height of the tunnel to 15 feet 9 inches. Plaintiff testified that he went on top of a box-car and sat down, and that was the last that he remembered. He was found upon the ground with a gash on his forehead, which it was claimed he received by coming in contact with the arch. The car on which plaintiff was sitting was 11 feet 2 inches high from the rail to the foot-board that the men walked on. *Held*, that as the plaintiff could not have been injured by striking the arch while he was sitting upon the car a verdict in his favor must be reversed. *Hunter v. New York, O. & W. R. Co.*, 41 *Am. & Eng. R. Cas.* 248, 116 *N. Y.* 615, 23 *N. E. Rep.* 9, 27 *N. Y. S. R.* 729; reversing 42 *Hun* 657, 5 *N. Y. S. R.* 64.

Defendant had contracted to supply the

B. & L. H. R. Co. with wood. In 1858 defendant released the railway company from the contract, and the company covenanted to indemnify defendant against all contracts made by him with one M., among which was a contract to convey to M. two lots of land. In 1865 defendant wrote to the railway company stating that plaintiffs had claimed from him rent in arrear on these two lots amounting to \$2000, and offering, if the company would pay him that sum and reconvey the leases, to assume them for the future. The company assented, paid him the \$2000, transferred to him the leases which he had transferred to them, and took a receipt under seal from defendant as in full of all claims for such leases, by which receipt defendant discharged the company of all further liability in respect of such leases under the indenture of 1858. The company had previously paid the rent of both these lots, and defendant, after receiving this money, paid the rent on one lot. The plaintiffs having recovered from defendant as for money received to their use—*held*, that the verdict was wrong, for though the settlement was made on the basis of the amount due to them on the leases, yet the money was paid to defendant, not as plaintiffs' money, but as the price of the company's discharge, and there was no privity between the plaintiffs and defendant. *Canada R. Co. v. McDonald*, 25 U. C. Q. B. 384.

**144. Dismissal of appeal.**—An appeal will be dismissed where the notice of appeal gives one date to the judgment appealed from and the undertaking another date, but the record only shows one of an earlier date than either. *Atkinson v. Chicago & N. W. R. Co.*, 69 Wis. 362, 34 N. W. Rep. 63.

Where, upon inspection of the record filed in the court of appeals in an action tried by a jury, it appears that the case presents no question of law that can be reviewed, the appeal will be dismissed on motion. *Dalsell v. Long Island R. Co.*, 119 N. Y. 626, 2 Silt. App. 531, 23 N. E. Rep. 487, 28 N. Y. S. R. 946; *dismissing appeal from* 53 Hun 633, 25 N. Y. S. R. 166, 1 Silt. Sup. Ct. 582, 6 N. Y. Supp. 167.

An appeal will lie from a personal decree for the balance of a railroad mortgage debt after a sale of the mortgaged property, but a reversal of the former decrees of foreclosure vacates such personal decree, in which case the appeal will be dismissed for

want of a subject-matter on which to operate. *Chicago, D. & V. R. Co. v. Fosdick*, 12 Am. & Eng. R. Cas. 367, 106 U. S. 82, 1 Sup. Ct. Rep. 10.

An appeal was taken in a railroad foreclosure suit from an order allowing a certain claim by one styling himself "the purchasing trustee of defendant's property," but it was not disclosed what interest or right he had in the proceedings, for whom he acted as trustee, or that he was interested in any way in the fund from which the claim would be paid; neither did it appear that the property had been sold under the decree. *Held*, that there was nothing to show that such person had a right to appeal, and his appeal should be dismissed. *Fitzgerald v. Evans*, 49 Fed. Rep. 426, 4 U. S. App. 154, 1 C. C. A. 307.

A judgment was obtained against "the purchasers of the Western Railroad of Alabama," and an appeal was prosecuted under the name of "the Central Railroad and Banking Company of Georgia." *Held*, that the appeal should be dismissed on motion of appellees, though it appeared that an amendment had been allowed substituting the corporation named instead of the purchasers of the road. *Hodnett v. Central R. & B. Co.*, 68 Ala. 562.

This action was brought in the district court to permanently enjoin the defendants, railroad commissioners, from publishing and enforcing a schedule of maximum rates to be charged by the railroad companies of the state for the transportation of cars and freight. A temporary injunction was allowed in the district court, and a motion to dissolve it was overruled, and defendants appealed to this court from the ruling on that motion, and the appeal was submitted on arguments to this court. Subsequently plaintiff filed in the district court a dismissal of the cause on the ground that the objectionable schedule of rates had been abandoned by the defendants, and paid the costs in the case; and these facts were duly made of record in the case in this court. *Held*: (1) that, as the main cause was no longer pending, the appeal from the interlocutory order could no longer be maintained; (2) that even if the order appealed from was erroneous, the error ceased to be prejudicial, and that this court would not review it. *Chicago, R. I. & P. R. Co. v. Dey*, 76 Iowa 278, 41 N. W. Rep. 17.

A receiver was appointed for a railroad in an action by a creditor of the company

to sequester its assets, and without notice to a majority of the stockholders, on motion of a minority, the receiver was ordered to sell the road. The majority of the stockholders gave notice and moved for an order vacating the order of sale, which was denied, and appeal was taken to the general term. *Held*, that in hearing the appeal the general term had a right to grant a stay of proceedings until the further order of the court, without prejudice to a new application to vacate the order, and that such order by the general term was not reviewable by the court of appeals. *Syracuse Sav. Bank v. Syracuse, C. & N. Y. R. Co.*, 9 *Am. & Eng. R. Cas.* 585, 88 *N. Y.* 110; *dismissing appeal from 25 Hun* 318.—**FOLLOWING** *Gray v. New York Floating Elevator Co.*, 88 *N. Y.* 645; *Genet v. Delaware & H. C. Co.*, 86 *N. Y.* 625.

A proceeding was instituted in the name of the people to restrain a company from laying a track in a city; afterward the complaint was dismissed, but an attorney interested in the case, without authority from the attorney-general, took the case from the special to the general term, and thereupon the attorney-general signed an order discontinuing the appeal. *Held*, that this order should not be vacated without notice to all the parties. *People v. Central C. T. R. Co.*, 21 *Hun (N. Y.)* 476.

**145. Ordering new trial below.**—Where there is a conflict of evidence as to whether the death was caused by the injury or by disease, and the jury were properly instructed as to the law, a new trial will not be granted on appeal. *Richmond & D. R. Co. v. Davis*, 86 *Ga.* 76, 12 *S. E. Rep.* 266.

The appellate court will grant a new trial where a verdict is clearly against the undisputed evidence but the trial judge has refused to set it aside. *Helfrich v. Ogden City R. Co.*, 7 *Utah* 186, 26 *Pac. Rep.* 295.

Where suit was instituted for damages alleged to have been sustained by the plaintiff in consequence of the closing of the ditches on his plantation by the building of a railroad, and no evidence was given on the trial from which an estimation of the damages could be formed, and the jury found a verdict for the plaintiff, the court remanded the case for a new trial. *Trudeau v. New Orleans, J. & G. N. R. Co.*, 15 *La. Ann.* 717.

Where a man suffered serious injury as a remote consequence of being carried by his railway station in the night, the only direct

injury being that he was obliged to walk an extra hundred rods, he was still allowed a new trial on reversal of a verdict for the remote injury, as it could not be said that damages for the direct injury would not carry costs. *Lewis v. Flint & P. M. R. Co.*, 56 *Mich.* 638, 23 *N. W. Rep.* 469.

In an action by an employé for personal injuries, two issues were made: (1) As to whether the machinery used was defective; (2) whether the defendant's superintendent was negligent. *Held*, that it was proper to instruct the jury as to the law relating to each issue, and that if there was evidence relating to the defective machinery, and there was nothing to show on which issue the verdict was found, an order granting a new trial for refusing to properly instruct as to the defective machinery was proper. *Brymer v. Southern Pac. R. Co.*, 90 *Cal.* 496, 27 *Pac. Rep.* 371.

Three several actions were commenced before a justice of the peace against a railroad company for killing stock, but only one citation was issued. The justice refused to consolidate the suits and proceeded to trial. If the three claims had been consolidated the amount would have exceeded the jurisdiction of the justice; but on appeal to the circuit court the cases were ordered consolidated and judgment was rendered for the plaintiff. *Held*, that such judgment must be reversed and, so far as the first claim was involved, remanded to the circuit court to be retried, and that the other two claims should be remanded to the justice to be proceeded on as claims where no summons had issued. *Louisville & N. R. Co. v. McCollister*, 66 *Miss.* 106, 5 *So. Rep.* 695.

**146. Mandate, and further proceedings below.**—(1) *General rules.*—In a suit for damages resulting from an accident, a fact proved in the case, and bearing on a subsequent case growing out of the same cause, will be noticed in the subsequent case, in which the testimony is reticent on the point. Under such circumstances the second case will be remanded for testimony on the point, in furtherance of substantial justice. *Paland v. Chicago, St. L. & N. O. R. Co.*, 42 *La. Ann.* 290, 7 *So. Rep.* 899.

A case will not be remanded to a lower court where it is brought to compel a railroad to transfer stock to a purchaser at an execution sale, in order that the conflicting claims of third parties may be adjudicated. Third parties will not be bound by the

judgment and may assert their rights in separate actions. *Morehead v. Western N. C. R. Co.*, 96 N. Car. 362, 2 S. E. Rep. 247.

Where a decree of the lower court, in a railroad foreclosure suit, was reversed on appeal and sent back with a mandate to the court below to make certain specified corrections, no new investigation is meant, and it is not error in the court below to refuse to reopen the case to hear new matter discovered since the first trial. *Kneeland v. American L. & T. Co.*, 138 U. S. 509, 11 Sup. Ct. Rep. 426.

Where a judgment of the United States district court is reversed by the supreme court, and a mandate is sent down to enter judgment for the defendant, the lower court must obey the mandate. *Ex parte Dubuque & P. R. Co.*, 1 Wall. (U. S.) 69.—FOLLOWING IN *Re Washington & G. R. Co.*, 140 U. S. 91.

Upon a mandate from the United States supreme court to the court below, in an action to recover land, to enter judgment for defendant, the lower court should simply enter the judgment as directed, and should not enter judgment that defendant has a right or title to the land. *Litchfield v. Dubuque & P. R. Co.*, 7 Wall. (U. S.) 270; reaffirmed in *Williams v. Baker*, 17 Wall. (U. S.) 144.

(2) *Illustrations.*—A ferry owner leased certain grounds to a railroad in consideration that the railroad would transport its passengers and freights across a river in his ferry. Afterward the railroad was sold and the purchasing company continued to use the grounds, but diverted its freights from the ferry. The ferry owner treated the lease as ended by the sale of the railroad, and entered an equitable suit for the use and occupation of the grounds. *Held*, that the supreme court, after deciding that the parties had accepted the terms of the original lease so as to be bound in equity, could remand the case to the lower court, for amended proceedings, so as to do full justice between the parties. *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 52 Am. & Eng. R. Cas. 82, 142 U. S. 396, 12 Sup. Ct. Rep. 188.

A mandate of the supreme court recited that the receiver of a railroad company was dead, and that the company had been substituted as plaintiff in error, and ordered that the defendant in error recover her costs, and that "such execution and proceedings be had as according to right and

justice and the laws of the United States ought to be had." Execution issued accordingly for the amount of the judgment with interest at the rate fixed by the state law when the judgment was rendered. *Held*, that such judgment conformed to the mandate, and that a circuit court of appeals had no jurisdiction to review it. *Texas & P. R. Co. v. Anderson*, 149 U. S. 237, 13 Sup. Ct. Rep. 843.

Matters not in issue, inadvertently decided by the supreme court, are under the control of the court of chancery after a mandate has been sent down. Thus the defendant B. had recovered a judgment against the defendant railroad—one of three railroad companies, partners, operating their respective roads as one continuous line—and had levied on an engine, baggage-car, etc., as the property of said company; whereupon the orators, two of the three partners, brought a bill to enjoin B., alleging that the property levied on was partnership property; that the liabilities of the partnership largely exceeded its assets; and that, therefore, the property could not be held on B.'s execution. B. answered and filed a cross-bill, praying that his judgment be declared a first lien on the rolling stock, and that the lien be enforced by a sale; or, if it were decided that he was entitled to have only an undivided third part sold, to have that set apart and sold. There was no evidence as to the proportionate interests of the partners in the engine. The mandate was "for the amount of one-third the value" of the property levied upon. Whereupon the orators applied to the court of chancery for leave to amend their bill by setting forth the proportion of interest that the defendant railroad had in the engine, claiming that it could not exceed one-eighth; which leave was granted. A master was appointed to ascertain the value of the property and such interest, and on the coming in of the report a decree was entered for B. for  $\frac{1}{8}$  of such value. *Held*, that the mandate was not obligatory on the court of chancery; that no issue was raised by the pleadings as to the proportion of interest; that the court inadvertently assumed that the defendant railroad had one-third interest; and that the amendment was properly allowed. *Lamoille Valley R. Co. v. Bixby*, 57 Vt. 548.

A statement filed in an action before a justice of the peace to recover for stock



killed, under the statute, was held to be insufficient because it did not aver that the stock were not killed within the limits of an incorporated town, and that therefore the judgment in favor of plaintiff was erroneous. It appeared to be a case where the defect could be remedied by an amendment in the circuit court. *Held*, that the case should not be dismissed, but should be remanded to the circuit court for amendment. *Schulte v. St. Louis, I. M. & S. R. Co.*, 76 Mo. 324.

Upon petition filed in a suit, wherein a railway company had been put into a receiver's hands, for damages for the negligent killing of petitioner's horse, alleged to have been of the value of \$50,000, a reference had been made to ascertain the value of the horse. The commissioner, having taken evidence, reported the horse to have been worth \$40,000; but the court recommitted the report, and the commissioner took additional evidence, and reported the horse to have been worth only \$1000. The additional evidence did not warrant the last report, yet the evidence offered by petitioner as to the speed and celebrity of the horse did not sustain his claim to have the first report confirmed. *Held*, that both reports should be set aside and that an issue should be directed to be tried by a jury at the bar of the court below to ascertain the amount of the damages sustained by the petitioner. *Melendy v. Barbour*, 25 Am. & Eng. R. Cas. 622, 78 Va. 544.

**147. Effect of the appeal while pending.**—Appeals under *supersedeas* bonds suspend judgments during their pendency, and orders made in the progress of a case, though interlocutory in their character, may, when they affect the merits of the case, be revised after a final judgment. *Ft. Worth St. R. Co. v. Rosedale St. R. Co.*, 68 Tex. 163, 7 S. W. F. p. 381.

Where an appeal is in the nature of a writ of error, and only carries up the case to the court of appeals as an appellate court for the correction of errors that may have intervened on the trial of the case below, and for its adjudication upon the question whether the judgment appealed from should be affirmed, reversed, or modified, and the court has no other than appellate powers to affirm, reverse, or modify, then such appeal does not vacate, but merely suspends, the operation of the judgment. So *held*, where a plaintiff who had sued for personal

injuries died pending an appeal from an order reversing a judgment. *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 495, 8 Am. Ry. Rep. 450.

While an appeal from a decree foreclosing a railroad mortgage is pending the trial court has no power to order a receiver of the road to turn it over to another company or to order him to pay money to the mortgage bondholders. *Bronson v. La Crosse & M. R. Co.*, 1 Wall. (U. S.) 405.

Individual bondholders, not parties to a decree in a railroad foreclosure suit, directing a sale of the property, have no legal right to have the decree executed while an appeal therefrom is pending in the supreme court of the United States, where the mortgage trustee in his judgment thinks that a sale is not for the best interests of all concerned; but the court allows the trustee to execute the order of sale or not, pending the appeal, as he may think best. *Farmers' L. & T. Co. v. Central Iowa R. Co.*, 4 Dill. (U. S.) 533.

When an appeal is taken from the appointment of a receiver, the authority of the receiver is suspended until a determination of the appeal, and the cause, notwithstanding the appeal, remains in the nisi prius court, and amendments and other changes in the pleadings may be made as in other cases. In such a case, on appeal, no question will be determined except that which immediately led to the appointment of a receiver without notice. *Wabash R. Co. v. Dykeman*, 133 Ind. 56, 32 N. E. Rep. 823.

## APPEARANCE.

In justices' courts, in stock-killing cases, see ANIMALS, INJURIES TO, 611.

**1. What constitutes an appearance.**—In an action against a railroad, defendant appeared "in its own proper person," and pleaded. *Held*, that the plea was bad, because a plea by a corporation aggregate, which is incapable of personal appearance, must purport to be by attorney. *Nispel v. Western U. R. Co.*, 64 Ill. 311.—FOLLOWING *Nixon v. Southwestern Ins. Co.*, 47 Ill. 444. OVERRULING *Mineral Point R. Co. v. Keep*, 22 Ill. 9.

Action for the death of plaintiff's intestate, alleged to have been caused by the wilful neglect of defendant, was brought in the county where the injury occurred, and



process issued to that county and returned executed on K., "the agent of the company." The defendant filed an answer stating that K. was not the agent of the company, and asking that the action be abated. A demurrer to this answer was sustained, and defendant then moved to quash the return on the summons. The court sustained this motion, but required the defendant, over its objection, to plead to the merits upon the ground that the answer previously filed was an appearance to the action; and a trial resulting in a judgment for plaintiff, this appeal is prosecuted. *Held*, that there was no appearance, and that the objection to the jurisdiction was not waived by the filing of the answer to the merits under protest. *Chesapeake, O. & S. R. Co. v. Heath*, 87 Ky. 651, 9 S. W. Rep. 832.—FOLLOWING *Baker v. Louisville & N. R. Co.*, 4 Bush. (Ky.) 619. QUOTING *Harkness v. Hyde*, 98 U. S. 476. —DISTINGUISHED IN *Harper v. Newport News & M. V. Co.*, 90 Ky. 359.

**2. Effect, generally.**—Where proceedings for the appraisal of damages, commenced before the first judge of a court of common pleas, were directed by him to be transferred to the county judge, on one day's notice being given to the owner of the land, and the landowner subsequently appeared before the county judge without raising the objection that he had not had notice of the transfer—*held*, that such notice being for his benefit, such appearance by him was a waiver of it, or an admission that notice had been regularly served. *Polly v. Saratoga & W. R. Co.*, 9 Barb. (N. Y.) 449.

**3. — to confer jurisdiction.**—A corporation existing under the laws of another state, having appeared and pleaded to an action in the New York supreme court, cannot subsequently object to the jurisdiction of the court. *Cook v. Champlain Transp. Co.*, 1 Den. (N. Y.) 91. *Brooks v. New York & G. L. R. Co.*, 30 Hun (N. Y.) 47.

Where a non-resident corporation is sued in a state court, and served by process outside of the state, an appearance is a waiver of objections to the jurisdiction of the court, so far as the non-residence is concerned, though it be expressly declared that the appearance is for the purpose of raising the question of jurisdiction only. *St. Louis, A. & T. R. Co. v. Whitley*, 77 Tex. 126, 13 S. W. Rep. 853.

In transitory actions, private corporations, like natural persons, may be sued anywhere

where the court can obtain jurisdiction of the corporation, either by legal service of process or its appearance by attorney; and where such corporation appears and pleads to the action, and the court has jurisdiction over the subject-matter, it cannot raise the question of the authority of the court to finally dispose of the case. *New Orleans, J. & G. N. R. Co. v. Wallace*, 50 Miss. 244. *Carpenter v. Central Park, N. & E. R. R. Co.*, 11 Abb. Pr. N. S. (N. Y.) 416, 4 Daly 550, *mem.*

Appearance by counsel for a defendant corporation, and taking part in the argument of the case in the supreme court, reserved in the district court, will constitute a general appearance in the case and submission to the jurisdiction of the court, and such appearance in the supreme court estops the defendant from denying his appearance in the district court. *Cleveland, C. & C. R. Co. v. Mara*, 26 Ohio St. 185, 13 Am. Ry. Rep. 335.—DISTINGUISHED IN *Cleveland & M. V. R. Co. v. Wick*, 35 Ohio St. 247.

An action by a railroad company against a tax collector brought in a different county from that in which he resides and holds his office, for wrongfully collecting certain fees from the company while collecting taxes, a voluntary appearance and pleading to the merits of the action is a waiver of objections to the jurisdiction of the court. *Kane v. Union Pac. R. Co.*, 5 Neb. 105.

Under the judiciary act of 1789 a United States circuit court may maintain jurisdiction where some of the defendants reside in the state where the suit is brought and other defendants reside in other states, but who appear and submit to the jurisdiction. In such case the want of jurisdiction relates to the person only, and is waived by appearance. *Pond v. Vermont Valley R. Co.*, 12 Blatchf. (U. S.) 280.

Under the judiciary act of 1789, § 11, a defendant who was not found or served in the district where sued, waives the question of jurisdiction by voluntarily appearing in the action. *Winans v. McKean R. & N. Co.*, 6 Blatchf. (U. S.) 215.

Under the New York Code of Civ. Pro., § 166, the want of jurisdiction in the superior city courts is matter of defense, and is waived by appearance, unless it is pleaded in the answer; and if thus waived the court should proceed, notwithstanding it may appear that if objection had been made to the jurisdiction it would have been sustained.

*McLean v. St. Paul & C. R. Co.*, 1 N. Y. S. R. 89, 18 Abb. N. Cas. 423.—APPLYING *Pease v. Delaware, L. & W. R. Co.*, 10 Daly 459.

**4. — as a waiver of defects in process.**—A full appearance, in an action where the court has jurisdiction over the subject-matter, is a waiver of any irregularity in the process or in its service. *Louisville, N. A. & C. R. Co. v. Nicholson*, 60 Ind. 158.

By the appearance to the action in any case, for any other purpose than to take advantage of the defective execution or non-execution of process, a defendant places himself precisely in the situation in which he would be if process were executed upon him, and he thereby waives all objection to the defective execution or non-execution of process upon him. *Mahany v. Baltimore & O. R. Co.*, 15 W. Va. 609.

Though a corporation may be sued under a wrong name, yet if it appears and litigates the cause on its merits without objection, it thereby waives the defect in the summons. *Virginia & M. S. N. Co. v. United States, Taney (U. S.)* 418.

In an action against a railroad company to recover for live stock killed, a failure to serve the summons on the defendant by delivery of a copy to the conductor, as required by statute, is waived by the appearance of the company to the action. *Louisville, N. A. & C. R. Co. v. Stover*, 57 Ind. 559, 18 Am. Ry. Rep. 398.

**5. — or defect in service.**—The general appearance of the attorney of a defendant corporation is a waiver of any defect or want of sufficient service of process. *Buckfield Branch R. Co. v. Benson*, 43 Me. 374.

A corporation, after appearing generally and pleading to the merits in an action in a justice's court, cannot afterwards object that the summons was not served in conformity with the requirements of statute. *Anderson v. Southern Minn. R. Co.*, 21 Minn. 30.—APPROVING *McCormick v. Pennsylvania C. R. Co.*, 49 N. Y. 303; *Congar v. Galena & C. U. R. Co.*, 17 Wis. 477.

An appearance for the purpose of consenting to a continuance is a waiver of insufficient service, and confers jurisdiction. *Peters v. St. Louis & I. M. R. Co.*, 59 Mo. 406.

Where a defendant specially appears for the purpose of contesting the sufficiency of

service of process, objections to such sufficiency are waived by a further appearance, and asking that a default be set aside on grounds not relating to the mode of service, and moving to strike off plaintiff's petition. *Pry v. Hannibal & St. J. R. Co.*, 73 Mo. 123.

The appearance of a railway company before a justice, in response to a summons served on a station agent, though limited to the purpose of a motion to quash the service of the summons, when followed by a full appearance and a motion for a nonsuit, waives any objection to the suit. *Colorado C. R. Co. v. Caldwell*, 11 Colo. 545, 19 Pac. Rep. 542.

Where defendants appear and move to dismiss a cause for defects in the summons, remaining and submitting to a trial of the action upon its merits after the motion is overruled is a waiver of the defects in the service of summons. *Kronski v. Missouri Pac. R. Co.*, 77 Mo. 362.

Where a railroad company appears generally before a justice of the peace, in an attachment proceeding, and moves to set aside a judgment by default, it thereby waives any defect in the service of summons. *Gant v. Chicago, R. I. & P. R. Co.*, 79 Mo. 502.—FOLLOWED IN *Fitterling v. Missouri Pac. R. Co.*, 20 Am. & Eng. R. Cas. 454, 79 Mo. 504.

Where a corporation appears in a suit in a circuit court of the United States and answers generally, it thereby waives the right to object that the court had not acquired jurisdiction over it because process was served on it in a district where it had no corporate existence. *Kelsey v. Pennsylvania R. Co.*, 14 Blatchf. (U. S.) 89.—DISTINGUISHING *Pomeroy v. New York & N. H. R. Co.*, 4 Blatchf. (U. S.) 120.

**6. — as an admission of corporate character.**—A corporation by appearing to a suit thereby admits its corporate existence. *Missouri River, Ft. S. & G. R. Co. v. Shirley*, 20 Kan. 660.—DISTINGUISHING *Stanley v. Farmers' Bank*, 17 Kan. 592. FOLLOWING *Seaton v. Chicago, R. I. & P. R. Co.*, 55 Mo. 416.—FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Brewer*, 20 Kan. 669.

Where a foreign corporation voluntarily appears in an attachment suit and gives bond in its corporate name, it is thereby estopped from denying its corporate existence. *Hudson v. St. Louis, K. C. & N. R.*

*Co.*, 53 *Mo.* 525. *Smith v. Burlington & M. R. R. Co.*, 55 *Mo.* 526.

Where a public corporation appears to an action and makes an affirmative defense, like a private corporation, it admits its corporate existence. *Eubank v. Edina*, 88 *Mo.* 650.

Where defendants are sued as a corporation, a general appearance and filing an affidavit of merits do not prevent them from thereafter denying that they are a corporation. *Greenwood v. Lake Shore R. Co.*, 10 *Gray (Mass.)* 373.

**7. Special or limited appearance.**—A full appearance waives defects in process, but a limited one, for the purpose of making objections, does not. *New Albany & S. R. Co. v. Combs*, 13 *Ind.* 490.

A special appearance for the single purpose of objecting to the jurisdiction of the court and setting aside service of summons, and to dismiss the action for want of service, is not a general appearance or waiver of defects in the service. *Sanderson v. Ohio C. R. & C. Co.*, 61 *Wis.* 609, 21 *N. W. Rep.* 818.

A provision of a state statute which gives to a special appearance, made to challenge the court's jurisdiction, the effect of a general appearance, so as to confer jurisdiction over the person of the defendant, is not binding upon the federal courts in that state, and does not apply to a suit brought against a railroad company in a district in which the company has not headquarters or a principal office. *Galveston, H. & S. A. R. Co. v. Gonzales*, 151 *U. S.* 496.—FOLLOWING *Southern Pac. R. Co. v. Denton*, 146 *U. S.* 202; *Mexican C. R. Co. v. Pinkney*, 149 *U. S.* 194. REVIEWING *Thorn v. Central R. Co.*, 26 *N. J. L.* 121.

Where a corporation enters a special appearance for the purpose of removing a cause from a state to a federal court, it does not thereby consent to the jurisdiction of the state court. *Hendrickson v. Chicago, R. I. & P. R. Co.*, 22 *Fed. Rep.* 569.—DISTINGUISHED IN *Tallman v. Baltimore & O. R. Co.*, 45 *Fed. Rep.* 156.

Where special appearance is entered for the purpose of moving to quash the officer's return on the summons, incidentally praying judgment in connection with the motion whether it should be compelled to plead, it is not such an appearance as would waive objection to the service of process. *Fairbanks v. Cincinnati, N. O. & T. P. R. Co.*, 54

*Fed. Rep.* 420, 9 *U. S. App.* 312, 4 *C. C. A.* 403.

Where a company is sued for injuries to stock, a special appearance for no other purpose except to appeal from a justice of the peace to the district court, and there to make a case for the supreme court, is not such an appearance as will waive defects in the bill of particulars. *St. Louis & S. F. R. Co. v. McReynolds*, 24 *Kan.* 368.—FOLLOWED IN *St. Louis & S. F. R. Co. v. Ellis*, 25 *Kan.* 108; *Kansas City, L. & S. W. R. Co. v. Richolson*, 31 *Kan.* 28.

**8. Compelling appearance.**—Action was brought by plaintiff against defendants, a company incorporated in Nova Scotia, but residing in the United States, and not British subjects. An attorney in Halifax was retained by them to defend the cause, and took some proceedings therein, and, according to the affidavit of plaintiff's attorney, promised to appear and plead. This, however, defendants' attorney denied. Plaintiff's attorney, after some years' delay, applied to the court for an order requiring defendants' attorney to enter an appearance, in order that the court might have jurisdiction. *Held*, that if defendants' attorney had given a signed understanding to appear, he would be compelled to do so, but that otherwise the court had no jurisdiction, and could not grant the desired order. *Belloni v. Sydney & L. R. Co.*, 9 *Nov. Sc.* 137.

## APPLICATION.

For appointment of receiver, see RECEIVERS, IV.

— certiorari, see CERTIORARI, 8.

Necessity of, to abate suit, see ABATEMENT, 11.

Of payments, see PAYMENT, 7.

## APPOINTMENT.

Of agents, see AGENCY, 1-9.

— attorneys, see ATTORNEYS, 1-3.

— directors, see BALTIMORE & OHIO RAILROAD, 1.

— directors by city, see DIRECTORS, 4.

— personal representatives, see EXECUTORS AND ADMINISTRATORS, 1-4.

— railway commissioners, see RAILWAY COMMISSIONERS, II.

— receiver, see RECEIVERS, I-III.

— receiver, when abates action, see ABATEMENT, 8.

- Of trustees, see TRUSTS AND TRUSTEES, 1.  
 — trustees for bondholders, see MORTGAGES, V, 1.  
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### APPRAISEMENT.

- Of damages for killing stock, constitutional-  
 ity of statutes as to, see ANIMALS, IN-  
 JURIES TO, 8.  
 — land taken, see EMINENT DOMAIN, XI, 4.  
 — property levied on, see EXECUTION, 19.

### APPRENTICES.

**1. Master's right of action for in-  
 juries to.**—A master may recover for per-  
 sonal injuries to his apprentice, whereby he  
 loses his services, caused by the negligence  
 of a street-car company while on its cars as  
 a passenger, though the contract to safely  
 carry was made by the company and the  
 apprentice in the absence of the master.  
*Ames v. Union R. Co.*, 117 Mass. 541, 6 Am.  
 Ry. Rep. 260.

### ARBITRATION AND AWARD.

- Assessment of land damages by arbitrators,  
 see EMINENT DOMAIN, XI, 5; XV, 5 (d).  
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#### I. THE SUBMISSION.

**1. What may be submitted.**—An  
 agreement between a railroad company and  
 its contractors, to the effect that estimates  
 of the amount of work done should be re-  
 ferred to third persons, whose determina-  
 tion should be conclusive upon the parties,  
 is not invalid, and an award made thereun-  
 der, in good faith, is binding. *Ross v. Mc-  
 Arthur*, 52 Am. & Eng. R. Cas. 1, 85 Iowa  
 203; 52 N. W. Rep. 125.

Where a lessor company gives a lessee  
 company notice that it will consider the  
 agreement between them, giving the lessor  
 the right to run over the lines of the lessee,  
 at an end, after a certain day, and the lessee  
 takes no heed of the notice and continues to

run trains, the matter comes within the  
 terms of an agreement for referring all mat-  
 ters and differences between the parties to  
 arbitration. *Llanely R. & D. Co. v. London  
 & N. W. R. Co.*, 20 W. R. 898.

Where two railway companies enter into  
 an agreement for jointly working suburban  
 passenger traffic, which provides that "any  
 questions of difference arising under this  
 agreement shall be referred to arbitration,  
 pursuant to the Railway Companies Arbi-  
 tration Act, 1859," a question in dispute re-  
 lating to the respective liability for an acci-  
 dent which occurred to the trains of one  
 company carrying the passengers of the  
 other company, which company alleges  
 that the accident arose through the negli-  
 gence of the other, does not fall within the  
 terms of the agreement and need not be re-  
 ferred to arbitration. *North London R. Co.  
 v. Great Northern R. Co.*, 47 L. T. N. S. 383;  
*reversed in L. R. 11 Q. B. D.* 30, 52 L. J. Q.  
 B. D. 380, 48 L. T. 695, 31 W. R. 490.—DIS-  
 CUSSED IN *London & B. R. Co. v. Cross*, L.  
 R. 31 Ch. D. 354, 34 W. R. 301, 55 L. J. Ch.  
 313, 54 L. T. 309.

Where two railway companies are empow-  
 ered by special act to enter into a working  
 agreement, but no provision is made in such  
 act respecting arbitration, and the agree-  
 ment made contains a clause providing that  
 any difference shall be determined by arbi-  
 tration, in accordance with the Railway Ar-  
 bitration Act, 1859, the railway commission-  
 ers have no jurisdiction under § 8 of the  
 Regulation of Railways Act, 1876, to decide  
 differences arising. *Great Western R. Co.  
 v. Waterford & L. R. Co.*, L. R. 17 Ch. D.  
 493, 50 L. J. Ch. D. 513, 44 L. T. N. S. 723,  
 29 W. R. 826.—CONSIDERED IN *Stannard v.  
 Vestry of St. Giles*, L. R. 20 Ch. D. 190, 51  
 L. J. Ch. 629, 46 L. T. 243, 30 W. R. 693.

The Railway Companies Arbitration Act,  
 1859, gives power to railway companies to  
 agree in writing to refer matters in differ-  
 ence, as they arise, to arbitration. *Torbay  
 & B. R. Co. v. South Devon R. Co.*, 2 Ry. &  
 C. T. Cas. 391. *Portpatrick R. Co. v. Caledo-  
 nian R. Co.*, 3 Ry. & C. T. Cas. 189.

The Railway Companies Arbitration Act,  
 1859, does not authorize railway companies  
 to refer differences between them to arbitra-  
 tion, but merely authorizes railway compa-  
 nies to agree to a reference in a particular  
 form and manner. *Waterford & L. R. Co.  
 v. Great Western R. Co.*, 3 Ry. & C. T.  
 Cas. 546.

With regard to differences arising in the course of their business, railway companies have power to agree to a reference without the authority of an act of parliament. *Waterford & L. R. Co. v. Great Western R. Co.*, 3 Ry. & C. T. Cas. 546.

The 8th section of the Regulation of Railways Act, 1873, does not apply to an arbitration clause inserted in an agreement between railway companies, made in pursuance of a special act, where such special act does not in itself require or authorize the matters comprised in the arbitration clause to be referred. *Waterford & L. R. Co. v. Great Western R. Co.*, 3 Ry. & C. T. Cas. 546.

An agreement between two railway companies provided that all disputes were to be referred to a single arbitrator to be named as therein stated. The agreement was made under the provisions of a special act, but there was no clause in such act requiring or authorizing matters in difference to be referred to arbitration. *Held*, that the railway commissioners had no jurisdiction to determine the matters in dispute on a reference for that purpose. *Waterford & L. R. Co. v. Great Western R. Co.*, 3 Ry. & C. T. Cas. 546.

Under a provision in a working agreement providing for the submission to arbitration of all questions arising between the companies as to its construction, the question whether certain new works on the line were a capital or revenue charge, and whether works of the former class were chargeable to the owning company, was referred to the commissioners. The agreement contained no reference to new expenses not chargeable to revenue; but it was contended that it must have been foreseen that new works would be required from time to time, and that the question how they were to be executed and paid for was a matter arising generally out of the agreement, and, therefore, one of those matters which the companies had agreed, in case of difference, to settle by arbitration. *Held*, that such particular difference could not properly be said to arise out of anything contained in the agreement, and that the arbitration clause did not, save questions of providing for the due working of the line in the manner contemplated by the agreement (e.g., to meet some requirement needed for the protection of the public), apply to matters not mentioned in any part

of the agreement. *Midland G. W. R. Co. v. Dublin & M. R. Co.*, 4 Ry. & C. T. Cas. 145.

An apparatus for heating water for the comfort of passengers is a revenue charged, for whether made a fixture or not, such an apparatus is more an accessory to the business done upon a railway than to the railway upon which the business is done. *Midland G. W. R. Co. v. Dublin & M. R. Co.*, 4 Ry. & C. T. Cas. 145.

**2. Who may submit or apply for reference.**—It is within the powers of the directors of a railroad company to inquire into the regularity of a dividend that has been made, and to order that the sum paid be refunded, but they have no power to submit such questions to arbitration, especially against the consent of some of the stockholders. *Gratz v. Redd*, 4 B. Mon. (Ky.) 178.

Where a dispute arises between a railroad company and a party who had erected an eating-house at a station, on the lands of the company, a resolution of the board of directors, authorizing the president of the company to receive the building at the valuation of disinterested parties, clothed him with the power to refer the matter to arbitration; and the appearance of the company before the arbitrators, by its agents and counsel, without objection to the reference, amounts to a ratification, and estops it from making any objection to the submission after the award is made. *Memphis & C. R. Co. v. Scruggs*, 50 Miss. 284.

Agents of a railroad company, who were employed to purchase land, had frequently, but without express authority, referred the question of the price that should be paid for land to arbitrators, and the price awarded had been paid by officers of the company. *Held*, that the agents had the implied authority to submit such matters, and that the company would be bound thereby. *Wood v. Auburn & R. R. Co.*, 8 N. Y. 160.

Two railway companies entered into an agreement to refer all matters in dispute to arbitration, as provided by the Railway Companies Arbitration Act, 1859, which was confirmed and made binding by a special act. *Held*, this did not confer jurisdiction upon the commissioners to undertake an arbitration on the application of one of the companies only. *Queen v. Midland R. Co.*, 19 Q. B. D. 540, 56 L. J. Ch. D. 585. 5 Ry. & C. T. Cas. 267.—REVIEWING Caledonian R.



*Co. v. Greenock & W. B. R. Co.*, L. R. 2 H. L. Sc. 347; *Great Western R. Co. v. Waterford & L. R. Co.*, 17 Ch. D. 493. **DISTINGUISHING** *Great Western R. Co. v. Halesowen R. Co.*, 52 L. J. Q. B. 473, 4 Nev. & Man. 224.

The clause in the 8th section of the Regulation of Railways Act, 1873, which enables one party to apply for the arbitration of the railway commissioners, "where any difference between railway companies is, under the provisions of any general or special act, required or authorized to be referred to arbitration," applies only to cases in which the specific difference has been required or authorized by a general or special act to be referred to arbitration. *Great Western R. Co. v. Waterford & L. R. Co.*, L. R. 17 Ch. D. 493, 50 L. J. Ch. D. 513, 44 L. T. N. S. 723, 29 W. R. 826.—**CONSIDERED** in *Stannard v. Vestry of St. Giles*, L. R. 20 Ch. D. 190, 51 L. J. Ch. 629, 46 L. T. 243, 30 W. R. 693.

**3. When a submission may be compelled.**—It seems that an agreement which provides that all differences shall be referred to arbitration when the agreement has been scheduled to and confirmed by an act of parliament, entitles one of the companies parties to the agreement to compel a reference to the railway commissioners, under § 8 of the Regulation of Railways Act, 1873. *Bedford & N. R. Co. v. Midland R. Co.*, 4 Ry. & C. T. Cas. 170.

A working agreement between two companies, made in pursuance of a special act, contained a general arbitration clause. *Held*, that a difference under this agreement was a difference between railway companies under the provisions of a special act required or authorized to be referred to arbitration, within the meaning of the 8th section of the Regulation of Railways Act, 1873. *Portpatrick R. Co. v. Caledonian R. Co.*, 3 Ry. & C. T. Cas. 189.

A clause in a special act of a railway company provided that the engines, carriages, officers, and servants in charge should have the privilege of using one railway to a certain junction, and that any differences which might from time to time arise should be settled by arbitration. *Held*, that it was not a condition precedent to the exercising of the running powers and facilities conferred by the above section that the differences stated should be settled by arbitration. *Taff Vale R. Co. v. Barry D. & R. Co.*, 7 Ry. & C. T. Cas. 52.

**4. Effect of the submission to oust jurisdiction of courts.**—Where, under an agreement confirmed by act of parliament, the parties were bound to settle by arbitration all differences that might arise between them as to the meaning and effect of the agreement, or as to the mode of carrying it out—*held*, that the jurisdiction of the courts was by this agreement excluded, and that all disputes arising under it must be settled by arbitration. *Caledonian R. Co. v. Greenock & W. B. R. Co.*, L. R. 2 Sc. App. 347, 2 Ry. & C. T. Cas. 15. *Watford & R. R. Co. v. London & N. W. R. Co.*, L. R. 8 Eq. 231, 38 L. J. Ch. 449, 17 W. R. 814, 21 L. T. N. S. 81.

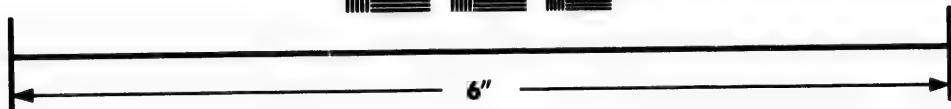
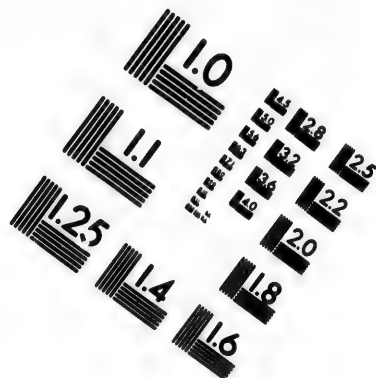
An agreement between railway companies to submit matters in dispute to arbitration, under the Railway Companies Arbitration Act, 1859, §§ 4 and 26, makes it the duty of the court to give effect to such agreement if either company insists upon it, but if not so insisted on the court is not deprived of its jurisdiction. *London, C. & D. R. Co. v. South Eastern R. Co.*, 40 Ch. D. 100, 6 Ry. & C. T. Cas. lxviii.—**DISTINGUISHING** *Watford & R. R. Co. v. London & N. W. R. Co.*, L. R. 8 Eq. 231; *Caledonian R. Co. v. Greenock & W. B. R. Co.*, L. R. 2 H. L. Sc. 347.

Although an account between two railway companies is of such a nature as to render it a proper subject of a suit in equity, the court is bound to give effect to a definite agreement to refer disputes to arbitration, under the Railway Companies Arbitration Act, 1859, § 26, and cannot entertain the suit. *Watford & R. R. Co. v. London & N. W. R. Co.*, L. R. 8 Eq. 231, 38 L. J. Ch. 449, 17 W. R. 814, 21 L. T. N. S. 81.

Where an agreement between two railway companies contains a provision to refer all differences to an arbitrator to be appointed each year, the jurisdiction of the court to determine a controversy is not ousted where no standing arbitrator has been appointed in accordance with such provision. *Wolverhampton & W. R. Co. v. London & N. W. R. Co.*, L. R. 16 Eq. 433, 43 L. J. Ch. 131.—**CONSIDERED** in *Donnell v. Bennett*, L. R. 22 Ch. D. 835, 52 L. J. Ch. 414, 48 L. T. 68, 31 W. R. 316.

Where a contract provides that the certificate of the engineer or of an arbitrator shall be a condition precedent to payment, the court does not obtain jurisdiction because of the power to refer to arbitration. *Sharpe v. San Paulo R. Co.*, L. R. 8 Ch. 597.





# Photographic Sciences Corporation

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An agreement between two railroad companies, to refer all matters of dispute between them to arbitration, does not oust a court, either at law or in equity, of jurisdiction, but upon a proper case made a court will even enjoin a submission to arbitration. *March v. Eastern R. Co.*, 40 N. H. 548.

An agreement to submit to arbitration will not be held valid when its effect is to oust the court of jurisdiction. *Chamberlain v. Connecticut C. R. Co.*, 54 Conn. 472, 4 N. Eng. Rep. 477, 9 Atl. Rep. 24.

By the terms of a contract between C. & Co. and the defendants, a railway company, it was agreed that all matters in dispute between the parties arising or to arise out of or connected with the contract should be settled by arbitration. C. & Co. became insolvent, and this suit was brought by their assignee in insolvency to recover the cost of the construction of the railway. Upon the application of the defendants under § 167 of the C. L. P. Act (C. S. U. C. c. 22), an order was granted staying all proceedings in this suit, it being held that the circumstance that the contractor had become insolvent did not take the case out of the statute. *Johnson v. Montreal & O. R. W. Co.*, 6 Prac. (Ont.) 230.

**5. What amounts to a submission.**—Defendant entered into an agreement with a railroad company to erect stone crushers along the line of its road, with a provision in the contract to the effect that when the stone was all furnished the company should have the option of buying the crushers, and if a satisfactory price could not be agreed on between the parties each should select an arbitrator and the two thus selected should select a third, who should fix the price of such crushers, which decision should be final. *Held*, that this was a submission to arbitrators whose decision had all the force of an award. *Missouri, K. & T. R. Co. v. Elliott*, 56 Fed. Rep. 772.

**6. Revocation.**—Where matters in dispute have been submitted to arbitration, a mistake of law by the arbitrator touching matters within his jurisdiction does not give a dissatisfied party the right to come into court and have the submission revoked. *James v. James*, 22 Q. B. D. 669.—EXPLAINING *East & W. I. D. Co. v. Kirk*, 12 App. Cas. 738.

After the directors of a company had entered into an agreement to arbitrate a certain matter, they voted to revoke the sub-

mission unless the arbitrators would make certain findings. Subsequently the president of the company signed a paper in the name of the corporation, absolutely revoking the submission, which was laid before the directors and ratified and approved, with a recital that the directors "will treat the said submission as no longer in force." *Held*, that this was an unconditional revocation of the submission. *Boston & L. R. Co. v. Nashua & L. R. Corp.*, 139 Mass. 463.—REVIEWED IN *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 157 Mass. 268.

## II. PROCEEDINGS BEFORE THE ARBITRATORS.

### 7. Qualifications of arbitrators.—

A bank held shares of a railroad company as collateral security for the debt of a person of fair standing and good credit. *Held*, that this would not disqualify stockholders of the bank from acting as arbitrators in a matter wherein the railroad company was interested. Their interest was too remote and contingent to induce a reasonable suspicion that it would influence their decision. *Leominster v. Fitchburg & W. R. Co.*, 7 Allen (Mass.) 38.

A railway company entered into a contract, one provision of which was that T., "if and so long as he shall continue to be the company's principal engineer," should be the arbitrator as to matters in difference. Afterwards the company was amalgamated by act of parliament with another railway company. Disputes having arisen between the parties to the contract, T. made two awards as to the subject-matter of it. *Held*, that he was still the proper person to make the awards. *Wansbeck R. Co. v. Trowsdale*, L. R. 1 C. P. 269, 12 Jur. N. S. 740.

### 8. Their jurisdiction and powers.—

The arbitrators to be appointed under the Ga. Act of 1847, to assess and award damages against railroad companies for injuries done to property, are a court with limited jurisdiction, and the record of their proceedings must show all that the Act requires to give jurisdiction, and if it does not the proceeding is *coram non judice* and void. *Macon & W. R. Co. v. Davis*, 13 Ga. 68.

The record in such case should show that the proceedings took place at the depot of the company in that magistrate's district, on the line of the road, in the direction the train was moving when the injury occurred, nearest to the point where the injury did

occur; that the magistrate who appointed the arbitrators was a magistrate of the district; that the arbitrators are freeholders of that district; and that the agent of the company did not attend at the depot in that district, to hear complaint, as directed by the statute. *Macon & W. R. Co. v. Davis*, 13 Ga. 68.

When the agent fails so to attend, and arbitrators are then appointed, and they proceed to make an award, it is not necessary that the company should have notice of their proceedings. *Macon & W. R. Co. v. Davis*, 13 Ga. 68.

Where real property is to be surrendered to the lessor, and the matter of compensation that he is to make to the lessee is submitted to arbitration, the arbitrators have the right to construe the contract, and estimate the value of the property at the time, upon the testimony before them; and although they may have erred in the application of the law or the facts, the court will not decree their award void. *Memphis & C. R. Co. v. Scruggs*, 50 Miss. 284.—QUOTING *Jones v. Boston Mill Co.*, 6 Pick (Mass.) 148. REVIEWING *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 131.

An agreement, submitting to arbitration the question of damages to an abutting owner caused by the erection and operation of an elevated railway, provided that the arbitrators, by a majority vote, might exercise their discretion as to the manner and way in which to inform themselves of the matters and things in dispute, and that they might refuse to hear witnesses and counsel, and proceed to follow their determination in whatever manner they, or a majority of them, might decide. *Held*, that this authorized the arbitrators to inform themselves by reading the evidence in other similar cases reported. *Bennett v. Union El. R. Co.*, 5 Silv. Sup. Ct. 464, 9 N. Y. Supp. 915.—DISTINGUISHING *Halstead v. Seaman*, 82 N. Y. 27.

**9. Evidence on the hearing.**—An agreement providing for the appointment of commissioners to fix the value of certain property to be acquired by a railroad company, provided that the commissioners should be governed, in estimating said valuation, by the rules of law applicable to proceedings under the statute, with a right of appeal; that no compensation was to be allowed for damage to this or adjoining property, but they were to take into con-

sideration "the capabilities of the premises for any use whatever." *Held*, that this would fairly admit, as an element of value, evidence of improvements of which the property was capable. *In re New York, L. & W. R. Co.*, 27 Am. & Eng. R. Cas. 404, 102 N. Y. 704, 7 N. E. Rep. 559, 2 N. Y. S. R. 456, 1 Silv. App. 79; reversing 40 Hun 130; which modified 2 How. Pr. N. S. 225.

**10. Appointment of umpire.**—An appointment of an umpire by the board of trade within twenty-one days after the last appointment of two arbitrators who made no award is valid. *In re East & W. I. Docks & L. & B. J. R. Co.*, 5 Railw. Cas. 527.

**11. Hearing before umpire.**—When a new arbitrator is chosen by the original arbitrators, either party has the right to adduce additional testimony and additional arguments. And when either party has not only not waived such right, but, before the award was made, presented his protest to the arbitrators as soon as could reasonably be done, and served an injunction upon them to restrain them from proceeding, and the arbitrators shut him out from this right and make their award in the face of the protest and injunction, it is such misconduct as will set aside the award. *West Jersey R. Co. v. Thomas*, 21 N. J. Eq. 205.

Where a matter is submitted to arbitration, proceeding to hear and determine the matter without giving the plaintiff notice or an opportunity to be heard is irregular and illegal, and would vitiate an award or be ground for enjoining the arbitrators; but where a matter has been submitted to two arbitrators, and the evidence and the arguments of counsel are to be in writing, this will extend to a hearing before the two arbitrators and an umpire, or a third person, which they are authorized to select if they cannot agree, and the parties are not entitled to a further hearing. *West Jersey R. Co. v. Thomas*, 7 Phila. (Pa.) 635.—DISTINGUISHING *Pickering v. Capetown R. V. Co.*, 1 Eq. Cas. 84.

**12. Effect of failure to agree.**—Arbitrators chosen under Ind. Local Laws, 1849, p. 364, § 5, having reported to the circuit court that they were unable to agree, etc., their duties terminated with such report, and they could not afterward proceed to make an award. *Jeffersonville R. Co. v. Mounts*, 7 Ind. 669.

**13. Enjoining the proceedings.**—Where a preliminary injunction has been

issued against arbitrators to restrain them from making an award, mere signing of an award afterward, which they had previously agreed upon, and keeping it in their possession, is not a violation of the injunction so as to authorize an attachment for contempt. *West Jersey R. Co. v. Thomas*, 7 *Phila. (Pa.)* 635.

An injunction should not be granted to restrain proceeding with an arbitration on the ground that a certain engineer acting as arbitrator was disqualified as such by reason of his having expressed an opinion on the point in dispute in a letter written by him, unless, from a fair construction of such letter, it appears that he had made up his mind so as not to be open to change it upon argument. *Jackson v. Barry R. Co.*, [1893] 1 *Ch.* 238.

Under the Judicature Act, 1873, § 25, subsec. 8, the high court has no jurisdiction to enjoin a party from proceeding with an arbitration in a matter beyond the agreement to refer, although such arbitration proceeding may be futile and vexatious. *North London R. Co. v. Great Northern R. Co.*, *L. R.* 11 *Q. B. D.* 30, 52 *L. J. Q. B. D.* 380, 48 *L. T.* 695, 31 *W. R.* 490; *reversing S. C.* 47 *L. T. N. S.* 383.—DISCUSSED IN *London & B. R. Co. v. Cross*, *L. R.* 31 *Ch. D.* 354, 34 *W. R.* 301, 55 *L. J. Ch.* 313, 54 *L. T.* 309.

**14. Vacating the appointment.**—Where a court has appointed commissioners to ascertain the value of certain property to be acquired by a railroad company, under a written agreement, mere fear that the award will be excessive is no ground for an order vacating their appointment. *In re New York, L. & W. R. Co.* 27 *Am. & Eng. R. Cas.* 404, 102 *N. Y.* 704, 7 *N. E. Rep.* 559, 2 *N. Y. S. R.* 456, 1 *Silv. App.* 79; *reversing 40 Hun* 130, which modified 2 *How. Pr. N. S.* 225.

**15. Compensation.**—Though the parties to an arbitration agree that the arbitrators shall fix their own compensation, yet upon a proper suggestion that it is extortionate or excessive, it becomes the duty of the judge to hear, and, if necessary, to pass upon the question just raised. *Kelly v. Lynchburg & D. R. Co.*, 110 *N. Car.* 431, 15 *S. E. Rep.* 200.

When upon the coming in of the award the court ordered notices to issue to the arbitrators to file itemized accounts of the time engaged and expenses incurred by each, together with the value of their ser-

vices; and in response to this order such accounts were filed, to which the defendants formally excepted—*held*, (1) that it was too late to object to the order; (2) that the ruling of the court that it had "no power to consider the evidence, in the absence of sustained proof of allegation, or some affidavit of the party setting forth fraud, collusion, conspiracy, or unfairness," was error. *Kelly v. Lynchburg & D. R. Co.*, 110 *N. Car.* 431, 15 *S. E. Rep.* 200.

The court has power to fix the compensation of its arbitrators when it is not agreed upon, to cut it down if it is excessive, and this in the absence of formal allegation and proof. *Kelly v. Lynchburg & D. R. Co.*, 110 *N. Car.* 431, 15 *S. E. Rep.* 200.

The promoters of an undertaking must, for the purpose of taking up the award, pay the fees due to the arbitrators, they having a lien on the award for such fees, except so far as the obligation may be limited by § 24 of the Lands Clauses Act. *Queen v. South Devon R. Co.*, 15 *Q. B.* 1043, 15 *Jur.* 464, 20 *L. J. Q. B.* 145.

**16. Costs.**—The right of a claimant, in arbitration proceedings under the Lands Clauses Consolidation Act, 1845, to costs is independent of the taxation of them, and an action may be maintained for costs though their amount has not been settled. *Metropolitan D. R. Co. v. Sharpe*, *L. R.* 5 *App. Cas.* 425, 50 *L. J. Q. B. D.* 14, 43 *L. T. N. S.* 130, 29 *W. R.* 617.

A special railway act declaring the provisions of the Lands Clauses Consolidation Act, 1845, to be incorporated with it, except where expressly varied, does not repeal the provisions as to costs in arbitration proceedings in the latter act by directing that arbitrations shall be conducted by an arbitrator appointed by the board of trade, but containing no specific directions as to costs. *Metropolitan D. R. Co. v. Sharpe*, *L. R.* 5 *App. Cas.* 425, 50 *L. T. Q. B. D.* 14, 43 *L. T. N. S.* 130, 29 *W. R.* 617.

Where an arbitrator by consent is given power to determine the matter of costs and expenses his certificates of costs must be enforced, and one of the parties cannot claim to have the costs settled by the taxing-master. In settling such costs the arbitrator may obtain professional help. *Rowcliffe v. Devon & S. R. Co.*, 21 *W. R.* 433.

The costs of arbitration, which are to be settled by the arbitrator or the umpire, need not be incorporated in the award, but may

be ascertained at a subsequent time, which need not be within three months after the time of the reference. If the arbitrator or umpire, as the case may be, refuse or neglect to settle the costs he may be compelled by *mandamus*. *Gould v. Staffordshire Potteries Waterworks Co.*, 5 *Exch.* 214, 1 *L. M. & P.* 264, 6 *Railw. Cas.* 568, 14 *Jur.* 528, 19 *L. J. Exch.* 281. *Contra, Quick v. London & N. W. R. Co.*, 5 *Railw. Cas.* 20, 5 *D. & L.* 685, 13 *Jur.* 408, 18 *L. J. Q. B.* 89.

The court has no jurisdiction to review the taxation of costs of an arbitration to settle disputed compensation made by a master acting in pursuance of § 1 of the Lands Clauses Act, 1869. *Sandbach Charity Trustees v. North Staffordshire R. Co.*, 37 *L. T. N. S.* 391.

### III. THE AWARD; HOW ENFORCED AND HOW IMPEACHED.

**17. Execution.**—The attestation of an award by a witness was essential, under *Ind. Rev. St.* 1843, to its validity. *Jeffersonville R. Co. v. Mounts*, 7 *Ind.* 669.

**18. What is an award.**—Where three persons are chosen by the vendor and vendee of land to ascertain and fix its value and to certify such valuation, the certificate of valuation cannot be considered as more conclusive or binding than an award; but it is an award, and the referees cannot be considered otherwise than as arbitrators. *Dickinson v. Chesapeake & O. R. Co.*, 7 *W. Va.* 390.

A common council passed an ordinance allowing a street railway company to lay its track on the street, reserving the right to another company to use the track jointly, upon making compensation as fixed by the council. *Held*, that the determination of the compensation to be thus made was not an arbitration. *Jersey City & B. R. Co. v. Jersey City & H. H. R. Co.*, 20 *N. J. Eq.* 61; *reversed* in 21 *N. J. Eq.* 550.—DISTINGUISHED IN *Louisville, N. A. & C. R. Co. v. Phillips*, 31 *Am. & Eng. R. Cas.* 432, 112 *Ind.* 59. FOLLOWED IN *North Baltimore Pass. R. Co. v. North Ave. R. Co.*, 75 *Md.* 233. QUOTED IN *State ex rel. v. Corrigan C. St. R. Co.*, 85 *Mo.* 263.

Certain disputes in which a railroad was interested were referred to arbitration. By clause 2 of the order, the referees were directed to make and publish their award in writing on or before January 3, 1887, or such other day as they should appoint; but

during the reference it was agreed that they should go on the ground and ascertain the quantities of material moved, and certify their findings; other questions to remain open. On August 23d, preceding the above date, the arbitrators made and published a report as to the quantities of material moved. *Held*, that such finding was not an award as provided for under said clause 2, nor an award within the meaning of the *C. L. P. Act*, § 209, but merely a finding of facts pending the reference, so as to enable the arbitrators thereafter to make an award. *Connec. v. Canadian Pac. R. Co.*, 16 *Ont.* 639.

**19. Time within which to make.**—Under § 23 of the Lands Clauses Consolidation Act, 1845, the umpire must make his award within three months from the date of his appointment. *Pullen & Liverpool, (Mayor) in re*, 51 *L. J. Q. B.* 285, 46 *L. T. N. S.* 391.

An award made after the statutory period of three months will not be set aside if the parties have consented to enlarge the time. *Palmer v. Metropolitan R. Co.*, 31 *L. J. Q. B.* 259.

Where an arbitrator from time to time enlarged the period for making his award under the submission made by the parties, the award was valid notwithstanding it was not made within the statutory period of three months. *Caledonian R. Co. v. Lockhart*, 6 *Jur. N. S.* 1311, 8 *W. R.* 373, 3 *L. T. N. S.* 252, 3 *Macq. H. L. Cas.* 808.

**20. All the arbitrators must concur in award.**—An award, by the common law, to be valid must have been concurred in by all the arbitrators. *Jeffersonville R. Co. v. Mounts*, 7 *Ind.* 669.

Under § 5 of "an act for the benefit of the Ohio & Indianapolis Railroad Company," etc. (*Local Laws* 1849, p. 364), there can be no valid award where all the arbitrators have not agreed thereto. *Jeffersonville R. Co. v. Mounts*, 7 *Ind.* 669.

The general statute of 1843, concerning arbitrations, and the fifth section of "an act for the benefit of the Ohio & Indianapolis Railroad Company," etc., above mentioned, cannot be taken *in pari materia*. *Jeffersonville R. Co. v. Mounts*, 7 *Ind.* 669.

One of the arbitrators was not present when an award was agreed upon, nor notified of the meeting at which it was made. *Held*, under the *Rev. St.* 1843, that the award was invalid. *Jeffersonville R. Co. v. Mounts*, 7 *Ind.* 669.



Where, under the terms of a submission, the award is to be by the arbitrators or a majority of them, an award made by a majority, in the absence of anything to show fraud, will not be set aside merely because the amount is excessive. *Port Huron & N. W. R. Co. v. Callanan*, 61 Mich. 22, 11 West. Rep. 525, 34 N. W. Rep. 678.

**21. Award must follow submission.**—Where the parties submitting the matter to arbitration request the arbitrators to hear and determine separately the different items submitted, an award is not invalid because not embracing all the matters submitted; nor is its validity affected where the agreement to arbitrate was revoked after the award was made and published. *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 157 Mass. 268, 31 N. E. Rep. 1060.—REVIEWING *Boston & L. R. Corp. v. Nashua & L. R. Corp.*, 139 Mass. 463.

**22. Return of award to court.**—An award inclosed in an envelope and sent by mail, addressed to the clerk of the court, at the court house, and received by him and so endorsed, is a return of the award to the court within the meaning of Mass. Pub. St. ch. 188, § 8, providing that "the award shall be delivered by one of the arbitrators to the court \* \* \*, or shall be inclosed and sealed by the arbitrators and transmitted to the court." *Morrell v. Old Colony R. Co.*, 158 Mass. 69, 32 N. E. Rep. 1030.

Under Mass. Pub. St. ch. 188, § 8, requiring that awards be inclosed in an envelope and sealed by the arbitrators and transmitted to the court, it is not necessary that there be anything written on the envelope showing its contents, though it is a common and convenient practice to do so. *Morrell v. Old Colony R. Co.*, 158 Mass. 69, 32 N. E. Rep. 1030.

**23. What awards are valid.**—Where a proceeding is instituted under the Pennsylvania act of April 3, 1830, to obtain the possession of demised premises for non-payment of rent, an award by the arbitrators finding a certain amount of money due is irregular, and the award will be set aside. *Philadelphia & R. R. Co. v. Thornton*, 3 Phila. (Pa.) 257.

A railroad contractor sued for damages for being wrongfully dismissed before completion of his work. The declaration set out the contract, which, *inter alia*, provided for payment, part in cash, and the remainder in stock, and averred that the company had

failed "to pay the amounts that had become payable prior to his dismissal." Afterward the suit was referred to an arbitrator, who made an award for damages for not having received a portion of the stock for work before the dismissal. Held, that the award was not open to the objection that it included damages not embraced in the writ and declaration. *New York & C. R. Co. v. Myers*, 18 How. (U. S.) 246.

An award by an arbitrator generally as to the whole action under distinct contracts for constructing as many distinct portions of a railway is good, and it is unnecessary for him to find separately upon each contract. *Crawshaw v. York & N. M. R. Co.*, 1 B. C. C. 45, 16 Jur. 668; 1 J. Q. B. 274.

Where two railway companies having connecting lines agree to refer to arbitration the matter of determining arrangements to be made for affording proper facilities for the conveyance and accommodation of passengers, etc., between two points, the arbitrators do not exceed their authority in making an award directing the number of trains to be run, the speed, and other similar matters; an arrangement directed by the arbitrators is not defective because not limited in point of time where either party may by notice require a fresh arbitration. *Eastern Union R. Co. v. Eastern Counties R. Co.*, 2 El. & Bl. 530, 22 L. J. Q. B. 371.

**24. Awards valid in part.**—Although an arbitrator exceeds his jurisdiction in ordering the money to be paid, the rest of the award may be good; and where the award ascertains the amount of the purchase-money which the company by the submission agreed to pay, there is sufficient to enable the court to make an order on it to pay such sum. *Lindsay v. Direct London & P. R. Co.*, 1 L. M. & P. 529, 15 Jur. 224, 19 L. J. Q. B. 417.

**25. Construction and effect of awards.**—The award of an arbitrator, upon a reference by the N. and R. Ry. Cos., decided that a joint station, portion of railway, and works should be constructed by the R. Co., and that the costs and expenses of constructing the same should be borne and paid by the two companies in equal shares. The companies differed, first, as to the length of line to be constructed under the award; secondly, as to an alteration (which was also a great improvement) proposed by the R. Co. in the mode of carrying out the award by substituting an incline for a hoist, as a

means of raising goods from a low to a high level. *Held*, on the first point, that upon the construction of the award the contention of the N. Co. was right; on the second, that the N. Co., not having objected to the alteration when informed of it, must be presumed to have consented to it, but that they must have the same facilities for passing to and from the incline that the R. Co. would have; and authority was given them to defer payment of their share of the cost of the line and station until these were given them to the satisfaction of the court. *Isle of Wight R. Co. v. Ryde & N. R. Co.*, 2 Ry. & C. T. Cas. 251.

The R. Co. having incurred considerable outlay in the construction of the joint station and line, applied for an order for payment from the N. Co., or that the latter company might give security. The N. Co. contended that no payment was due from them until the works were completed. *Held*, that under the award payment must be concurrent with both parties, but that the R. Co. was not entitled to be paid until they advanced the side of the works in which the N. Co. were interested as far as their own, and that in the meantime the N. Co. must give security for the costs and expenses incurred by the R. Co. *Isle of Wight R. Co. v. Ryde & N. R. Co.*, 2 Ry. & C. T. Cas. 251.

**26. Conclusiveness.**—An award by an arbitrator, whom the submission requires to determine all questions at issue, may be set aside if not conclusive of the rights of the parties. *McGregor & M. R. Co. v. Sioux City & St. P. R. Co.*, 49 Iowa 604.

A. contracted to build a railroad for B., to be paid upon monthly estimates, to be made by B.'s engineers, of the work done, and made sub-contracts with C. for the building of certain sections. As the work progressed, the estimates made were small, and A. having died, C. presented claims against A.'s estate on account of said underestimates. There being matters in dispute also between A.'s estate and B., they petitioned the probate court, as provided by statute, for an order to refer all said matters to referees, and the order was granted and the award duly made. The claim of C. against A.'s estate, on account of said underestimates, was also a valid claim on the part of A.'s estate against B. *Held*, that said submission was broad enough to cover all claims and demands between the parties, A.'s estate and B., including the claim on account of said under-

estimates. *Held*, also, that the claim being within the submission, the award was a bar to any action brought for the recovery thereof, or of any claim that was included in the submission, though it was not in fact brought before the arbitrators; the same rule applying in this respect as though it had been an award by deed. *Barker v. Belknap*, 39 Vt. 168.

A.'s estate and B. were made defendants to a bill in chancery brought by C., seeking relief on account of said underestimates. The bill was ordered to be dismissed as to B. and retained as only against A.'s estate, but before formal dismissal A.'s representative filed a cross-bill against B. and C., setting forth the same facts as were in the original bill and the proceedings thereon, and claiming that, from facts established by the decree in the former bill, B. should indemnify A.'s estate against all claims by C. in consequence of short and false estimates of B.'s engineers. *Held*, that B. could rely for defense, first, upon the award, as a bar to inquiry in respect to the merits of claims litigated or which might have been litigated under it; second, upon the merits of the respective claims set up in the cross-bill, as disclosed by the proof in the case, irrespective of the award, the same as if it were an independent proceeding. *Barker v. Belknap*, 39 Vt. 168.

**27. Confirmation by court.**—A statutory award is not subject to confirmation by the court unless a copy thereof, together with notice in writing of the motion to confirm, has been served on the adverse party at least fifteen days before filing the award and motion in the proper court. *Springfield & S. R. Co. v. Calkins*, 90 Mo. 538, 3 S. W. Rep. 82.

Where this course is not pursued, the arbitration, if relied on at the trial, must be set up by amended or supplemental pleading, and where this is not done evidence of an arbitration and award is not admissible. *Springfield & S. R. Co. v. Calkins*, 90 Mo. 538, 3 S. W. Rep. 82.

**28. Actions upon awards.**—In an action upon an award, the defendants being an incorporated railroad company, an agreement of submission to arbitration by the plaintiff and defendants, as a subsisting obligation, being in evidence without objection, both parties having joined in a request to one of the witnesses to write an award already determined on by the referees, and the

defendants having offered a series of prayers assuming, as a matter of fact, said agreement to be an existing contract between the parties, the objection subsequently made, that the authority of the president of said company to sign said agreement was not submitted to the jury as a distinct fact, comes too late. *Maryland & D. R. Co. v. Porter*, 19 Md. 458.

Although it may generally be necessary to submit the question of notice, as a fact, to the jury, to entitle one claiming upon an award to recover, it is not so in a case where that necessity is avoided by an express agreement, or where the parties themselves make the appointment of the time and place for hearing before the arbitrators. *Maryland & D. R. Co. v. Porter*, 19 Md. 458.

Upon the filing of an award directing payment to the plaintiff of a certain sum in dollars and cents, the defendant moved, upon affidavits setting forth the contracts upon which the award was based, that the judgment to be rendered thereon should be so framed that defendant might discharge the same with certain bonds, as stipulated in the said contract. *Held*, that evidence *aliunde* of the principle upon which the award was based was not competent; and that the award, being regular on its face, and no objection on account of fraud, mistake, or irregularity being made, should be affirmed. *Wyatt v. Lynchburg & D. R. Co.*, 110 N. Car. 245, 14 S. E. Rep. 683.

Suit was brought against a railroad company to recover damages for injury to merchandise while being carried, and by agreement of the parties the case was submitted to arbitration and the plaintiff was awarded \$41 damages. At the trial plaintiff claimed that he was entitled to more, but said if the company would pay that sum in ten days he would accept it. It appeared that, if the arbitrators overlooked any item of damage, such oversight was due to plaintiff's failure to call their attention to it. *Held*, that he was bound by the award, and that a failure to pay the amount awarded would not give him the right to bring a new action, his remedy being an action to enforce the award. *Houston & T. C. R. Co. v. Newman*, 2 Tex. App. (Civ. Cas.) 393.

**20. Appeals from awards.**—In a suit upon a void award, made under Ind. Local Laws 1849, p. 364, § 5, the defendant is not estopped from denying its validity by not

having appealed therefrom. *Jeffersonville R. Co. v. Mounts*, 7 Ind. 669.

The Pennsylvania act of 1817, requiring corporations to give bail absolute for the debt, in cases of appeals from the award of arbitrators, was superseded by the non-imprisonment act of 1842; therefore a corporation has a right to appeal from an award without giving such bond. *Erie & A. R. Co. v. Atlantic & G. W. R. Co.*, 3 Pittsb. (Pa.) 232.

**30. Impeachment of awards, generally.**—The question whether an award is excessive or unjust cannot be considered in a court of equity, nor are its merits reviewed. But where the alleged errors are of a sort sufficient to set aside the award, the court will regard them, so that a determination apparently excessive may be reviewed. *West Jersey R. Co. v. Thomas*, 21 N. J. Eq. 205.

The court of chancery has jurisdiction over awards, but it will not exercise it in case of awards which, by agreement, are made rules of court. The court in which the rule is entered has that power, and must exercise it. *West Jersey R. Co. v. Thomas*, 21 N. J. Eq. 205.

No court will review and correct an award; the only power is to set it aside for corruption or misconduct in the arbitrators, or for a plain mistake of law or fact. And if arbitrators decide against law, not by mistake, but of purpose, with the intention of making a just award, when the strict principles of law seem to them to work injustice, their award will not be disturbed. *West Jersey R. Co. v. Thomas*, 21 N. J. Eq. 205.

The inability of a company under its charter to expend its funds in paying an award is no ground for setting the award aside. *In re Barrie & N. R. Co.*, 22 U. C. Q. B. 25.

Where a railway act provides that the expense of altering the gauge of a railway should be borne by several companies in equitable proportions, to be determined in case of difference by the board of trade, the board of trade and their successors the railway commissioners have a discretion which the court cannot control, and a bill to set aside their award on the ground of undue delegation of authority, and the admission of *ex-parte* statements, should not be sustained. *Newry & E. R. Co. v. Ulster R. Co.*, 8 De G., M. & G. 487.

A railroad company and its contractors for the construction of a section of its road

submitted to an arbitrator questions in dispute between them as to the liquidated damages that the contractors should pay for not completing the road on time and as to the right of the engineer to extend the time for a completion of the work, with the provision that the arbitrator had the right to construe the contract between them, the right to determine all questions of fact in relation to the contract, and the right to determine the application of the law to these matters of fact. *Held*, that where the objections made to the award relate only to the construction of the contract, such objections constitute no ground for setting it aside. *Adams v. Great North of S. R. Co.*, [1891] A. C. 31.

**31. Impeachment for mistake.**—Arbitrators have authority to decide all questions of law necessary to the decision of the matter submitted to them, unless they are restricted by the terms of submission, and their mistakes in adopting erroneous rules are not a legal cause for avoiding their award; and a court will refuse to review the award, although it is accompanied by a statement of the facts and particulars upon which it is made, signed by the arbitrators and made part of the award. *Smith v. Boston & M. R. Co.* 16 Gray (Mass.) 521.

Arbitrators who are not restricted by the terms of submission are authorized to decide all questions of law and fact arising in the case, and their decision upon questions of law discussed before them, deliberately and fairly made, is conclusive. Their award may be impeached by showing that they have fallen into some mistake of the law by which they are misled, so that their award is not the result of their judgment; but their mistake in drawing conclusions of fact from evidence, or in adopting erroneous opinions of the law upon debated questions, is not a legal cause for avoiding their award. *White Mountains R. Co. v. Beane*, 39 N. H. 107.

An award of the chief engineer of a railroad will be set aside where it appears that he made a clear mistake in regard to the number of cross-ties delivered by plaintiffs, and that he was a stockholder in the company and thus an interested party. *Atlanta & R. A. L. R. Co. v. Mangham*, 49 Ga. 266.

Where an arbitrator, in passing upon the claim of a contractor with a railway com-

pany for extra work, has not been guilty of misconduct, and has acted within his jurisdiction, his mistake in point of law, in admitting certain evidence, is no ground for setting aside the award. *Fawcett v. Eastern Counties R. Co.*, 2 Exch. 344, 17 L. J. Exch. 223.

A railroad hotel or eating-house was built upon the lands of a company, and at the end of the term the matter of compensation that should be paid by the company upon taking possession of the property was referred to arbitration, with a provision that the amount of the award should constitute a lien on the property. *Held*, that as this lien could only be enforced by a court of chancery by a sale of the property, the lien attached from the making of the award and gave the court equity jurisdiction. *Memphis & C. R. Co. v. Scruggs*, 50 Miss. 284.

**32. Impeachment for fraud or corruption.**—A distinction must be made where an award is sought to be vacated upon motion, and where a court of equity is resorted to to set aside the award for fraud or concealment. In the first class of cases the award will not be set aside or vacated where any mistake of law or fact does not appear on the face of the award itself; but in the second class extrinsic evidence may be resorted to to show that the arbitrators have acted through prejudice, or that there have been fraudulent practices or concealments by the prevailing party. *Valle v. North Mo. R. Co.*, 37 Mo. 446.

Though the simple fact that one of the parties to the submission wrote the award in the absence of the other, who was not notified of the time and place of meeting of the arbitrators proceeding to make their award, may not, of itself, be sufficient to invalidate the award, still it may be considered, unexplained, as affording just ground for suspicion and criticism. But where such party in such case wrote the award himself, and so wrote it that it is materially erroneous and deceptive in his favor, and the arbitrators did sign it as written, a court of equity may set it aside. *Dickinson v. Chesapeake & O. R. Co.*, 7 W. Va. 390.

Mediators (*amiables compositeurs*) are not subject to the provisions of art. 1346, Quebec Code of Procedure, and their award can only be set aside by reason of fraud or collusion if given on the matters referred to them. So *held*, on petition by a contractor for the construction of a railway, to set aside the

award of arbitrators finding the amount due him. *McGreevy v. Queen*, 19 *Can. Sup. Ct.* 180; *reversing* 14 *Can. Sup. Ct.* 735.

Where a railroad company is one of the parties in an arbitration proceeding, proof that one of the arbitrators had received an offer of the solicitorship of the company while the reference was pending, which he accepted after a finding, is good ground for setting aside the award. *Connec v. Canadian Pac. R. Co.*, 16 *Ont.* 639.

Matters in dispute between a railroad company and its contractor were submitted to arbitration, and resulted in an award and judgment for a large sum in favor of the contractor. Afterward the company began suit to set aside the award, on the ground of fraud, in that its assistant engineer was a secret partner in the contract. *Held*, that proof that the assistant engineer only acquired an interest after the contract was made and had no connection with the making of the contract or superintending the work was not sufficient to set aside the award. *Union R. Co. v. Dull*, 124 *U. S.* 173, 8 *Sup. Ct. Rep.* 433.

It is no ground for setting aside an award in such case that the assistant engineer was sworn as a disinterested witness and gave evidence before the arbitrators in favor of the contractor, where there is no evidence to show that he did not tell the truth, but where in fact he was corroborated. *Union R. Co. v. Dull*, 124 *U. S.* 173, 8 *Sup. Ct. Rep.* 433.

**33. Impeachment for misconduct of arbitrators.**—If the arbitrators proceed without the knowledge of either party and without giving him an opportunity to be heard, or if they decide without any evidence, it is such misconduct as will set aside their award. *West Jersey R. Co. v. Thomas*, 21 *N. J. Eq.* 205.

A proceeding for malicious prosecution against a railroad company was submitted to arbitration, with the provision that the referees, or two of them, should report to the court, whose report should be binding and conclusive upon the parties. *Held*, that an award which was unobjectionable upon its face will not be set aside upon the ground that a heated conversation took place between two of the referees on the one side against the other, whereupon the two refused to further confer with the third and made the award without his signing it. *Roberts v. Old Colony R. Co.*, 123 *Mass.* 552.

## ARGUMENT.

Of counsel to the jury, see TRIAL, V, 5.

— discretionary power of court over, see APPEAL, 27.

— improper remarks, when ground for reversal, see APPEAL, 30, 69.

— objections to, how to be taken, see APPEAL, 97.

— reading statutes to jury, see ANIMALS, INJURIES TO, 525.

## ARKANSAS.

Aid to railroads by the state, see STATE AID, II.

Double damages for killing stock in, see ANIMALS, INJURIES TO, 595.

## ARREST.

For crime, see CRIMINAL LAW, II.

Of execution sales, see EXECUTION, 24.

— judgment, see JUDGMENT, V.

— receiver, when a contempt, see CONTEMPT, 4.

Offense of resisting, see CRIMINAL LAW, III.  
See also FALSE IMPRISONMENT.

### 1. In civil actions, grounds for.—

Where the agent of a railroad company receives gold as the funds of the company and pays in silver at a time when gold is at a premium, proof that he had not accounted for the premium, but had written a threatening letter to prevent one from informing the company that he had been dealing with brokers and had made over \$5000, is sufficient evidence to warrant an order of arrest in an action for the premium so converted. *Panama R. Co. v. Robinson*, 4 *T. & C. (N. Y.)* 672, 2 *Hun* 381.

Defendants, while acting in a fiduciary capacity toward the company, took certificates of stock and converted them, with the coupons attached, and disposed of the same and appropriated the proceeds. *Held*, that, if the certificates were the property of the company, then the defendants were liable to arrest under *N. Y. Code*, § 179, subsec. 2, authorizing arrest of the party in an action for property embezzled or fraudulently misapplied by an officer or agent of a corporation, in the course of his employment as such, or by an agent or other person acting in a fiduciary capacity. *Northern R. Co. v. Carpentier*, 4 *Abb. Pr. (N. Y.)* 47.

Under the *N. Y. Code*, § 206, a party may be arrested when he has been guilty of a

fraud in concealing and disposing of the property, or in the taking, detention, or conversion for which the action is brought; and to maintain this action it is not essential that the plaintiffs should be the owners of property taken, detained, or converted. A bailee, trustee, or any other person who is responsible to his principal may maintain the action. *Northern R. Co. v. Carpentier*, 4 *Abb. Pr. (N. Y.)* 47.

**2. Of females.**—A female defendant was shown to have aided and abetted co-defendants in taking railroad certificates of stock and disposing of the same for their own use and benefit. *Held*, that this showed a wilful injury to property, subjecting the female to arrest under the N. Y. Code, § 179, providing that no female shall be arrested in any action except for a wilful injury to a person, character, or property. *Northern R. Co. v. Carpentier*, 3 *Abb. Pr. (N. Y.)* 259, 13 *How. Pr.* 222.

A woman who was known to be of lewd character came into defendant's waiting-room several hours before train time, and for misconduct there was removed by the police at the request of the company's agent. *Held*, that if she was entitled to a verdict at all it was for nothing more than nominal damages, and that a verdict in her favor for \$175 should be set aside. *Beeson v. Chicago, R. I. & P. R. Co.*, 13 *Am. & Eng. R. Cas.* 45, 62 *Iowa* 173, 17 *N. W. Rep.* 448.

**3. Of passengers, at instance of carrier.\***—A police officer who, in response to the invitation of the regular agents of the company, assists in ejecting a passenger becomes a special agent of the company for that purpose, and is subject to the same rule in regard to excessive violence in executing the regulations of the company as its employes. *Jardine v. Cornell*, 34 *Am. & Eng. R. Cas.* 307, 50 *N. J. L.* 485, 14 *Atl. Rep.* 590.

If the conduct of a passenger unlawfully persisting in riding in a railroad car is such as to constitute him a disorderly person, a policeman may, by virtue of his office, arrest such disorderly character, notwithstanding the fact that such policeman was originally called in as an agent of the company; and for violence incident to such arrest the

company and its agents are not liable. *Jardine v. Cornell*, 34 *Am. & Eng. R. Cas.* 307, 50 *N. J. L.* 485, 14 *Atl. Rep.* 590.

When a city police officer takes by force a disorderly person from the scene of disorder to the police station, such action will be presumed to have been done by virtue of his official character, notwithstanding the fact that prior to such disorderly conduct the officer was in law the agent of the defendant; and for force used in making said arrest the defendant is not liable. *Jardine v. Cornell*, 34 *Am. & Eng. R. Cas.* 307, 50 *N. J. L.* 485, 14 *Atl. Rep.* 590.

**4. Of person obstructing track.**—Persons in charge of a passenger train saw an obstruction on the track, and about the same time saw plaintiff running from the place of the obstruction. They stopped the train, suspecting that he had placed the obstruction there, captured him, and took him before an officer for a preliminary examination. Sufficient evidence was not produced to hold him, and he was discharged and returned without expense to himself. They had no authority to make the arrest, unless such authority were implied from their being employes of the company. *Held*, that the company was not liable. *Porter v. Chicago, R. I. & P. R. Co.*, 41 *Iowa* 358.

**5. Power of officer in effecting arrest.**—An officer having a writ by which he is commanded to arrest the body of the defendant, a railroad engineer, may, for the purpose of making the arrest, lawfully stop a train of cars run by such engineer. *St. Johnsbury & L. C. R. Co. v. Hunt*, 38 *Am. & Eng. R. Cas.* 238, 60 *Vt.* 588, 7 *N. Eng. Rep.* 39, 1 *L. R. A.* 189, 6 *Am. St. Rep.* 138, 15 *Atl. Rep.* 186.

## ARRIVAL.

Notice of, see CARRIAGE OF MERCHANDISE, V, 2; EXPRESS COMPANIES, II, 5.

## ARSON.

Prosecution for burning bridges, see CRIMINAL LAW, III.

## ARTICLES OF ASSOCIATION.

See INCORPORATION, 9.

\* Liability of company for arrests of passengers by servants, see note, 32 *AM. ST. REP.* 100.

Company not liable for unlawful arrests by servants, see note, 18 *AM. & ENG. R. CAS.* 386.

1 *D. R. D.*—30.



**ASSAULT, CIVIL ACTION FOR.**

By conductors, see CONDUCTOR, 10.

Criminal prosecution for, see CRIMINAL LAW, III.

Upon passengers, see CARRIAGE OF PASSENGERS, II, 4.

— by strikers, see STRIKES, 4.

**1. When action lies—Parties.**—For an assault committed by an agent in the line of his duty and within the scope of his employment the master is liable, and is liable in exemplary damages in a proper case. *Hamilton v. Third Ave. R. Co.*, 13 *Abb. Pr. N. S.* (N. Y.) 318.

An action of trespass for an assault and battery can be maintained against a corporation, and in such action an individual can be joined as a codefendant with the corporation. *Brokaw v. New Jersey R. & T. Co.*, 32 *N. J. L.* 328.—FOLLOWING *Eastern Counties R. Co. v. Broom*, 6 *Exch.* 314; *Chilton v. London & C. R. Co.*, 16 *M. & W.* 212; *Roe v. Birkenhead, L. & C. J. R. Co.*, 7 *Exch.* 36; *Seymour v. Greenwood*, 6 *H. & N.* 359; *Goff v. Great Northern R. Co.*, 3 *El. & El.* 672; *Moore v. Fitchburg R. Corp.*, 4 *Gray* (Mass.) 465; *Evansville & C. R. Co. v. Baum*, 26 *Ind.* 70.

What was termed an action of trespass before the adoption of the Code is the proper remedy where a passenger sues for assault and battery committed on him by an employé of the company; and such action will be barred if not commenced in two years, under the provision of the Code providing that actions for libel, slander, assault and battery, or false imprisonment shall be commenced within two years. *Priest v. Hudson River R. Co.*, 40 *How. Pr. (N. Y.)* 456.

Where an employé of a railroad company assaults a passenger, a joint action against the employé and the company may be maintained therefor, or either may be sued separately. *Priest v. Hudson River R. Co.*, 40 *How. Pr. (N. Y.)* 456.

An agent of a railroad company made a complaint to a trial justice against plaintiff for unlawfully refusing to pay his fare, and the magistrate issued his warrant in due form for his arrest. Neither the company nor any of its agents did anything except to enter the complaint. The complaint was defective, but the warrant was good on its face. *Held*, that an arrest under it was an act done by virtue of legal authority, and did

not constitute an assault for which the company would be liable. *Langford v. Boston & A. R. Co.*, 30 *Am. & Eng. R. Cas.* 653, 144 *Mass.* 431, 4 *N. Eng. Rep.* 209, 11 *N. E. Rep.* 697.

**2. Liability for assaults upon passengers, generally.**\*—A railroad company is liable in an action of trespass for an assault and battery committed by one of its agents. *St. Louis, A. & C. R. Co. v. Dalby*, 19 *Ill.* 353.—DISAPPROVING *Orr v. Bank of United States*, 1 *Ohio* 36. EXPLAINING *Vanderbilt v. Richmond Turnpike Co.*, 2 *N. Y.* 479. *Hanson v. European & N. A. R. Co.*, 62 *Me.* 84.—FOLLOWING *Goddard v. Grand Trunk R. Co.*, 57 *Me.* 202.—REVIEWED IN *Atchison, T. & S. F. R. Co. v. Gants*, 34 *Am. & Eng. R. Cas.* 290, 38 *Kan.* 608. *Priest v. Hudson River R. Co.*, 10 *Abb. Pr. N. S.* (N. Y.) 60, 40 *How. Pr.* 456, 2 *Sweeney* 595. *Eastern Counties R. Co. v. Broom*, (in error) 6 *Exch.* 314, 15 *Jur.* 297, 20 *L. J. Exch.* 196, 6 *Railw. Cas.* 743.—NOT FOLLOWED IN *Goff v. Great Northern R. Co.*, 3 *El. & El.* 672, 30 *L. J. Q. B.* 148, 7 *Jur. N. S.* 286, 3 *L. T. N. S.* 850.

It is settled law that unwarrantable assaults on passengers by the carrier's servants are breaches of the contract of carriage, and as such impose liability upon the carrier. *International & G. N. R. Co. v. Kettle*, (Tex.) 16 *Am. & Eng. R. Cas.* 337.

A passenger who is assaulted and grossly insulted in a railway car by a brakeman employed on the train has a remedy therefor against the company. *Goddard v. Grand Trunk R. Co.*, 57 *Me.* 202.—QUOTED IN *Chicago & E. R. Co. v. Flexman*, 8 *Am. & Eng. R. Cas.* 354, 103 *Ill.* 546.

The law makes it the duty of railroad companies to employ competent, safe, and civil men as conductors, and for the as-

\* Liability of company for assaults by servants, see notes, 13 *AM. & ENG. R. CAS.* 4, 15; *Id.* 149; 18 *Id.* 382, 390; 21 *Id.* 336; 26 *Id.* 256; 34 *Id.* 380.

Liability of company to passengers for torts of trainmen, see notes, 41 *AM. REP.* 340; 42 *Id.* 36.

Liability of corporations for torts, such as assault and battery, malicious prosecution, slander, etc., see note, 34 *AM. REP.* 495.

Liability of company for assaults on passengers by servants, see notes, 32 *AM. ST. REP.* 95; 14 *L. R. A.* 737.

Assault by street-car driver on passenger. Liability of company for, where contract of carriage had ceased, see 41 *AM. & ENG. R. CAS.* 239, *abstr.*

Liability of company for assault by servant on female passenger, see note, 32 *AM. ST. REP.* 101.

saults, injuries, and wrongs inflicted on a passenger by a conductor in the course of his employment the railroad company is responsible. *Gallena v. Hot Springs R. Co.*, 4 *McCrary* (U. S.) 371, 13 *Fed. Rep.* 116.

If a conductor wrongfully accuses a passenger of attempting to evade the payment of his fare, and the insult leads to an assault and battery by the conductor, the company will be liable. *Randolph v. Hannibal & St. J. R. Co.*, 18 *Mo. App.* 609.

Where a conductor attempts to seize the property of a passenger to enforce payment of his fare, and the difficulty leads to an assault and battery by the conductor, the railroad company will be liable. *Ramsden v. Boston & A. R. Co.*, 104 *Mass.* 117.—APPLIED IN *Buck v. People's St. R. El. Light & P. Co.*, 46 *Mo. App.* 555; *Corbett v. Twenty-third St. R. Co.*, 42 *Hun* (N. Y.) 587, 4 *N. Y. S. R.* 535. QUOTED IN *Heenrich v. Pullman Palace Car Co.*, 18 *Am. & Eng. R. Cas.* 379, 20 *Fed. Rep.* 100; *Heinrich v. Pullman Palace Car Co.*, 10 *Sawyer* (U. S.) 80; *Jeffersonville R. Co. v. Rogers*, 38 *Ind.* 116.

A passenger on a steamboat interfered in a proper way with the rude treatment of a relative of his, who was also a passenger, by the steward and table waiters, which led to an assault. *Held*, that the owners of the vessel were liable. *Byrant v. Rich*, 106 *Mass.* 180.—REFERRING TO *Philadelphia & R. R. Co. v. Derby*, 14 *How.* (U. S.) 468.

A railroad company that maintains an eating-house at a station may prevent a person who runs a rival house from riding on its trains for the purpose of drumming for his house, though he pays his fare as a passenger; but the remedy of the company is to eject him if he persists in it; and if a conductor who knows that the party has drummed on former occasions, upon seeing him enter a car with papers in his hand which he believes are intended to circulate among the passengers for the purpose of drumming, assaults such person, not for the purpose of putting him off the train, but for the purpose of keeping him in one seat and preventing him from drumming among the passengers, the company will be liable. *Texas & P. R. Co. v. Pearl*, 3 *Tex. App. (Civ. Cas.)* 19.

A conductor on passing a station was warned by a watchman that he thought that three persons who entered the car were doing so for the purpose of robbing a pas-

senger. During the route the conductor, mistaking plaintiff for one of the three suspicious persons, assaulted him, as he thought, for the purpose of preventing him committing the robbery. *Held*, that the mistake of the conductor did not exempt the company from liability for the actual damage resulting from the act, and that \$2000 was not excessive. *Texas & P. R. Co. v. Graves*, 2 *Tex. Unrep. Cas.* 306.

Plaintiff bought a through limited ticket, and after he had bought it was informed that the regular train had gone, but that a special train had been made up for him and others who had not departed on the regular train. This train, however, did not run to the end of plaintiff's journey, and at a station where he was required to change cars the gatekeeper refused to allow him to pass the gate, saying his ticket was not good, and assaulted him and violently pushed him back. *Held*, in an action for this assault, that the company was liable. It was its duty to inform its agents along the route of the status of plaintiff, and that his ticket must be honored. *Watkins v. Pennsylvania R. Co.*, (D. C.) 52 *Am. & Eng. R. Cas.* 159.

**3. — by reason of ratification.**—An assault by a servant of a railway company who imprisons a passenger to compel him to pay his fare may be ratified by the company. *Eastern Counties R. Co. v. Broom* (in error), 6 *Exch.* 314, 15 *Jur.* 297, 20 *L. J. Exch.* 196, 6 *Railw. Cas.* 743.—NOT FOLLOWED IN *Goff v. Great Northern R. Co.*, 3 *El. & El.* 672, 30 *L. J. Q. B.* 148, 7 *Jur. N. S.* 286, 3 *L. T.* 850.

Where a railway company ratifies an act of its agent in committing an assault on its behalf and for its benefit, it is liable to an action therefor. *Eastern Counties R. Co. v. Broom* (in error), 6 *Exch.* 314, 6 *Railw. Cas.* 743, 15 *Jur.* 297, 20 *L. J. Exch.* 196.—NOT FOLLOWED IN *Goff v. Great Northern R. Co.*, 3 *El. & El.* 672, 30 *L. J. Q. B.* 148, 7 *Jur. N. S.* 286, 3 *L. T.* 850.

Retaining a conductor in the service of the company after it has notice that he has committed an assault upon a passenger is sufficient ratification of his act by the company as to authorize a jury to give exemplary damages. *Bass v. Chicago & N. W. R. Co.*, 39 *Wis.* 636.

**4. Wanton and malicious assaults.**—(1) *Company liable.*—A railroad company is liable in damages for a wanton and malicious assault by one of its servants on a

passenger. *Williams v. Pullman Palace Car Co.*, 33 *Am. & Eng. R. Cas.* 414, 40 *La. Ann.* 417, 4 *So. Rep.* 85.—QUOTING Keene *v. Lizardi*, 5 *La.* 433.

The company is liable for the wilful assault of a brakeman upon a passenger who is lawfully on the train. *Chicago & E. I. R. Co. v. Flexman*, 9 *Ill. App.* 250.

It is the duty of railroad companies to protect their passengers against outrage and insult; and a company will be liable for an assault by a conductor upon a passenger, though it be malicious and outside of the conductor's line of duty. *Dillingham v. Anthony*, 37 *Am. & Eng. R. Cas.* 1, 73 *Tex.* 47, 3 *L. R. A.* 634, 11 *S. W. Rep.* 139.

A railroad company is responsible to a passenger for a battery by the conductor, committed first on the car, and repeated shortly afterward at the office of the company, whither the passenger had gone to make complaint to the superintendent. *Savannah St. & R. R. Co. v. Bryan*, 86 *Ga.* 312, 12 *S. E. Rep.* 307.

No degree of carelessness or negligence on the part of a passenger will excuse a wanton and malicious attack on him by the conductor or other servant of the railroad company. No matter how negligent a passenger may be for his safety, that will not warrant the infliction of a wilful injury by a railroad employé. *Wabash, St. L. & P. R. Co. v. Rector*, 9 *Am. & Eng. R. Cas.* 264, 104 *Ill.* 296.

(2) *Company not liable.*—For a wilful and malicious trespass by a servant, not commanded or ratified by the master, but perpetrated to gratify the private malice of the servant, under mere color of discharging the duty which he has undertaken for his master, no action will lie against the master. *Evansville & C. R. Co. v. Baum*, 26 *Ind.* 70.—DISAPPROVING *Pennsylvania R. Co. v. Vandiver*, 42 *Pa. St.* 365; *Seymour v. Greenwood*, 30 *L. J. Exch.* 189.—DISTINGUISHED IN *Indianapolis, P. & C. R. Co. v. Anthony* 43 *Ind.* 183. FOLLOWED IN *Brokaw v. New Jersey R. & T. Co.*, 32 *N. J. L.* 328.

But if the act of the servant was necessary to accomplish the purpose of his employment, and was intended for that purpose, then it was implied in the employment, and the master is liable, though the servant may have executed it wilfully and maliciously. *Evansville & C. R. Co. v. Baum*, 26 *Ind.* 70.

A railway company is not liable for damages resulting from a wilful and malicious trespass committed upon a stranger to the company by its engineer or conductor, outside of and beyond the scope of his authority or line of duty. *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 *Miss.* 112.—DISTINGUISHING *Brown v. New York C. R. Co.*, 32 *N. Y.* 597; *Lalor v. Chicago, B. & Q. R. Co.*, 52 *Ill.* 401.

(2) *Illustrations.*—A brakeman became angry at a passenger who had refused to pay him for watering hogs, and dashed a jet of water on him. *Held*, that the company was liable. *Terre Haute & I. R. Co. v. Jackson*, 6 *Am. & Eng. R. Cas.* 178, 81 *Ind.* 19.—APPROVED IN *Louisville, N. A. & C. R. Co. v. Wood*, 113 *Ind.* 544.

Plaintiff, while a passenger on one of the defendant's street cars, was unjustifiably attacked and beaten by the driver, who also acted as conductor. In an action to recover damages—*held*, that the defendant was liable. *Stewart v. Brooklyn & C. T. R. Co.*, 12 *Am. & Eng. R. Cas.* 127, 90 *N. Y.* 588, 43 *Am. Rep.* 185.—REVIEWING *Goddard v. Grand Trunk R. Co.*, 57 *Me.* 202, 2 *Am. Rep.* 39; *Day v. Owen*, 5 *Mich.* 520; *Nieto v. Clark*, 1 *Cliff. (U. S.)* 145; *Flint v. Norwich & N. Y. Transp. Co.*, 34 *Conn.* 554; *Craker v. Chicago & N. W. R. Co.*, 36 *Wis.* 657, 17 *Am. Rep.* 504.—APPLIED IN *Dwinelle v. New York C. & H. R. R. Co.*, 44 *Am. & Eng. R. Cas.* 384, 120 *N. Y.* 117, 24 *N. E. Rep.* 319, 30 *N. Y. S. R.* 578, 8 *L. R. A.* 224; *Rowen v. Christopher & T. S. R. Co.*, 34 *Hun (N. Y.)* 471. FOLLOWED IN *Lyons v. Broadway & S. A. R. Co.*, 32 *N. Y. S. R.* 232, 10 *N. Y. Supp.* 237. REVIEWED IN *Hepworth v. Union Ferry Co.*, 41 *N. Y. S. R.* 783, 16 *N. Y. Supp.* 692.

Plaintiff got on the platform of a baggage car without the knowledge of the conductor, and rode for some distance, and, being discovered, went into a smoker and sat down, where he was assaulted by the conductor without any demand for his fare or without any opportunity to pay it after entering the car, and there was not evidence to show that the party was trying to evade payment of the fare. *Held*, that the conductor was acting in the line of his employment, and that the company was liable. *Fordyce v. Beecher*, 2 *Tex. Civ. App.* 29, 21 *S. W. Rep.* 179.

Where a physician and surgeon employed by a railway company to attend the sick

and injured persons committed to his charge is alleged to have wilfully and maliciously assaulted an assistant, it is presumptively an independent tort, for which the master is not liable; and a bare statement or allegation that it was done in the course of his employment and while in the discharge of his duty is insufficient, by itself, to charge the master with liability. *Campbell v. Northern Pac. R. Co.*, 51 Minn. 488, 53 N. W. Rep. 768.

A drunken man came aboard a passenger car and was using insulting language toward ladies. Plaintiff's intestate, a gentleman who was travelling with the ladies, appealed to the conductor to make him be quiet. The man sat down near intestate, and, having taken offense, used abusive and threatening language, but not in a tone to be heard by the conductor. In a short time the intestate left the cars at his station, whereupon the drunken man jumped off, assaulted, and killed him. *Held*, that there was nothing to show want of proper care on the part of the servants of the company, and it was therefore not liable. *Putnam v. Broadway & S. A. R. Co.*, 55 N. Y. 108, 15 Abb. Pr. N. S. 383, 6 Am. Ry. Rep. 40; reversing 4 J. & S. 195.—APPLYING *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. St. 512.

Plaintiff sued for an assault committed on him by a brakeman. *Held*, that if the brakeman, standing upon the car platform, assaulted the plaintiff, who was making no attempt to board the train, and thereby caused the injury, the company was not liable, because the act was both wilful and intentional, and outside the limits of his duties and the purpose for which he was employed; but otherwise, if he assaults a person attempting to get on the train. *Molloy v. New York C. & H. R. R. Co.*, 10 Daly (N. Y.) 453.—APPLYING *Hoffman v. New York C. & H. R. R. Co.*, 37 N. Y. 25. *REVIEWING* *Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 129.—APPLIED IN *Shultz v. Third Ave. R. Co.*, 15 Daly (N. Y.) 95, 2 N. Y. Supp. 693, 19 N. Y. S. R. 917.

**5. Assaults upon licensees.**—Where a passenger, on arriving at the place to which he had paid his fare, missed his watch, and, supposing it to have been stolen, refused to leave the train until he should recover his watch, and the conductor consented that he might remain on the train until it reached another station; and, after

the train had started and a partial search had been made a passenger asked who he thought had his watch, when he replied, "That fellow," pointing to a brakeman, who immediately struck him in the face with a lantern—*held*, that the facts showed a right of action against the railroad company for the injury inflicted by its servant, and that the company occupied the same position towards the passenger as if he had paid his fare to such other station. *Chicago & E. R. Co. v. Flexman*, 8 Am. & Eng. R. Cas. 354, 103 Ill. 546.—QUOTING *Goddard v. Grand Trunk R. Co.*, 57 Me. 202; *Craker v. Chicago & N. W. R. Co.*, 36 Wis. 657.

**6. Who is an employee, within the rule.**—A person left by the regular ticket agent in charge of the ticket office during the absence of the latter is a servant of the railroad company for the issuing of tickets, and the company is liable for an assault committed by him during an altercation regarding the making of change on the sale of a ticket. *Fick v. Chicago & N. W. R. Co.*, 34 Am. & Eng. R. Cas. 378, 68 Wis. 469, 32 N. W. Rep. 527.

A lessee or licensee of the exclusive privilege of entering railroad cars, or upon the right of way to sell or supply lunches, is not a servant or agent of the corporation so as to render it liable for an assault and battery committed by such lessee or licensee upon a competitor who seeks lawfully, on his own premises, to obtain the patronage of passengers. *Fluker v. Georgia R. & B. Co.*, 38 Am. & Eng. R. Cas. 379, 81 Ga. 461, 8 S. E. Rep. 529, 2 L. R. A. 843.

Where a flagman, whose duties are confined to a highway crossing, leaves the highway and goes upon the company's right of way, he is not in the discharge of duty so as to make the company liable for an assault committed on a person there. *Illinois C. R. Co. v. Ross*, 31 Ill. App. 170.—DISTINGUISHING *Northwestern R. Co. v. Hack*, 66 Ill. 238.

It appeared that plaintiff, while standing upon the platform of one of the cars of a train, which he was about to enter as a passenger, was knocked off and robbed, just as the train started, by a person holding a lantern in one hand and a club in the other. It did not appear that the person committing the assault and robbery was an employé of the railroad company, otherwise than that he carried a lantern with letters on it and

wore a cap with a badge upon it; or that the assault was made in ejecting or attempting to eject the plaintiff from the cars, by anyone connected with the operation of the train, or having any charge of the depot, its grounds, or the road; but, on the contrary, that the alleged assault was wholly disconnected with any service in which any employé of the company was engaged. *Held*, that the company operating the train was not responsible for the wrongful acts committed upon the plaintiff, under a petition charging that the plaintiff was assaulted and injured by the servants and employés operating and controlling a train of the company. *Sachrowitz v. Atchison, T. & S. F. R. Co.*, 34 Am. & Eng. R. Cas. 382, 37 Kan. 212, 15 Pac. Rep. 242.

**7. Assaults by station agents.**—Where it appeared that plaintiff was authorized to receive freight for certain parties, and in pursuance thereof went to the depot of defendant and demanded the same of the agent who was in charge of the depot and was authorized to receive and deliver freight, and while so demanding it the said agent made an assault upon him, and it did not appear that said assault was made in ejecting or attempting to eject plaintiff from the depot, or in preventing or attempting to prevent him from committing any injury to the property of the defendant, or from transgressing any rules for the regulation of its depot and the transaction of its business—*held*, that the company was not liable for the assault, and that only the agent who actually made it was liable. *Hudson v. Missouri, K. & T. R. Co.*, 16 Kan. 470.

A railway station keeper assaulted a passenger for not leaving the waiting-room when ordered, the passenger having enraged him by spitting on the floor. *Held*, that in defending an action for the assault and battery, a question as to the plaintiff's smoking was irrelevant, where his smoking had not been objected to. *People v. McKay*, 8 Am. & Eng. R. Cas. 205, 46 Mich. 439, 9 N. W. Rep. 486.

**8. Assaults upon intending passengers.\***—Where it is customary for persons to enter cars without a ticket and to pay on the train, it is not necessary that a ticket be procured in advance to consti-

tute the party a passenger. So where one enters a car without a ticket and sits down, intending to take passage, and is assaulted by one of the company's employés, the company cannot avoid liability by saying he did not occupy the relation of a passenger. *Illinois C. R. Co. v. Sheehan*, 29 Ill. App. 90.

Defendant placed an agent at the entrance to its passenger-cars, with instructions to refuse admission to any one not having a ticket, provided there was sufficient time to procure a ticket before the train left; and tickets were required to be produced and were punched by the agent. Plaintiff attempted to enter a car without a ticket, but was stopped by the agent, who asked for his ticket, and on being advised that plaintiff had no ticket told him he could not enter without one. There was time enough to procure one before the departure of the train. Plaintiff persisted in his attempt to enter the car, when, as he testified, the agent struck him and pulled him from the car, doing the injuries complained of. *Held* (DWIGHT and EARL, C. C., dissenting), that the cause of action was for assault and battery substantially alleged to have been committed by the defendant, and as no evidence was given tending to prove that defendant in any way directed or sanctioned the acts of assault and battery, the defendant was not liable. *Priest v. Hudson River R. Co.*, 65 N. Y. 589.

**9. Assault by one passenger upon another.\***—It is the duty of carriers of passengers to protect one passenger against the assaults of others; so where plaintiff was injured by the discharge of a gun dropped by a soldier while engaged in a contest with another soldier, the carrier is liable for the injury, and he cannot avoid it by showing that he was compelled by the government to carry the soldiers; especially is this so where the injured passenger enters after the soldiers are already aboard, and without any notice of their enforced presence. *Flint v. Norwich & N. Y. Transp. Co.*, 34 Conn. 554.—APPLIED IN *Putnam v. Broadway & S. A. R. Co.*, 55 N. Y. 108. FOLLOWED IN *Carpenter v. Boston & A. R. Co.*, 21 Am. & Eng. R. Cas. 331, 97 N. Y.

\* Duty of carrier to protect passenger from assault of fellow-passenger, *supra* note, 16 L. R. A. 627.

Liability of carrier for assault upon passenger by a fellow-passenger, see notes, 52 AM. & ENG. R. CAS. 446; 32 AM. ST. REP. 90.

\* Regulations of companies concerning gates and gatekeepers at entrance to trains. Assaults on passengers by gatekeepers, see 52 AM. & ENG. R. CAS. 169 *abstr.*

494, 49 Am. Rep. 540. QUOTED IN Putnam v. Broadway, & S. A. R. Co., 15 Abb. Pr. N. S. (N. Y.) 383. REVIEWED IN Goddard v. Grand Trunk R. Co., 57 Me. 202; Stewart v. Brooklyn & C. T. R. Co., 90 N. Y. 588, 43 Am. Rep. 185.

The employes of a railroad company constitute the police of the train, and the passenger, from the moment he enters the car, is entitled to look to them for protection in cases of assault growing out of the disorderly conduct of another passenger or passengers. *Flannery v. Baltimore & O. R. Co.*, 4 Mackey (D. C.) 111.

A passenger may be liable for entering a car and forcibly ejecting a fellow-passenger. *Murphy v. Western & A. R. Co.*, 21 Am. & Eng. R. Cas. 258, 23 Fed. Rep. 637.

A common carrier of passengers is not liable for an assault by one passenger upon another, which is committed in the absence of the conductor and without his knowledge. *Royston v. Illinois C. R. Co.*, 67 Miss. 376, 7 So. Rep. 320.—REVIEWING *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200.

A person who had incurred the ill-will of a certain class of men by evicting them from their homes took passage on a train. When he bought the ticket the company's servants had no notice that he was exposed to danger at the hands of these men, but before the journey commenced he was threatened in the presence of the servants, and took refuge in the guard's van for safety, but was removed and placed in a third-rate car by servants who knew that he was threatened. The angry men crowded into his compartment and assaulted and injured him, and at the next and several other succeeding stations the men would get off and others get on and repeat the assault. The guard and other employes, when appealed to, did nothing to secure his safety. *Held*, that there was no proof of a breach by the company of any duty growing out of the contract of carriage, and that it was not liable. *Pounder v. North Eastern R. Co.*, 52 Am. & Eng. R. Cas. 433, [1892] 1 Q. B. 385.—APPLYING *Readhead v. Midland R. Co.*, L. R. 2 Q. B. 412, L. R. 4 Q. B. 379; *Daniel v. Metropolitan R. Co.*, L. R. 5 H. L. 45. DISTINGUISHING *Metropolitan R. Co. v. Jackson*, 3 App. Cas. 193.

#### 10. Assaults by strangers.\*—A com-

\* Liability of company for assaults on passengers by third persons, see notes, 34 AM. & ENG. R. CAS. 386; 28 AM. REP. 112.

pany during the time of a strike of laborers upon its road stopped at a place not a regular station and took on laborers against whom the strikers were incensed. At the next station the train was captured by a mob which broke into the cars, and in the difficulty that ensued between the two classes of laborers other passengers were injured. *Held*, that as it did not appear that the company had exercised proper diligence in stopping and taking the laborers on, and putting them in cars with passengers, it was liable for the injury. (SHELDON, Ch. J., and MAGRUDER, J., dissent.) *Chicago & A. R. Co. v. Pillsbury*, 31 Am. & Eng. R. Cas. 24, 123 Ill. 9, 14 N. E. Rep. 22, 11 West. Rep. 757.

**11. Assaults upon persons not passengers.**—A railroad company is not liable for an assault committed by its employes, who are engaged in running a train, upon a person who is not a passenger, nor in any way connected with the road. *Porter v. Chicago, R. I. & P. R. Co.*, 41 Iowa 358.—APPROVING *Allen v. London & S. W. R. Co.*, L. R. 6 Q. B. 65; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110; *Thames Steamboat Co. v. Housatonic R. Co.*, 24 Conn. 40, 54; *Elkins v. Boston & M. R. Co.*, 23 N. H. 275; *Pennsylvania R. Co. v. Zug*, 47 Pa. St. 480. FOLLOWING *DeCamp v. Mississippi & M. R. Co.*, 12 Iowa 348; *Cooke v. Illinois C. R. Co.*, 30 Iowa 202.

**12. Matters of defense, generally.**—A railway company is not liable for an injury to a passenger caused by his being shot by the conductor, if the conductor acted in the reasonable belief that the passenger was about to assault him, and that the shooting was necessary to prevent great bodily harm. *New Orleans & N. E. R. Co. v. Jones*, 52 Am. & Eng. R. Cas. 447, 142 U. S. 18, 12 Sup. Ct. Rep. 109.—APPLIED IN *Smith v. Manhattan R. Co.*, 45 N. Y. S. R. 865.

If a passenger persists in violating the reasonable rules of the company, after notice and a request not to further violate them, the carrier has a right to rescind the contract for further conveyance and put him off, but not the right to maltreat him while continuing to perform the contract for his conveyance. *Hanson v. European & N. A. R. Co.*, 62 Me. 84.

In the trial of an action for an assault and battery brought against the superintendent of a railroad depot for expelling the plaintiff from the depot for a supposed



violation of one of the regulations established by the railroad corporation, the defendant cannot give in evidence former violations by the plaintiff of other regulations established by the corporation. *Hall v. Power*, 12 Met. (Mass.) 482.

In an action for an assault and battery committed while entering, against plaintiff's consent, and to overcome her resistance to such entry, upon premises occupied by her, it cannot be shown, in mitigation of damages, that the defendants were acting under the authority of a railroad company, and that proceedings by it were still pending for condemnation of the premises. *Colvill v. Langdon*, 22 Minn. 565.

When sued for an assault and battery in forcibly ejecting a passenger from a train, a conductor cannot prove the existence of certain regulations of the company, and that in committing the act complained of he was acting in obedience to such regulations, unless such matter has been set up as a defense in the answer. *Pier v. Finch*, 29 Barb. (N. Y.) 170.

Plaintiff sued a railroad company for an assault made upon him by a brakeman, who was armed with a billet, on the train on which he was a passenger. At the trial the company offered to show, as a reason why the brakeman was so armed, that on previous occasions the train in that locality had been boarded by roughs and confidence men, who had attacked the brakeman. *Held*, that such evidence should have been admitted, where the plaintiff was seeking to recover exemplary damages, as it tended to show that the arming of the brakeman was not wilful. *Chicago, B. & Q. R. Co. v. Boger*, 1 Ill. App. 472.

**13. Provocation.**—Where a passenger provokes a difficulty with a conductor, which causes him to draw a pistol on the passenger and to use unbecoming language, as calling him a coward in the presence of other passengers, the company is not liable. *Harrison v. Fink*, 42 Fed. Rep. 787.—QUOTING *Peavy v. Georgia R. & B. Co.*, 81 Ga. 485, 8 S. E. Rep. 70.

Where a passenger provokes a difficulty with the driver of a street car, which leads to an assault by the driver, the company is not civilly liable, though the act might not be justifiable, criminally, on the part of the driver. *Scott v. Central Park, N. & E. R. Co.*, 53 Hun (N. Y.) 414, 24 N. Y. S. R. 754, 6 N. Y. Supp. 382.

If a disorderly passenger defies a conductor, draws a pistol, and thereby induces the conductor to arm in order to expel him from the train; and if, after expulsion, he still uses grossly obscene and profane language, reeking with insult, on which a mutual combat with pistols ensues, the railway company is not liable for the consequences, though the expelled passenger be wounded in the conflict, even if the conductor, excited by danger and irritated by insult, be not fully excusable for the shooting. *Peavy v. Georgia R. & B. Co.*, 37 Am. & Eng. R. Cas. 114, 81 Ga. 485, 8 S. E. Rep. 70.—QUOTED IN *Harrison v. Fink*, 42 Fed. Rep. 787.

If an employé of a railroad is first assaulted by a passenger he may defend himself, and, if he be resisted in the performance of any duty he may use force enough to overcome the resistance; but, the assault being over, or the resistance ended, he cannot pursue and punish the wrongdoer, and, if he does, both he and the company will be liable. *Hanson v. European & N. A. R. Co.*, 62 Me. 84.

A charge of the court, to the effect that sneers, looks, and contemptuous gestures will not justify an assault by a conductor upon a passenger, and that a railroad company is not released from its contract guaranteeing polite and courteous treatment to a passenger, because the passenger does not smile upon the conductor or because he wears a frown, is not erroneous. Failure to charge that such conduct of the passenger could be considered in mitigation of the damages is no cause for a new trial, when no request to so charge was made. *East Tenn., V. & G. R. Co. v. Fleetwood*, 90 Ga. 23, 15 S. E. Rep. 778.

Where a railroad conductor, without apparent provocation, rudely assaulted a passenger, used to him opprobrious and insulting language, caught hold of him roughly and pulled him to the end of the car, threatened to kill him, appeared about to draw a pistol upon him, and spat tobacco-juice in his face, the company is liable for punitive damages, and will not be permitted to prove, in mitigation thereof, that on some previous occasion the passenger had used slanderous and indecent language about the conductor's sister-in-law, and that this was the reason of the conductor's conduct, it being the first meeting between them since the alleged language of the passenger had

been communicated to the conductor, when it does not appear how long before the assault the passenger had spoken the words ascribed to him, or how long the conductor had been informed thereof. If such facts could be received at all in mitigation of damages, their occurrence must have been so recent as to indicate that the conductor acted under the immediate provocation thereof, and had not had time to control the passion produced thereby. *East Tenn., V. & G. R. Co. v. Fleetwood*, 90 Ga. 23, 15 S. E. Rep. 778.

**14. Variance.**—A complaint alleged that plaintiff was a passenger on defendant's train, and that the agents of defendant in charge of the train wilfully, maliciously, forcibly, and violently, and while the train was running at a rapid rate of speed, kicked and ejected him from the steps of the car onto the ground and under the cars, whereby he sustained personal injuries, for which he seeks damages. *Held*, that the cause of action thus pleaded was one in tort, the *gravamen* of the complaint being an intentional and personal assault and battery; and the fact that the evidence showed that plaintiff was a trespasser and not a passenger on the train (the wrongful assault being proved as alleged) constituted neither a failure of proof nor a material variance between the complaint and the evidence. *Mykleby v. Chicago, St. P., M. & O. R. Co.*, 34 Am. & Eng. R. Cas. 387, 39 Minn. 54, 38 N. W. Rep. 763.

**15. Questions for jury.**—Where a company is sued for an assault and battery committed by an employé in removing a passenger from a car, and it appears that the employé had a right to expel him, it is a question for the jury whether there was more force used than was necessary to expel him and to overcome his resistance. *Coleman v. New York & N. H. R. Co.*, 106 Mass. 160, 6 Am. Ry. Rep. 306.

Plaintiff sued for assault and battery committed on him in expelling him from defendant's cars. It appeared that he received blows on the head, but claimed that it aggravated hernia, with which he was afflicted. *Held*, that the question whether blows on the head could aggravate such a trouble was for the jury. *Coleman v. New York & N. H. R. Co.*, 106 Mass. 160, 6 Am. Ry. Rep. 306.

Plaintiff entered a sleeping-car in the absence of the conductor and purchased a section from the porter. Before the journey

was completed the train was stopped by a washout. The porter transferred plaintiff to another train, but, finding the sleeping-cars filled, took him into a common car. Plaintiff requested the porter to furnish him a sleeping-car section or give him something to show that he was entitled to it, which he refused to do. Upon attempting to leave the car plaintiff touched him upon the arm, saying that he must not leave without satisfaction, whereupon the porter struck plaintiff with considerable violence. *Held*, that the question whether the porter was engaged in the performance of his duties as defendant's servant at the time of inflicting the blow should have been submitted to the jury. *Dwinelle v. New York C. & H. R. R. Co.*, 44 Am. & Eng. R. Cas. 384, 120 N. Y. 117, 24 N. E. Rep. 319, 30 N. Y. S. R. 578, 8 L. R. A. 224; reversing 45 Hun 139, 9 N. Y. S. R. 838.

**16. Verdict.**—Where both the company and a conductor are sued jointly for an assault committed by the conductor, the question whether the act was justifiable or not determines the innocence or guilt of both defendants; and a jury is not justified in acquitting the conductor and finding the company guilty. *Hyatt v. New York C. & H. R. R. Co.*, 6 Hun (N. Y.) 306.

**17. Damages recoverable, generally.**—A railroad company is liable to a passenger who is assaulted by a conductor in compensatory damages, including compensation for the insult, indignity, and wounded feelings, as well as bodily pain and injury. *Randolph v. Hannibal & St. J. R. Co.*, 18 Mo. App. 609.—QUOTING *Smith v. Pittsburg, Ft. W. & C. R. Co.*, 23 Ohio St. 10; *Craker v. Chicago & N. W. R. Co.*, 36 Wis. 675. REVIEWING *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa 314.

Where suit is brought to recover for an assault, plaintiff cannot recover for loss of time in the absence of evidence to show what the time lost was worth. *Kane v. Manhattan R. Co.*, 3 N. Y. S. R. 145.

A female passenger sued a sleeping-car company for an indecent assault upon her by one of its porters. *Held*, that she had a right to recover for all injuries, temporary or permanent, to her health, person, and strength by the wrong done her, including compensation for pain and suffering, mental and physical, which had been caused, or might thereafter be caused, by reason of the wrong, which would include a miscarriage,

if the jury believed it resulted from the injury. *Campbell v. Pullman Palace Car Co.*, 42 *Fed. Rep.* 484.

**18. Exemplary damages, when recoverable.**—An excessive battery is a complete answer to a plea of *son assault demesne*, and, if wantonly and maliciously inflicted, subjects the party making it to the same liability to exemplary damages as if he had been the original wrongdoer. *Philadelphia, W. & B. R. Co. v. Larkin*, 47  *Md.* 155, 18 *Am. Ry. Rep.* 536.

If a brakeman employed on a railway passenger train assaults and grossly insults a passenger thereon, and the company retains the offending servant in its service after his misconduct is known to it, it will be liable to exemplary damages. (TAPLEY, J., dissenting.) *Goddard v. Grand Trunk R. Co.*, 57 *Me.* 202.—APPROVED IN *Cobb v. Columbia & G. R. Co.*, 37 *So. Car.* 194. FOLLOWED IN *Hanson v. European & N. A. R. Co.*, 62 *Me.* 84. QUOTED IN *Haley v. Mobile & O. R. Co.*, 7 *Baxt. (Tenn.)* 239. REVIEWED IN *Rouse v. Metropolitan St. R. Co.*, 41 *Mo. App.* 298; *Stewart v. Brooklyn & C. T. R. Co.*, 90 *N. Y.* 588, 43 *Am. Rep.* 185; *Palmer v. Charlotte, C. & A. R. Co.*, 3 *So. Car.* 580.

The plaintiff, a highly respectable citizen, and a passenger in the defendant's railway car, on request surrendered his ticket to a brakeman authorized to demand and receive it. Shortly after, the brakeman, without provocation, approached the plaintiff in his seat, and accosting him in a loud voice, denied, in the presence of the other passengers, that he had seen or received the plaintiff's ticket, and in language coarse, profane, and grossly insulting called the plaintiff a liar, charged him with then attempting to evade the payment of his fare, and with having done so before; and, leaning over the plaintiff, then in feeble health and partially reclining in his seat, and bringing his fist down close to his face, violently shook it there and threatened to split the plaintiff's head open and spill his brains right there on the spot, with much more to the same effect. The defendant, although well knowing the brakeman's misconduct, did not discharge him, but retained him in his place, which he continued to occupy at the time of the trial. The jury were instructed that the case was a proper one for exemplary damages, and they returned a verdict for \$3,300, which the court declined to set

aside. *Goddard v. Grand Trunk R. Co.*, 57 *Me.* 202.—DISTINGUISHED IN *Missouri, K. & T. R. Co. v. Weaver*, 16 *Kan.* 456. QUOTED IN *McGinnis v. Missouri Pac. R. Co.*, 21 *Mo. App.* 399.

**19. — when not recoverable.**—In New Hampshire, damages recoverable in a civil action even for a wilful tort, such as assault and battery, must be founded on the idea of compensation for the injury. The jury may allow for injury to the feelings as well as to the person. But to go beyond all elements of injury to the plaintiff, and give what are literally punitive damages—that is, a fine awarded by way of punishment and for the protection of the public—is not allowable. *Fay v. Parker*, 53 *N. H.* 342.—NOT FOLLOWING *Towle v. Blake*, 48 *N. H.* 92. QUOTING *Holyoke v. Grand Trunk R. Co.*, 48 *N. H.* 541. REVIEWING *Hopkins v. Atlantic & St. L. R. Co.*, 36 *N. H.* 9; *Taylor v. Grand Trunk R. Co.*, 48 *N. H.* 303; *Belknap v. Boston & M. R. Co.*, 49 *N. H.* 358; *Detroit Daily Post Co. v. McArthur*, 16 *Mich.* 447.

In New York, a carrier corporation is not liable in punitive damages for an assault and battery by its servant on a passenger unless the corporation authorize or ratify the tort, or wrongfully further employ or retain the servant. *Donivan v. Manhattan R. Co.*, 1 *Misc. (N. Y.)* 368, 49 *N. Y. S. R.* 722, 21 *N. Y. Supp.* 457.—QUOTING *Ricketts v. Chesapeake & O. R. Co.*, 33 *W. Va.* 433, 25 *Am. St. Rep.* 901.

In Texas, a company is not liable in punitive damages for a wanton and malicious assault committed by a conductor, though the company retains the conductor in its service thereafter, such act being in no way connected with the discharge of his duties. *Dillingham v. Anthony*, 37 *Am. & Eng. R. Cas.* 1, 73 *Tex.* 47, 3 *L. R. A.* 634, 11 *S. W. Rep.* 139.—APPROVING *Galveston, H. & S. A. R. Co. v. Donahoe*, 56 *Tex.* 162. QUOTING *Hays v. Houston G. N. R. Co.*, 46 *Tex.* 272.

Plaintiff was caught in the press of a crowd while waiting to take passage in a ferry-boat, and was forced by the crowd through the gate that was intended only for vehicles, and was forcibly removed therefrom by the servants of the ferry company, after offering to pay regular ferry charges. *Held*, that, in the absence of anything to show malice or ill-will, he was not entitled to punitive damages, and that a verdict for

\$1500 should be set aside as excessive. *Doran v. Brooklyn & N. Y. F. Co.*, 46 N. Y. S. R. 310.

**20. Excessive damages.**—Plaintiff was assaulted by an employé for entering a ladies' car, where his ticket did not admit him, and in the difficulty which followed his cane and a ring were broken, which cut his finger to the bone; the back of one of his hands was lacerated and one of his arms somewhat bruised, so that he suffered for three weeks thereafter. The assault was in the presence of a number of persons. The court instructed the jury that they could not allow exemplary damages. *Held*, that a verdict for \$4500 was excessive. *Bass v. Chicago & N. W. R. Co.*, 39 Wis. 636, 13 Am. Ry. Rep. 414.—REVIEWED IN *Atchison, T. & S. F. R. Co. v. Gants*, 34 Am. & Eng. R. Cas. 290, 38 Kan. 608.

**21. Recoveries held not excessive.**—The passenger having been badly beaten, kicked, cut with a knife, and had his arm broken, a verdict for \$2000 is not excessive. *Savannah St. & R. R. Co. v. Bryan*, 86 Ga. 312, 12 S. E. Rep. 307.

A verdict of \$4000 where punitive damages were authorized is not so excessive as to demand a reversal, where the action was by a passenger for being assaulted by a brakeman with an iron poker, from which he received a fracture of the skull and was threatened with paralysis of the optic nerve. *Hanson v. European & N. A. R. Co.*, 62 Me. 84.—FOLLOWING *Goddard v. Grand Trunk R. Co.*, 57 Me. 202.

A female passenger sued for improper familiarities taken with her by a conductor. It appeared that she was a school-teacher of considerable refinement and capable of keenly feeling such indignities. *Held*, that a verdict for \$1000 in her favor was not excessive. *Craker v. Chicago & N. W. R. Co.*, 36 Wis. 657, 9 Am. Ry. Rep. 118.—FOLLOWED IN *Hinckley v. Chicago, M. & St. P. R. Co.*, 38 Wis. 194.

### ASSENT.

**Estoppel by**, see ESTOPPEL, IV, 2.

### ASSESSMENTS.

**For drainage**, see DRAINS, 7.

— **local improvements**, see STREETS AND HIGHWAYS V, 6; STREET RAILWAYS, VIII, 3.

**Of damages**, see DAMAGES, III.

— **for land taken**, see EMINENT DOMAIN, XI, 3-7; XV, 5.

— **taxes**, see TAXATION, VII.

— **upon street railways**, see STREET RAILWAYS, VIII.

**On stock subscriptions**, see SUBSCRIPTIONS TO STOCK, II.

### ASSESSORS.

**Boards of**, see TAXATION, VII, 4, 5.

### ASSETS.

**Administration of**, in equity, see EQUITY, 9.

**Marshalling**, see INSOLVENCY, 5.

**What are**, see EXECUTORS AND ADMINISTRATORS, 7.

### ASSIGNEE.

**Generally, rights and remedies of**, see ASSIGNMENT, 17-24.

**Of bankrupt, rights and powers of**, see BANKRUPTCY, 6-9.

**Right of assignee of cause of action to sue** see ANIMALS, INJURIES TO, 318.

### ASSIGNMENT.

**Of claims for wages**, see EMPLOYÉES, 11.

— **dower in railroad stock**, see DOWER, 2.

— **errors**, see APPEAL, 135.

— **franchises**, see FRANCHISES, 4.

— **lease**, see LANDLORD AND TENANT, 5.

— **laborer's lien**, see LIENS, III, 4.

— **patent rights**, see PATENTS FOR INVENTIONS, III.

— **stocks**, see STOCK, V.

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#### I. WHAT IS ASSIGNABLE.

**1. In general.**—A contract between a railroad company and individuals, that the company will construct a depot at a certain place, and that upon its construction the individuals will pay to the company a certain sum of money, is negotiable by indorsement so as to vest the title thereof in each indorsee successively. *Vannoy v. Duprez*, 72 Ind. 26.

One who has a right of action against a railway company for damages to his city lot on account of the building of a road on the

adjacent street, does not transfer his right of action by conveying the lot to another by warranty deed after the road is built and in operation. *Pratt v. Des Moines N. W. R. Co.*, 32 *Am. & Eng. R. Cas.* 236, 72 *Iowa* 249, 33 *N. W. Rep.* 666.—DISTINGUISHED IN *Merchants' Union Barb-Wire Co. v. Chicago, R. I. & P. R. Co.*, 43 *Am. & Eng. R. Cas.* 121, 79 *Iowa* 613. FOLLOWED IN *Jolly v. Des Moines N. W. R. Co.*, 72 *Iowa* 759.

The mere naked right to sue, unaccompanied by a conveyance of the property itself, is not assignable. *Graham v. La Crosse & M. R. Co.*, 1 *Am. & Eng. R. Cas.* 416, 103 *U. S.* 148.

A railroad company entered into a contract with certain parties for the transfer of their passengers and freight across a river. *Held*, that such contract was assignable with the consent of the company, and that the assignment was good consideration for a note given therefor; but that where the note was afterward sued on the makers might set up as a defense that the company had repudiated the assignment: but where such defense is denied by a replication, it is error to take judgment without proofs. *Early v. Reed*, 60 *Mo.* 528.

Where a contract provides that payments equal to eighty-five per cent of the contract value of the work to be done were to be made monthly, and that fifteen per cent of the contract value of the work done each month was to be retained and paid within ninety days after the entire completion of the work—*held*, that the retained percentage became a separate and distinct demand which could be assigned. *Adler v. Kansas City, S. & M. R. Co.*, 92 *Mo.* 242, 10 *West. Rep.* 333, 4 *S. W. Rep.* 917.—APPLYING *Union R. & T. Co. v. Traube*, 59 *Mo.* 363.

### 2. Causes of action on contract.\*—

A right of action against a common carrier for injury to goods while in course of transportation is assignable. *Norfolk & W. R. Co. v. Read*, 87 *Va.* 185, 12 *S. E. Rep.* 395.

A claim against a common carrier for loss of goods in transit is a cause of action arising on contract, and is assignable. *Watson v. Hoosac Tunnel Line Co.*, 13 *Mo. App.* 263.

The right of action against a railroad company, as a common carrier, for negli-

gence in failing to safely carry or deliver goods is assignable, and the assignee may sue in his own name, the action being in the nature of one for the conversion of personal property. *Smith v. New York & N. H. R. Co.*, 28 *Barb. (N. Y.)* 605, 16 *How. Pr.* 277.

A right of action against a common carrier to recover the value of property entrusted to him is assignable, and the assignee may sue in his own name. *Merrill v. Grinnell*, 30 *N. Y.* 594.

**3. Causes of action in tort.\*—**A right of action arising from a tort to property is assignable under the Code. *Snyder v. Wabash, St. L. & P. R. Co.*, 29 *Am. & Eng. R. Cas.* 237, 86 *Mo.* 613.—REVIEWING *Butler v. New York & E. R. Co.*, 22 *Barb. (N. Y.)* 110. DISTINGUISHING *Cable v. Marine R. & D. Co.*, 21 *Mo.* 133; *Burnett v. Crandall*, 63 *Mo.* 410.—FOLLOWED IN *Doering v. Kenamore*, 86 *Mo.* 588.

The provision of the act of Congress of 1875, to the effect: "Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless the suit might have been prosecuted in such court to recover thereon, if no assignment had been made, except in cases of promissory notes, negotiable by the law merchant and bills of exchange," does not change the common-law rule as to the assignment of causes of action based upon torts. *Northern Ins. Co. v. St. Louis & S. F. R. Co.*, 5 *McCrory (U. S.)* 126, 15 *Fed. Rep.* 840.

All such rights of action for a tort as would survive to the personal representatives of the party may be assigned so as to pass an interest to the assignee, which he can assert in his own name in a civil action under the Code, as he formerly might do in the name of the assignor at law. Applied to an action for killing an ox. *Butler v. New York & E. R. Co.*, 22 *Barb. (N. Y.)* 110.—APPROVED IN *Galveston H. & S. A. R. Co. v. Freeman*, 57 *Tex.* 156. REVIEWED IN *Snyder v. Wabash, St. L. & P. R. Co.*, 29 *Am. & Eng. R. Cas.* 237, 86 *Mo.* 613.

Under the New York statute the right of action against a corporation for personal injuries is not assignable, unless it is where the injury affects the estate of the party rather than the person. *Hodgman v. West-*

\*Assignment of right of action against carrier for injury to goods, see 45 *AM. & ENG. R. CAS.* 373 *abstr.*

\*Assignability of cause of action for personal torts, see note, 14 *L. R. A.* 512.

*ern R. Corp.* 7 *How. Pr. (N. Y.)* 492.—  
QUOTED IN *Galveston, H. & S. A. R. Co. v.*  
*Freeman*, 57 *Tex.* 156.

The rule of law that a cause of action  
founded on injuries to the person is not  
assignable has not been altered by the Code  
of New York. *Purple v. Hudson River R.*  
*Co.*, 1 *Abb. Pr. (N. Y.)* 33, 4 *Duer* 74.

A right of action for an unliquidated, un-  
recognized claim, arising *ex delicto*, such as  
a claim against an express company for loss  
of goods intrusted to it, is not assignable so  
as to enable the assignee to sue in his own  
name. *Thurman v. Wells*, 18 *Barb. (N. Y.)*  
500.

The right of action against a railroad  
company for killing stock may be assigned,  
and the assignee may sue in his own  
name. (McFARLAND, J., dissenting.) *East*  
*Tenn., G. & V. R. Co. v. Henderson*, 1 *Lea*  
*(Tenn.)* 1.

A right of action against a railroad com-  
pany, under the Indiana statute, for killing  
stock where the road is not fenced, is as-  
signable, though the statute says that the  
"owner" must make complaint, and that  
the "owner" may sue, etc. *Louisville, N.*  
*A. & C. R. Co. v. Goodbar*, 13 *Am. & Eng.*  
*R. Cas.* 599, 88 *Ind.* 213.

Under Iowa Code, § 1289, a claim against  
a railroad company for killing stock on its  
track is assignable, and, if not paid within  
thirty days after notice by the assignee, as  
required by statute, he may recover double  
damages, just as his assignor might have  
done. (REED, J., dissenting.) *Everett v.*  
*Central Iowa R. Co.*, 31 *Am. & Eng. R. Cas.*  
550, 73 *Iowa* 442, 35 *N. W. Rep.* 609.

A right of action against a railroad com-  
pany for negligently starting a fire and de-  
stroying property is assignable. *Fried v.*  
*New York C. R. Co.*, 25 *How. Pr. (N. Y.)*  
285, 1 *Shelden* 1.

A right of action in a pending suit against  
a railroad company for negligently setting  
fire to plaintiff's property may be assigned  
in whole or in part, and the suit continued  
to be prosecuted in assignor's name for  
benefit of assignee. *Tyler v. Ricamore*, 87  
*Va.* 466, 12 *S. E. Rep.* 799.

An employé sued a railroad company to  
recover for personal injuries, and compro-  
mised the suit before judgment and signed  
a release; whereupon his attorneys inter-  
vened, claiming that they were prosecuting  
the suit for an interest in the damages,  
which had been assigned to them, and deny-

ing the right of their client to release their  
partie. *Held*, that the client's unliquidated  
claim for damages could not be assigned.  
*Stewart v. Houston & T. C. R. Co.*, 62 *Tex.*  
246.—FOLLOWING *Galveston, H. & S. A. R.*  
*Co. v. Freeman*, 57 *Tex.* 156.

**4. Claims of laborers.**—A railroad  
laborer cannot assign wages which are not  
then earned, nor the contract of service then  
made. *Lehigh Valley R. Co. v. Woodring*,  
116 *Pa. St.* 513, 9 *Atl. Rep.* 58.—FOLLOWING  
*Jermyn v. Moffitt*, 75 *Pa. St.* 402.

Under Mansf. Ark. Dig. § 473, making all  
agreements and contracts in writing for  
the payment of money assignable, a mere  
memorandum of accounts given to railroad  
laborers, and only intended as information  
to the road-master in auditing such accounts,  
cannot be said to be a written agreement, and  
therefore is not assignable. *St. Louis, I. M.*  
*& S. R. Co. v. Camden Bank, (Ark.)* 1. *S. W.*  
*Rep.* 704.

An assignment of a portion of the wages  
of a railway employé may be made, and the  
courts will recognize and protect the equit-  
able interest of the assignee. *Dean v. St.*  
*Paul & D. R. Co.*, 53 *Minn.* 504, 55 *N. W.*  
*Rep.* 628.

The N. Y. act of 1871, ch. 609, § 4, made  
it the duty of railroad companies to station  
flagmen at certain highway crossings, and  
upon a failure of the company to employ  
such flagmen it became the duty of the  
highway commissioners to appoint them,  
their compensation to be paid by the com-  
pany. *Held*, that the compensation or wages  
earned by such flagmen, appointed by such  
commissioners, is assignable. *Stoothoff v.*  
*Long Island R. Co.*, 32 *Hun (N. Y.)* 437.

Time-checks issued to laborers by a con-  
tractor for labor in building a railroad are  
assignable, and carry with them the statu-  
tory lien on the road, which may be enforced  
against the same. *Texas & P. R. Co. v.*  
*McMullen*, 1 *Tex. App. (Civ. Cas.)* 64.

**5. Corporate bonds.**—The bond of a  
corporation, made payable to the obligee or  
his assigns, is not negotiable so as to enable  
the holder to sue at law in his own name,  
without an assignment, under the Pa. act of  
May 28, 1715, providing that assignments of  
bonds payable to order or assigns shall be  
under hand and seal, and before two wit-  
nesses. *Bunting v. Camden & A. R. Co.*, 81  
*Pa. St.* 254, 15 *Am. Ry. Rep.* 570.—DISTIN-  
GUISHING *Lacey v. Lacey*, 7 *Pa. St.* 251; *Carr*  
*v. Le Fevre*, 27 *Pa. St.* 413.



**6. Corporate franchise.**—The provision of the California constitution that "corporations may be formed under general laws, but shall not be created by special act," does not prevent a legally organized corporation from assigning its franchise. *People ex rel. v. Stanford*, 77 Cal. 360, 18 Pac. Rep. 85, 19 Pac. Rep. 693.

**7. Railroad tickets.**\*—A commutation mileage ticket is not an "instrument," within the meaning of Iowa Code, § 2086, providing that when "by the terms of an instrument its assignment is prohibited, an assignment of it shall, nevertheless, be valid;" and where such ticket is issued "not transferable," on its face, a person riding on it, not the one to whom it is issued, does not sustain the relation of a passenger so as to entitle him to recover for injuries. *Way v. Chicago, R. I. & P. R. Co.*, 64 Iowa 48, 52 Am. Rep. 431, 19 N. W. Rep. 828.

**8. Subscriptions to stock.**—A corporation may assign a subscription to its capital stock, or the amount unpaid thereon. *Racine County Bank v. Ayres*, 12 Wis. 512.—FOLLOWING Downie v. Hoover, 12 Wis. 174; Downie v. White, 12 Wis. 176.

**9. Verdicts and judgments.**—A judgment recovered in an action for a tort against a railroad for a personal injury is not assignable before it has been rendered or entered up, although a verdict has been returned upon which judgment can be and is afterwards signed. The plaintiff acquires title, not by the verdict, but by the judgment, and until its rendition he has no title to assign; until then his action for the tort is not terminated, but is still pending and in progress. *Gamble v. Central R. & B. Co.*, 80 Ga. 595, 7 S. E. Rep. 315.

## II. WHO MAY ASSIGN, AND HOW.

**10. Corporate officers.**—The power of a corporation to assign a cause of action cannot be questioned by the defendant in an action thereon by the assignee. *Small v. Chicago, R. I. & P. R. Co.*, 55 Iowa 582, 8 N. W. Rep. 437.

A writing recited, "for value received we assign to M. any claim or cause of action we may have \* \* \* under the contract with" a certain railroad named, and was signed by the president and secretary of the company as such, and had the corporate seal at-

tached. *Held*, that, notwithstanding the use of the word "we," it sufficiently appeared that the officers were acting for the corporation, and that the writing was its deed. *Musser v. Johnson*, 42 Mo. 74.

**11. Consolidated company.**—A plaintiff who declares upon an assignment of his claim to him by a consolidated railroad company must fail if he does not show that the statutory conditions to consolidation were substantially observed. *Rodgers v. Wells*, 44 Mich. 411, 6 N. W. Rep. 860.

One who declares upon a claim held under an assignment from a consolidated company cannot recover on proof merely that it was assigned by one of the constituent companies to his assignor. *Rodgers v. Wells*, 44 Mich. 411, 6 N. W. Rep. 860.

**12. Assignment by delivery of subject-matter.**—Certain parties interested in procuring a railroad entered into an agreement that they would pay certain specified sums to any company that would build a railroad, and placed this agreement in the hands of their agents to negotiate with, and deliver the same to, any company that might undertake to build the road. *Held*, that the interest in such contract passed by a delivery to a company agreeing to build the road, and that no formal assignment was necessary to enable such company to sue thereon. *Cedar Rapids & St. P. R. Co. v. Stewart*, 25 Iowa 115.

## III. VALIDITY, INTERPRETATION, AND EFFECT.

**13. Validity.**—An agreement by a railroad company to pay for work in bonds issued for stock subscribed by a county, where the persons agreeing to receive them have full knowledge of the terms upon which they were issued, is not an assignment of the bonds, or placing them in the hands of third parties, so as to prevent an order declaring them cancelled. *Mercer County v. Pittsburgh & E. R. Co.*, 27 Pa. St. 389.

Where a claim for damages for personal injuries caused by the negligence of a railroad was assigned, the court, without deciding whether the assignment and a collateral agreement were champertous, held that, even were they champertous, the defendant company could not plead that fact to defeat the action, it being a stranger to the contract and not injuriously affected by it. *Vimont v. Chicago & N. W. R. Co.*, 19 Am.

\* Assignability of railroad tickets, see note, 18 L. R. A. 55.

*Eng. R. Cas.* 213, 69 *Iowa* 296, 22 *N. W. Rep.* 906, 28 *N. W. Rep.* 612.

An employé of a railroad company assigned his wages, using a printed form in which the names, amounts, and dates were left blank, with an agreement that the assignee should fill the blanks whenever necessary. *Held*, that the assignment of the wages and the authority to fill in the blanks constituted a valid assignment and contract within the statute of frauds, and that the assignee could recover said wages. *Cole v. New York, L. E. & W. R. Co.*, 37 *Hun* (*N. Y.*) 394.

The appellant, who had sustained bodily injuries in a collision on a railroad, assigned his claim for damages therefor to an attorney for \$330, who was to prosecute the claim, and did so successfully. The amount eventually recovered against the railroad company was \$4000. *Held*, (1) that the assignment, as to the excess beyond reasonable compensation to the attorney for his services, was void as to appellant's antecedent judgment-creditors; (2) that a receiver appointed under an unsatisfied execution issued on the judgment of such creditors could maintain a suit in chancery to avoid the assignment. *Colgan v. Jones*, 44 *N. J. Eq.* 274, 18 *Atl. Rep.* 55.

**14. How construed.**—A contractor, entitled to money under a contract with the S. & M. R. Co., made an assignment of the same by a written notice and statement addressed to "George H. Nettleton, president and manager of K. C., S. & M. R. R." It appeared that Nettleton was the president of both corporations, and that the S. & M. Railroad was known by the name of the Kansas City, S. & M. Railroad, as well as by its own name, and was managed by the same chief officers. *Held*, that it was competent for the trial court to apply the assignment to its proper subject-matter by disregarding the letters "K. C." in the description of Nettleton's office. *Adler v. Kansas City, S. & M. R. Co.*, 92 *Mo.* 242, 10 *West. Rep.* 333, 4 *S. W. Rep.* 917.

**15. What will pass by an assignment.**—Where goods while in transit are damaged and sold by the carrier, the assignor may assign all his interests in the goods, and such assignment will convey a valid right of action to the assignee. *Waldron v. Willard*, 17 *N. Y.* 466.

Whether an assignment of the accruing profits of a railroad attached to an incorpo-

rated railroad and banking company, by the corporation, be not also an assignment of the estate on which the road is built, to the extent of the assignment of the profits of the road, *quære?* *Arthur v. Commercial & R. Bank*, 17 *Miss.* 394.

Plaintiff sued as assignee of a passenger whose baggage was lost while travelling on a through ticket. The assignment was of all his claim against one of the intermediate lines. The suit was against the initial carrier. *Held*, that the assignment would not support the action. *Talcott v. Wabash R. Co.*, 50 *N. Y. S. R.* 423, 66 *Hun* 456, 21 *N. Y. Supp.* 318.

**16. Effect.**—Where a party conveys a part of his land, after a railroad is located over it, the right to the whole damages is in him; and where his deeds contain covenants against incumbrances, the remedy of his vendees is by action of covenant under the deed, and persons taking an assignment of only the right that the vendees have to damages for land taken by the railroad cannot maintain an action against the vendor to recover a part of the damages that have been awarded to him. *New York & N. E. R. Co. v. Drury*, 10 *Am. & Eng. R. Cas.* 518, 133 *Mass.* 167.

It will hardly do to affirm that a railroad, a citizen of Iowa, may enter into a contract with a citizen of New York, and, after incurring liability thereunder, may, for the purpose of defeating the jurisdiction of the federal courts, assign such contract, or his right of action thereon, to another citizen of New York, with an agreement that the latter shall prosecute the suit to judgment, pay the costs and expenses, and then pay the balance to the assignor, who is to remain the real litigant. *Goodnow v. Litchfield*, 4 *McCrory* (*U. S.*) 215.

A ferry company contracted with a railroad company to furnish the latter with grounds for a depot, in consideration that it would give the ferry company the ferrying of all goods required to be transported across a river at that point. There was a provision in the contract authorizing its assignment to another company, and stipulating that all its covenants should be binding on the assignee, it being understood at the time that it was procured with a view to such assignment. *Held*, that the assignee was bound by the stipulation, and was liable to be sued for a breach of such covenants. *Wiggins Ferry Co. v. Chicago & A. R. Co.*,

5 *Am. & Eng. R. Cas.* 1, 73 *Mo.* 389, 39 *Am. Rep.* 519; reversing 5 *Mo. App.* 347.

#### IV. RIGHTS AND REMEDIES OF THE ASSIGNEE.

##### 17. Rights of assignee, generally.

—The assignee of a judgment against a railroad company acquires only the right of the judgment-creditor as against the company. *Butler v. Rahm*, 46 *Md.* 541, 18 *Am. Ky. Rep.* 86.

##### 18. — of assignee of labor claims.

—The assignment of labor claims invests the assignee with all the rights the labor claimants themselves would have had if their claims had not been sold and assigned. *Huntingdon & B. T. R. Co.'s Appeal*, (Pa.) 6 *Atl. Rep.* 383.

##### 19. Notice to debtor of the assignment.

—The assignee of an employé of a railroad company presented an assignment of wages to the head officer of the transportation and freight department of the company at one end of the line where the employé was hired but not paid. When presented, said officer told the assignee that if the claim was sent to the head office the employé would lose his position, whereupon the assignee took the claim away. *Held*, that it was error to instruct the jury, in an action on the assignment, that these facts constituted actual notice to the company of the assignment as a matter of law. *Corbett v. Fitchburg R. Co.*, 110 *Mass.* 204.

**20. When assignee may sue in his own name.**—The assignee or equitable owner of a chose in action may sue in his own name. *Galveston, H. & S. A. R. Co. v. Freeman*, 57 *Tex.* 156.—REVIEWING *Sublett v. McKinney*, 19 *Tex.* 438.—FOLLOWED IN *Stewart v. Houston & T. C. R. Co.*, 62 *Tex.* 246.

The assignee of a claim against the receiver of a railway company, having obtained permission from the proper court, may, under the Code, bring suit in his own name, and though the assignment be indorsed to another, he may still maintain the action in his own name so long as he retains possession of the instrument of assignment, and may cause the record to be amended by adding the name of the indorsee as the use party, who will thereafter be entitled to control the proceedings, and will be bound by the judgment. *Jackson v. Hamm*, 14 *Colo.* 58, 23 *Pac. Rep.* 88.

The assignee of a claim for damages for

personal injury may maintain an action thereon. *Hawley v. Chicago, B. & Q. R. Co.*, 71 *Iowa* 717, 29 *N. W. Rep.* 787.—FOLLOWING *Vimont v. Chicago & N. W. R. Co.*, 64 *Iowa* 513, 69 *Iowa* 296.

A party to whom a claim for damages for personal injuries caused by the negligence of a railroad company in Iowa has been assigned, may maintain an action thereon in the courts of this state, although such assignment was executed and delivered in another state, by the law of which it would be void. *Vimont v. Chicago & N. W. R. Co.*, 19 *Am. & Eng. R. Cas.* 213, 69 *Iowa* 296, 22 *N. W. Rep.* 906, 28 *N. W. Rep.* 612.

Where the judgment superseded was assigned, with an agreement that the proceeds should be paid to several parties, and the assignee has a beneficial interest in the judgment, he may, when a liability arises on the undertaking, bring an action thereon in his own name, without joining with him all the parties who are to receive a part of the proceeds of the judgment, and for whose benefit the action is in part prosecuted. *Walburn v. Chenault*, 43 *Kan.* 352, 23 *Pac. Rep.* 657.—REVIEWING *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 37 *Kan.* 606.

The assignee of a claim against a railroad company for negligently killing a horse may maintain an action in his own name under Miss. Code 1880, § 1507, providing that an assignee of a chose in action may sue in his own name. *Chicago, St. L. & N. O. R. Co. v. Packwood*, 7 *Am. & Eng. R. Cas.* 584, 59 *Miss.* 280.

If the interest of one of a company which has contracted to do a work for hire be assigned, with the assent and concurrence of the company, to another, to whom also a portion of the work and of the expected compensation is by them allotted, and upon the completion of the work the stipulated price is paid to the company, it is liable to such assignee in an action for money had and received; and it is the same whether the assignee derives his interest in the contract directly from the original party or through a mesne assignee. *Frost v. Reed*, 30 *N. H.* 17.

Under such circumstances he may maintain the action without first exhibiting the written assignment, although requested to exhibit it, no claim having been made by the intermediate assignee. *Frost v. Reed*, 30 *N. H.* 17.

Actions for damages which survive to the

personal representative are assignable. So an assignee is the real party in interest, and it is immaterial whether or not any consideration was paid for the assignment, or whether or not the assignment was merely for the purpose of bringing a suit. *Wines v. Rio Grande W. R. Co.*, 9 *Utah* 228, 33 *Pac. Rep.* 1042.

The assignee of a railway bond is the proper party to sue thereon under Companies Clauses Act, 8 & 9 Vict. c. 16, § 46. *Vertue v. East Anglian R. Co.*, 6 *Railw. Cas.* 252, 5 *Exch.* 208, 1 *L. M. & P.* 302, 19 *L. J. Exch.* 235.

Claims against a railroad company, arising under the Missouri act of Feb. 24, 1853, entitled "An act to authorize the formation of railroad associations and to regulate the same," were assigned with power to the assignee to collect them in his own name. The assignee was to pay all costs, receive one-fourth of the amount of the claims, and pay the remainder to the assignor. *Held*, that the assignee might sue on the claims in his own name. *Peters v. St. Louis & I. M. R. Co.*, 24 *Mo.* 586.

A cause of action for the obstruction of a navigable river was assigned absolutely in consideration of the assignee applying the net proceeds of the claim to the payment of certain debts of the assignors, and paying any overplus to such assignors. *Held*, that the assignee might maintain the action in his own name. *Gates v. Northern Pac. R. Co.*, 64 *Wis.* 64, 24 *N. W. Rep.* 494.

**21. Assignor, when a necessary party.**—Where a claim against a railroad for personal injuries is assigned without recourse, the assignor has no further interest in the matter, and is not a necessary party in a suit thereon. *Vimont v. Chicago & N. W. R. Co.*, 13 *Am. & Eng. R. Cas.* 176, 19 *Am. & Eng. R. Cas.* 215, 64 *Iowa* 513, 21 *N. W. Rep.* 9.

**22. Pleading in suits by assignees.**—A complaint, against a railroad company, which alleges that the company's contractors issued checks to their workmen, which plaintiff cashed and took an assignment of at the special instance and request of the company, and upon a promise that it would repay plaintiff the money, shows a good cause of action. *Ware v. Galveston, H. & S. A. R. Co.*, 2 *Tex. App. (Civ. Cas.)* 648.—**DISTINGUISHING** *Austin & N. W. R. Co. v. Rucker*, 59 *Tex.* 587.

Plaintiff bought property after a railroad  
1 *D. R. D.*—31.

had been built in the street adjoining it, and sued as assignee to recover damages to the property caused by the erection and operation of the road before his purchase, and united a further claim for damages after the purchase. *Held*, that under the Ohio Code he could sue as assignee in his own name, and unite the claims; but that as there were two causes of action, each must be set out in a separate count. *Hall v. Cincinnati, H. & D. R. Co.*, 1 *Disn. (Ohio)* 58.

**23. When assignee's remedy is against assignor only.**—A construction company assigned, with the consent of the railway company, its contract to build the road. The assignee was protected by certain 6 per cent mortgage bonds of the railway company deposited with a trust company. There was a stipulation that the 6 per cent bonds should not be paid until certain 7 per cent bonds of a prior issue had been paid by the railway company. This the company failed to do. *Held*, that the remedy of the assignee, if any, was against the assignor. *Appeal of Kelly, (Pa.)* 12 *Atl. Rep.* 256.

**24. Extent of assignee's recovery.**—Insured cotton was lost by the negligence of a railroad company while in its hands, and the owners assigned their interest to the insurance company. *Held*, that the insurance company, as against the carrier, was entitled to recover the value of the cotton at the time of the loss, with interest from the time it should have been delivered if properly carried. *North American Ins. Co. v. St. Louis, I. M. & S. R. Co.*, 3 *McCrory (U. S.)* 233, 11 *Fed. Rep.* 380.

#### V. EQUITABLE ASSIGNMENT.

**25. What amounts to an equitable assignment.**—The keeper of a boarding-house for railroad employes made an agreement with the railroad company whereby the boarding dues of each employe were deducted from his pay and forwarded in the form of a check to the boarding-house keeper each month. Subsequently he procured an advance of money from a bank on the credit of the amounts which were to fall due on the following pay-day, and by promising to turn such amounts over to the bank. The railroad company consented to transfer such payments to the bank. *Held*, that this constituted an equitable assignment of such sums, so as to vest title in the bank as against a creditor of the boarding-

house keeper, who garnished the same in the hands of the railroad company. *Chamberlin v. Gilman*, 10 *Colo.* 94, 14 *Pac. Rep.* 107.

Subsequent declarations of the boarding-house keeper, indicative of an intention to set apart such sums to the payment of his debt to plaintiff in garnishment, are not admissible in evidence to impeach the title vested by prior assignment. *Chamberlin v. Gilman*, 10 *Colo.* 94, 14 *Pac. Rep.* 107.

The mere fact that the railroad company, after it had consented to the transfer of the indebtedness to the bank, continued to draw its check in favor of the boarding-house keeper was held not to divest the bank of the title acquired under the equitable assignment. *Chamberlin v. Gilman*, 10 *Colo.* 94, 14 *Pac. Rep.* 107.

Whether the railroad company had notice of such assignment in no way affects the rights of plaintiff in garnishment, and therefore the admission of evidence of such notice is not prejudicial error. *Chamberlin v. Gilman*, 10 *Colo.* 94, 14 *Pac. Rep.* 107.

A. J. A. was a subcontractor under J. F. to build certain sections of a railroad, which work he again sublet to H., L. & L., who were performing said work. Upon the completion of said contract said J. F. would be indebted to A. J. A. \$2413.27. H., L. & L. filed a statutory lien on said railroad for their work and labor in building said sections thereof. W. R. C., in the presence of A. J. A., presented for acceptance and payment to J. F. a draft or order drawn by A. J. A. on J. F., in favor of and payable to W. R. C., for the sum of \$1041.50 in full of all claims. Whereupon J. F. stated to A. J. A., in the presence of W. R. C., that he would not pay it until all the liens for labor on said sections were settled and paid off. N. G. O. C. sued out an attachment against A. J. A. and garnished J. F. Held, that there was an equitable assignment and appropriation of the money payable from J. F. to A. J. A., to W. R. C., to the amount called for in said draft or order, subject to the said statutory liens. *Code v. Carlton*, 18 *Neb.* 328.

The judgment-debtor, through his subcontractors, delivered to the garnishees certain railway ties, and gave the subcontractors an order on the garnishees for all money coming to him therefor. Subsequent to this, but before the garnishees had any notice of the above order, they

were served with the attaching order in this case. Held, that the order in favor of the subcontractors operated as an assignment of the fund to them, although there was no notice of it to the garnishees, they not having been led by the want of notice to alter their position so as to make it inequitable as against them to enforce the assignment. *Brown v. McGuffin*, 5 *Prac. (Ont.)* 231.—QUOTING *Pickering v. Ilfrcombe R. Co.*, L. R. 3 C. P. 235.

**20. What does not.**—In order to constitute an equitable assignment by a debtor to his creditor of a sum due to the debtor from a third person, it is not enough that there be an agreement to pay the creditor out of the particular fund, but there must be an appropriation of the fund, either by giving an order upon it or by transferring it in such a manner that the holder would be authorized to pay it to the creditor directly, without the further intervention of the debtor. *Hoyt v. Story*, 3 *Barb. (N. Y.)* 262.

Where a railway company and its contractors agreed with a subcontractor that, in consideration of his furnishing laborers' board, the amount due for their board should be taken out of their wages and be due to the subcontractor and should constitute a lien upon the road, the laborers not being parties to such an agreement, there was not such an assignment of the claim as would give the subcontractor a laborer's lien. *Texas & St. L. R. Co. v. McCaughey*, 62 *Tex.* 271.

To show that the subcontractor was subrogated to the rights of the laborers there must appear to have been an extinguishment of the original debt; and to create an equitable assignment in this case the debt must have been purchased of the laborers for a consideration satisfactory to them. *Texas & St. L. R. Co. v. McCaughey*, 62 *Tex.* 271.

## ASSIGNMENT FOR BENEFIT OF CREDITORS.

See also BANKRUPTCY, INSOLVENCY, RECEIVERS.

**1. What constitutes an assignment for creditors—Recording.**—The lease of a railroad reserving rent in trust for the benefit of the creditors of the lessors is an assignment, within the meaning of the act of March 24, 1818, and must be recorded

within thirty days in the proper county. *Lucas v. Sunbury & E. R. Co.*, 32 Pa. St. 458.—DISTINGUISHING *Guy v. McIlree*, 26 Pa. St. 92.—DISTINGUISHED IN *Gratz v. Pennsylvania R. Co.*, 41 Pa. St. 447.

An assignment by a railroad company of unpaid instalments due on subscriptions to capital stock to an indorser, to secure him against loss by reason of his indorsement for the company, is not an assignment in trust for creditors, and therefore is not invalid because not recorded, nor an inventory filed within thirty days thereafter. *McBroom's Appeal*, 44 Pa. St. 92.

**2. Preferences.**—One railroad company made a lease to another which was declared but an assignment for the benefit of creditors, with preferences. A preferred creditor who had a claim against the road for rolling stock continued to work for the assignee company upon the promise of its president to pay him, and upon its failure to do so brought his action of assumpsit, claiming that the company had received profits enough to pay his claim. *Held*, that as the promise of the president was nothing more than to carry out the preferences made in the lease, which was void under the law, his action could not be maintained. *Bittenbender v. Sunbury & E. R. Co.*, 40 Pa. St. 269.

**3. Validity, generally** Though the act incorporating the New York and Erie Railroad Company, § 18, expressly refers to and adopts the provisions of the Rev. St. ch. 18, title 3, pt. 1, it is not to be construed as exempting the company from the provisions of the same chapter, title 4; therefore an assignment by the company of its property in contemplation of insolvency is void. *Bowen v. Lease*, 5 Hill (N. Y.) 221.

Subcontractors who had no claim against the company until nearly a year after the assignment was made cannot allege that it is invalid, under the act of 21st Jan., 1843, providing that no public internal improvement company shall make an assignment, etc., of real or personal estate, while debts or liabilities to contractors, laborers, and workmen remain unpaid, without first obtaining their written consent. *McBroom's Appeal*, 44 Pa. St. 92.

Where an assignment was made by an incorporated railroad and banking company of all its effects, real and personal, to trustees, for the purpose, first, of enabling them to borrow money to complete the road; and,

second, out of the profits of the road when completed, to pay, first, the money borrowed, then the salaries of the assignees, the expenses of the trust, the bank, and the railroad, and the residue to the general creditors who might come in under the assignment; the leading object of the assignment being to save the forfeiture of the charter of incorporation, which provided that the act of incorporation should be null and void if the road were not built in a limited time. *Held*, that if the assignment were otherwise obnoxious to the law this motive would not avail to sustain it, as the charter of incorporation, by a failure to erect the road in the limited period, would not *ipso facto* have been avoided, nor until the state, by proper judicial proceeding, had obtained a judgment of forfeiture. *Arthur v. Commercial & R. Bank*, 17 Miss. 394.

**4. When void for fraud.**—An assignment by a railroad in trust to sell part of the property assigned to pay for advances, and to retain part of it, subject to the future order of the assignor, is intended only as a cover to keep off execution creditors, and has premeditated fraud on its face. *Hart v. McFarland*, 13 Pa. St. 182.

An assignment, by a railroad corporation actually insolvent, of all its estate for the security of certain bonds to be afterward issued for the purpose of raising money to put a portion of the road in use, is not void *per se*, although it provides that the estate shall be retained by the corporation until maturity of the bonds, and then sold in case of default for the benefit of the holders of the bonds, and afterward of its creditors generally, who shall prove their demands, etc.; but the deed is imperative as a security, unless the bonds are actually issued to *bona-fide* creditors before the lien of other creditors attaches or the property is conveyed either by judgment or execution, as the estate is real or personal. *Allen v. Montgomery R. Co.*, 11 Ala. 437.

The circumstances that the corporation is actually insolvent at the time of making such a deed, and that all the estate conveyed by it is afterward sold in a lump by the trustee and does not produce a sum sufficient to pay the bondholders, is not sufficient proof of fraud to avoid the deed; nor does the fact that the deed reserves the property from sale prevent any execution creditor from selling the reversionary interest of the corporation at any time previous to the law



day of the deed. *Allen v. Montgomery R. Co.*, 11 Ala. 437.—FOLLOWED IN *Pollard v. Maddox*, 28 Ala. 321.

A company organized to do a railroad and banking business made an assignment of all its bank effects, directing the trustees to borrow \$250,000 to complete the road and to collect all claims, and from the assets in their hands to pay first the loan of \$250,000. If there were not assets remaining sufficient to pay the bank creditors they were to be paid *pro rata* from dividends of the railroad after its completion. *Held*, that the assignment was fraudulent and void as to creditors not assenting thereto. *Bodley v. Goodrich*, 7 How. (U. S.) 277.

Where an incorporated railroad and banking company, in failing circumstances, made an assignment of a very large amount of real and personal estate and choses in action, including the railroad, and imposed thereby various onerous and responsible duties on the assignees, and provided in the deed of assignment that each assignee should, out of the property assigned, receive an annual salary of eight thousand dollars, it was held that the amount of salary, though very large, and calculated to excite suspicion, was not necessarily fraudulent on the face of the assignment, but was a subject to be inquired into by proof. *Arthur v. Commercial & R. Bank*, 17 Miss. 394.

Where an incorporated railroad and banking company, being in failing circumstances, and by its charter owning in fee simple the site of the railroad and other buildings and lots attached to it, assigned by deed all its real and personal estate to assignees to pay therewith and out of the profits of the railroad, when completed—it being then unfinished—a certain debt to be contracted by the assignees for the completion of the road, and all the expenses of the trust and of the corporation, and then the debts of the corporation; and no provision whatever was made for the sale of the fee simple of the corporation in the site of the road and in the buildings and lots attached to it, and the assignment of the profits of the road was indefinite in its duration, except that it was to last until the debts were paid, when the fee, with the road, was to revert to the corporation—*held*, that the tendency of the assignment was to lock up the estate indefinitely, to create a perpetuity, to hinder and delay creditors unreasonably, and to secure an ultimate and permanent advantage to the

corporation, and that the assignment was therefore void. *Arthur v. Commercial & R. Bank*, 17 Miss. 394.—APPROVING *Fellows v. Commercial & R. Bank*, 6 Rob. (La.) 246.

**5. Effect of the assignment, and what will pass thereby.**—A claim against a railroad corporation for injury to the person does not, before the recovery of judgment, pass by an assignment of the estate of the injured person under the insolvent laws. *Stone v. Boston & M. R. Co.*, 7 Gray (Mass.) 539.

An assignment by one who holds certificates of stock in a railroad company, "of all his estate and effects," for the benefit of creditors, is an assignment of everything he owns, and includes the certificates of stock. *Haldeman v. Hillsborough & C. R. Co.*, 2 Handy (Ohio) 101.

The assignee under a deed of assignment for the benefit of creditors, conveying, among other things, stock in a railroad company, will be preferred to subsequent attaching creditors, though there is no transfer of the certificates to the assignee on the company's books. *Haldeman v. Hillsborough & C. R. Co.*, 2 Handy (Ohio) 101.

An uncompleted contract for the construction of a railroad was assigned to creditors. The assignor then made an agreement with the plaintiff that he should complete the contract at his own expense and receive a certain compensation. The creditors drew an order on the assignor in favor of plaintiff for the amount expended by him on the work, and for a certain sum for his trouble. The work having been completed by the plaintiff—*held*, that the order became irrevocable, whether drawn before or after performance of the work; and that one of the creditors receiving a dividend out of the fund from the assignee was liable to the plaintiff in an action for money had and received. *Cunningham v. Garvin*, 10 Pa. St. 366.

A mining company which has entered into an agreement with a railway company to furnish daily, for the period of one year, a specified quantity of coal taken from a particular vein cannot assign the contract. If the mining company fails, its assignees in insolvency cannot compel the railway company to complete the contract. *Worden v. Chicago & N. W. R. Co.*, 82 Iowa 735, 48 N. W. Rep. 71.

**6. Sale by assignee and rights of purchasers.**—The Montgomery R. Co., having made a valid assignment of its road

and all its effects, the purchasers at the trustee sale, who were afterwards incorporated under a new name, acquired and succeeded to all the rights which the old company had under a deed conveying the right of way for the construction of the road. *Pollard v. Maddox*, 28 Ala. 321.—FOLLOWING Allen v. Montgomery R. Co., 11 Ala. 437.

### ASSISTANT CONDUCTOR.

See CONDUCTOR, 15.

### ASSUMPSIT.

Against conductor for not collecting fares, see CONDUCTOR, 8.

**1. When assumpsit will lie.**—Where a party agrees to do certain work in the construction of a railroad, to be paid partly in cash and partly in stock of the company, and does extra work for which he is entitled to be paid, the whole of the payment for the extra work is to be paid in money as upon an implied assumpsit. *Childs v. Somerset & K. R. Co., Brunner Col. Cas. (U. S.)* 593.

Where a right of way is conveyed to a company on condition that it will erect and maintain necessary crossings and fences, an acceptance of the deed and entering upon the land raises an implied contract, and upon the failure of the company to carry out the conditions of the deed the injured party may maintain assumpsit. *Willenborg v. Illinois C. R. Co.*, 11 Ill. App. 298.

Where a debtor abandons his contract, and the owner, being indebted to the contractor for work done, pays the laborers, deducting what they owe A., then pays A., deducting what he owes B., all parties thus paid acceding to the arrangement, there is an implied undertaking on the part of the owner to pay B. the amounts thus retained, and B. has a right of action therefor upon the implied promise thus made for his benefit. *Gibson v. St. Louis, K. C. & N. R. Co.*, 76 Mo. 549; affirming 7 Mo. App. 586.

Assumpsit will not lie for labor performed and materials furnished to a railroad company under a contract under seal. *Porter v. Androscoggin & K. R. Co.*, 37 Me. 349. See also *Gately v. Kniss*, 64 Iowa 537, 21 N. W. Rep. 21.

The relation of trustee and *cestui que trust* exists in a qualified sense as between the directors and the stockholders, and the funds in the hands of the former in which

the latter have an interest cannot be sued for in an injunction of general *indebitatus assumpsit*, unless a dividend has been declared. *State v. Baltimore & O. R. Co.*, 6 Gill (Md.) 363.

A civil engineer, on settlement of his account with a railway, was induced to accept bonds of the company in payment, on the representations of the president that the bonds were worth eighty-five cents on a dollar and that the railroad had, up to that time, paid all expenses of operation and interest on indebtedness, and it afterwards appeared that the company had not paid expenses and interest from the earnings of the road, and it was not shown that the president had knowledge of this fact, or of the value of the bonds at the time, but that some three months afterward they were of little value. *Held*, not such fraud as to authorize an opening of the settlement and a suit to recover for the services. *St. Louis & S. W. R. Co. v. Rice*, 85 Ill. 406.

**2. Election between this and other forms of action.**—Where a street-car company, under its charter, is required to pave between tracks, and fails to do so, the proper remedy of the city to recover for the cost of the paving is an action of assumpsit, not of debt. *District of Columbia v. Washington & G. R. Co.*, 4 Am. & Eng. R. Cas. 161, 1 Mackey (D. C.) 361.—REVIEWING *Pennsylvania R. Co. v. Duquesne Borough*, 46 Pa. St. 224; *Oconto v. Chicago & N. W. R. Co.*, 44 Wis. 238.

**3. Common counts.**—A recovery may be had upon the common counts for an instalment due from a stockholder upon a call of an incorporated company. *Gayle v. Cahawba & M. R. Co.*, 8 Ala. 586.

A railroad aid note conditioned on the completion of the road to a certain point may be sued on by the payee, when absolutely payable, in an action on the common counts. *Port Huron & S. W. R. Co. v. Potter*, 55 Mich. 627, 22 N. W. Rep. 70.

Plaintiffs and defendant entered into a special contract by which the plaintiffs were to make certain sections of defendant's railroad in a special manner, under the supervision and control of the defendant's engineers, to be completed by a specified time and at a specified price; estimates were to be made by the engineers, and acquittances executed by the plaintiffs. Much of the work was done under the contract, and the road partly finished and

partly paid for, but the plaintiffs failing to complete the work in the time specified, they continued it, with the consent of the defendant, until it was completed, or accepted as completed by the defendant's engineers having the supervision and control of it, and final estimates were made and rendered. *Held*, that the plaintiffs could recover in assumpsit under the common counts. *Baltimore & O. R. Co. v. Lafferty*, 2 W. Va. 104.

**4. Money had and received.**—(1) *General rules.*—Whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged, by the ties of natural justice and equity, to refund, the action for money had and received may be maintained. *Missouri Pac. R. Co. v. McLiney*, 32 Mo. App. 166. *Wells v. American Exp. Co.*, 49 Wis. 224, 5 N. W. Rep. 333.

Where a town has issued bonds in aid of a railroad, taxes assessed upon the road in the town should be paid to the town, to be applied to the payment of such bonds, under the New York statute; and such taxes having been collected and paid to the county treasurer, who has paid them out for general purposes, including state taxes, the town supervisor may maintain an action against the treasurer for money had and received. *Strough v. Supervisors of Jefferson County*, 119 N. Y. 212, 23 N. E. Rep. 552, 28 N. Y. S. R. 967; *affirming* 50 Hun 54, 3 N. Y. Supp. 110, 23 N. Y. S. R. 940.—*FOLLOWING* *Bridges v. Supervisors of Sullivan Co.*, 92 N. Y. 570.

A railroad company may recover in general assumpsit from its treasurer the money which he has received from the sale of its stock fraudulently overissued by him, where such spurious stock has become so intermingled with the genuine as to be indistinguishable, and the company has been compelled to treat it as genuine. *Rutland R. Co. v. Haven*, 62 Vt. 39, 19 Atl. Rep. 769.—*FOLLOWING* *State v. St. Johnsbury*, 59 Vt. 332.

Although the stock, when issued, may have been absolutely void, and the issuing of it a crime, the treasurer cannot allege the illegality of his act as a reason why he should not pay over the money. *Rutland R. Co. v. Haven*, 62 Vt. 39, 19 Atl. Rep. 769.

Although the person representing the company had no authority under the charter or by-laws to make the agreement sued

on, yet if he and the plaintiff acted under a mutual mistake as to his power, the law raises an implied promise on the part of the company to pay back the money and interest. *Weeden v. Lake Erie & M. R. R. Co.*, 14 Ohio 563.

Assumpsit for money had and received will not lie to recover from a railroad company an amount paid by plaintiff for freight on goods in excess of the rates the company were by law entitled to exact; the payment having been made after the goods had been carried and delivered, and without objection, protest, or notice of discontent. *Kenneth v. South Carolina R. Co.*, 15 Rich. (S. Car.) 284.

(2) *Illustrations.*—A railroad company, of which both plaintiff and defendant were directors, transferred to the former, by resolution of the board of directors, a quarter's pay due from the Post-office Department on a contract for carrying the mail (which contract was in defendant's name), as collateral security for his indorsement of a note for the benefit of the company, which he subsequently paid; and afterward, by another resolution, transferred the same quarter's pay to defendant for the purpose of paying other debts, which defendant accordingly paid. *Held*, that plaintiff might maintain assumpsit for money had and received against the defendant, to the amount paid on the note. *Sherrod v. Hampton*, 25 Ala. 652.

Plaintiffs paid their note to a railroad company before maturity in railroad bonds, but by an oversight failed to take up the note, which was negotiated before maturity, and they were compelled to pay it. After suit was brought against them and before judgment they instituted suit against the company for money paid and money had and received. *Held*, that, as the bonds were taken the same as cash in payment of the note, the action could be maintained. *Connecticut & P. R. R. Co. v. Newell*, 31 Vt. 364.

The paymaster of a railroad paid the salary of one employé to another upon an order in favor of the party receiving the money, but he afterward discovered that he had paid the same salary to the employé earning it at another place. *Held*, that the money could be recovered from the person holding the order, although the order was given before the payment to the person giving it, but where the company had no notice of it

until after such payment. *Stebbins v. Union Pacific R. Co.*, 2 *Wyom.* 71.

Plaintiff loaned money to the treasurer of a corporation, for the corporation, under the belief that he was authorized to borrow, but it appeared that under the by-laws of the company he and the president were authorized to borrow and sign notes in the name of the company. The money borrowed was used in paying the debts of the corporation, but it appeared that the treasurer was a defaulter at the time, and that the money was used to cover up his defalcation by paying company debts created by reason of his former embezzlement. *Held*, that an action for money had and received would not lie against the corporation. *Craft v. South Boston R. Co.*, 28 *Am. & Eng. Corp. Cas.* 579, 150 *Mass.* 207, 2 *Bkg. L. J.* 276, 5 *L. R. A.* 641, 22 *N. E. Rep.* 920.

**5. Pleading and evidence.**—Plaintiff sued to recover for services under a contract employing him as the general agent of defendant company for at least six months, or until a contract made on the same day by the defendant company with another railroad company should be rescinded. *Held*, that it was not necessary for plaintiff to allege that the contract with the other company still remained in force, such matters being proper for the defense. *Kitchen v. Cape Girardeau & S. L. R. Co.*, 59 *Mo.* 514, 8 *Am. Ry. Rep.* 481.

A railroad company appointed plaintiff their "permanent land commissioner" and notified him of his appointment by letter with the corporate seal attached. He afterward sued in assumpsit for a wrongful dismissal. *Held*, that he could not set up the hiring as under seal in that form of action. *Belch v. Manitoba & N. W. R. Co.*, 4 *Man.* 198.

In assumpsit upon a promissory note, alleged to have been made by the W. I. R. W. & C. Co., payable to defendants, and indorsed by them to plaintiffs, a plea that the writing sued on is an instrument under the seal of the company and not a promissory note, or negotiable as such, is good on demurrer. The declaration is also good, as the court could not assume that the company was not authorized to make notes. *Merritt v. Maxwell*, 14 *U. C. Q. B.* 50.

Where a party declares in assumpsit against a common carrier or bailee for hire, without regard to the bills of lading which he receives from the carrier for the transportation of goods, and which appear from

their face to be special contracts, to the stipulations whereof both parties are equally bound, he cannot introduce the bills in evidence, they not being applicable to any of the counts in the declaration. *Baltimore & O. R. Co. v. Rathbone*, 1 *W. Va.* 87. —QUOTED IN *Kline v. McLain*, 33 *W. Va.*, 32.

An action was brought against a railroad company to recover for services rendered. The plaintiff had been engaged in obtaining a loan for an investment company. The defendant sought to prove that the investment company was the real owner of the railroad and that the plaintiff was estopped, by his representations to it, from making any claim for his services. *Held*, that as the investment company was not a party to the action, the evidence was inadmissible. *Ten Eyck v. Pontiac, O. & P. A. R. Co.*, 37 *Am. & Eng. R. Cas.* 273, 74 *Mich.* 226, 41 *N. W. Rep.* 905, 3 *L. R. A.* 378.

Plaintiff sued to recover for services rendered under a contract with defendant corporation appointing him as its general agent. *Held*, that, after plaintiff had shown a contract to employ and pay him, it was not necessary for him to prove a subsequent contract or agreement to pay him; and that, after he had proven that he had once notified the company of his constant readiness to perform the services contracted for, it was not necessary for him to show that from time to time he gave further notice of his address and where notice would reach him. *Kitchen v. Cape Girardeau & S. L. R. Co.*, 59 *Mo.* 514, 8 *Am. Ry. Rep.* 481.

**6. Quantum meruit.**—In an action of quantum meruit for services rendered a recovery is not warranted in the absence of evidence either of the reasonable value of the services or of a special contract fixing the rate of compensation. *Sanford v. Cape Girardeau & S. W. R. Co.*, 40 *Mo. App.* 15.

When, in the performance of a contract for work, its stipulations are deviated from by mutual agreement, the contract prices govern, if applicable; but if the deviation relates to extra work not provided for in the contract, the party performing the work may recover on a quantum meruit. *Houston, E. & W. T. R. Co. v. Snelling*, 59 *Tex.* 116.

One who performs services for a railway company, under a special agreement that he should receive therefor an annual pass over defendant's road, may, upon refusal of defendant to give the pass, recover upon a quantum meruit for his services, as the

value of such pass is impossible of proof or of estimation as a measure of damages. *Brown v. St. Paul, M. & M. R. Co.*, 36 Minn. 236, 31 N. W. Rep. 941.

**7. Use and occupation.**—(1) *When action will lie.*—Where a corporation has actually used and occupied land for a corporate purpose, by permission of the owner, it is liable for use and occupation, though there is no contract under seal. *Lowe v. London & N. W. R. Co.*, 18 Q. B. 632, 17 Jur. 375, 21 L. J. Q. B. 361, 7 Railw. Cas. 524.

Where a corporation occupying premises was a railway company, within the provision of 8 & 9 Vic. c. 16, Companies Clauses Act, § 97, authorizing parol contracts by the directors of a company, a parol contract may be presumed against the company in an action for use and occupation in the absence of direct evidence to the contrary. *Lowe v. London & N. W. R. Co.*, 18 Q. B. 632, 17 Jur. 375, 21 L. J. Q. B. 361, 7 Railw. Cas. 524.

Although a corporation may be liable for use and occupation of premises, it can only be so for the period of actual occupation; and a continuous occupation for several years will not render it a tenant from year to year. *Finlay v. Bristol R. Co.*, 7 Exch. 409, 7 Railw. Cas. 449, 21 L. J. Exch. 117.

Where the tenancy was not for any definite period, the fact that the landlord commenced proceedings against the tenant railroad company to compel it to pay for the lot, which proceedings resulted in a surrender of the possession to him, will not prevent his recovering for the use and occupation prior to the commencement of those proceedings. *Wittman v. Milwaukee, L. S. & W. F. Co.*, 51 Wis. 89, 8 N. W. Rep. 6.

(2) *When action will not lie.*—An action for use and occupation will not lie for use and occupation of a right of way over the plaintiff's land by a railroad when such holding has been adverse. *McLendon v. Atlanta & W. P. R. Co.*, 54 Ga. 293.

Where there is a lease under seal, an action for use and occupation cannot be maintained, either against the lessee or his assignee; the action must be upon the demise to recover the rent reserved. *Kiersted v. Orange & A. R. Co.*, 69 N. Y. 343, reversing 54 How. Pr. 29.

*Assumpsit* for the use and occupation of land can only be maintained where the relation of landlord and tenant exists; so where a railroad company enters upon the land of another under an agreement to purchase,

the action will not lie against it for a subsequent failure to comply with the agreement. *Stacy v. Vermont C. R. Co.*, 32 Vt. 551.—QUOTED IN *Adams County v. Burlington & M. R. R. Co.*, 55 Iowa 94.

**8. Amount recoverable.**—Where plaintiff sues in *assumpsit* to recover for water furnished to a railroad company, which he would not have used himself, the true measure of damages is the value of the water to the company; and it is no defense that plaintiff would not have used the water himself. *Chicago & R. I. R. Co. v. Northern I., C. & I. Co.*, 36 Ill. 60.

There was a dispute between plaintiff and others as to their right to use a railroad which belonged to plaintiff. Before the suit was commenced plaintiff informed them that if they continued to use the road they must pay him a specified sum. *Held*, that, notwithstanding such notice, he could only recover a reasonable sum as compensation for the use of the road. *Kittredge v. Peaslee*, 3 Allen (Mass.) 235.

### ASSUMPTION.

Of facts in instructions, see ANIMALS, INJURIES TO, 570; APPEAL, 43, 78.

— risk by owner of private car, see PRIVATE CARS, 2.

— — — employees, see EMPLOYEES, INJURIES TO, II.

### ATTACHMENT; GARNISHMENT; TRUSTEE PROCESS.

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## I. JURISDICTION.

**1. In general.—Existence of equitable remedy.**—The statutory remedy by garnishment is a legal one, and ordinarily contemplates only such rights, credits, and effects as are of a legal nature, and are not encumbered with the embarrassments thrown around trust estates; if they are thus involved, a proceeding in equity is the more appropriate remedy. *Galveston, H. & S. A. R. Co. v. McDonald*, 53 Tex. 510.—REVIEWED IN *Galveston, H. & S. A. R. Co. v. Butler*, 9 Am. & Eng. R. Cas. 552, 56 Tex. 506.

Though, as a general rule, when a third person is indebted to the judgment-debtor, or has in his possession property or effects of such debtor, the law affords an adequate remedy by garnishment, yet that remedy has especial application to legal right. When the right to recover is embarrassed by questions growing out of trusts, fraudulent conspiracy, and the like, a proceeding in equity affords a more appropriate remedy. *Galveston, H. & S. A. R. Co. v. Hume*, 59 Tex. 47.—FOLLOWING *Galveston, H. & S. A. R. Co. v. Butler*, 9 Am. & Eng. R. Cas. 552, 56 Tex. 506.

**2. Debt contracted and payable in another state.\***—Where a debt was contracted in another state and is there payable by the terms of the contract, the courts of Missouri have no jurisdiction to proceed to judgment in garnishment on account of such an indebtedness. *Todd v. Missouri Pac. R. Co.*, 33 Mo. App. 110.

**3. Torts committed in another state.**—Courts of general jurisdiction in Wisconsin entertain actions for personal injuries where the act complained of is committed in another state; therefore, where the action is against a foreign railroad company, jurisdiction may be obtained by attachment in Wisconsin and service of process, as required by statute. *Curtis v. Bradford*, 33 Wis. 190.

**4. Effect of suit pending in another jurisdiction.†**—In an action to recover money due by a railroad on contract, it is a sufficient defense to show that the money sought to be recovered has been attached by process of garnishment duly issued by a court of a sister state, in an action there prosecuted against the plaintiff by his creditors, although it appear that the

plaintiff and such creditors are all residents of this state. *Baltimore & O. R. Co. v. May*, 25 Ohio St. 347, 10 Am. Ry. Rep. 155.—FOLLOWED IN *Moore v. Chicago, R. I. & P. R. Co.*, 43 Iowa 385. RECONCILED IN *Missouri Pac. R. Co. v. Sharitt*, 44 Am. & Eng. R. Cas. 657, 43 Kan. 375.

Where a South Carolina railroad enters the state of Georgia, the pendency of a bill to foreclose a mortgage on the road and for the appointment of a receiver in a federal court in South Carolina will not prevent the attachment of the company's property in Georgia, where the bill in the foreclosure suit is not a general creditor's bill, though some of the plaintiffs in the attachment were defendants therein before any levy was made, and others were made so afterward. *South Carolina R. Co. v. People's Sav. Inst.*, 12 Am. & Eng. R. Cas. 432, 64 Ga. 18.

**5. Conflicting attachments.—One first served good.**—A creditor of a railroad company began an action at law in a United States circuit court, and attached several cars. The mortgagees of the road replevied the cars in a suit in a state court, and took them out of the marshal's hands by the sheriff. The marshal defended the replevin suit, and set up the authority by which he held the property. *Held*, that the question which authority or jurisdiction should prevail depended upon which had first seized the property, and not upon the respective rights of the parties to the property. *Freeman v. Howe*, 24 How. (U. S.) 450.

## II. THE RIGHT OF ACTION; WHO MAY SUE.

**6. When attachment is proper remedy.**—An action to enforce a laborer's lien on cord-wood, under Wis. Rev. St. ch. 143, as amended, is a legal proceeding, and garnishment may be resorted to in aid thereof. *O'Reilly v. Milwaukee & N. W. R. Co.*, 68 Wis. 212, 31 N. W. Rep. 485.

Under N. Y. Code Civ. Proc. § 635, authorizing an attachment in actions to recover a sum of money only, for breach of contract, whether express or implied, other than a contract of marriage, an attachment may be issued against a railroad corporation to recover the amount of certain coupons and scrip certificates issued by the company, and payable out of its net income. *Seeley v. Missouri, K. & T. R. Co.*, 39 Fed. Rep. 252.

A merchant and shipper, after several years in business, secretly changed the

\* See also *post*, 54.

† See also ABATEMENT, 2.



business from his own right to that of agent, and gave checks to a common carrier for freights, which were protested for want of funds. *Held*, good grounds for an attachment for conveying or assigning property to hinder and delay creditors. *Barrett v. Spaid*, 70 Ill. 408.

#### 7. Right of non-resident to sue.—

A non-resident may proceed by attachment against his debtor, and garnishee a railroad of another state doing business in Illinois. A court of equity has not jurisdiction to enjoin such a proceeding. *Missouri Pac. R. Co. v. Flannigan*, 47 Ill. App. 322.—FOLLOWING *Wabash R. Co. v. Dougan*, 41 Ill. App. 543.

Under N. Y. Code, § 427, allowing an action in certain New York courts against foreign corporations by "a resident of New York for any cause of action," or "by a plaintiff not a resident of said state when the cause of action shall have arisen, or the subject of the action shall be situated within this state," a non-resident plaintiff, claiming damages for breach of a contract not made in the state, cannot maintain an attachment against such foreign corporation. In such case "the subject of the action," within the meaning of the statute, is the claim asserted by the plaintiff, and not the property against which he attempts to enforce the claim. *Whitehead v. Buffalo & L. H. R. Co.*, 18 How. Pr. (N. Y.) 218.

As under So. Car. Code, § 423, a non-resident can sue a foreign corporation only in case the cause arose or the subject is situated within the state, he cannot under any other circumstances obtain an attachment. *Central R. & B. Co. v. Georgia C. & I. Co.*, 32 So. Car. 319, 11 S. E. Rep. 192, 638.

The property upon which attachments are levied is not the subject of the action in aid of which the attachments are issued, within the meaning of So. Car. Code, § 423, providing that an action against a foreign corporation may be brought by a plaintiff not a resident of the state when the subject of the action is situated within the state. *Central R. & B. Co. v. Georgia C. & I. Co.*, 32 So. Car. 319, 11 S. E. Rep. 192, 638.

Where the demand for which the action was brought arose upon written contracts for the payment of money made, executed, delivered, and made payable in Canada, and all the labor done and materials furnished were, under those contracts and upon work located in Canada, for a railroad created by

the laws of Canada and existing there, except a small part, which was performed in New York by virtue of said contracts—*held*, not a case where the subject of the action was situated in New York; and although the defendant (the foreign corporation) had property in this state liable to attachment, the attachment could not be sustained by a non-resident plaintiff. *Campbell v. Champlain & St. L. R. Co.*, 18 How. Pr. (N. Y.) 412.

### III. WHO MAY BE SUED.

#### 1. As principal debtor.

**8. In general.**—In an action to recover the sum of \$45,000 and interest, as damages for the breach of an alleged contract to deliver to plaintiff certain town bonds, an attachment may properly issue against a non-resident defendant. *Clews v. Rockford, R. I. & St. L. R. Co.*, 2 Hun (N. Y.) 379, 4 T. & C. 669.

A corporation cannot be attached, but can only be made a party to a suit by summons and *distringas*. *Glaise v. South Carolina R. Co.*, 1 Strobb. (So. Car.) 70.

Under Tay. Wis. St. 1566, § 103, a garnishment proceeding may be maintained against a debtor corporation. *Everdell v. Sheboygan & F. du L. R. Co.*, 41 Wis. 395.—FOLLOWING *Ballston Spa Bank v. Marine Bank*, 18 Wis. 490; *Pierce v. Milwaukee C. Co.*, 38 Wis. 253.

Under the Attachment Act, 37 Vic. c. 7, § 1, providing that attachment may issue against "the property, real or personal, within this province, of any defendant, which by law is liable to be taken in execution," an attachment may issue against the property of a railroad corporation. The duty it owes to the public to run cars will not exempt it from the operation of the statute. *Kitchen v. Chatham B. R. Co.*, 17 New Brun. 215.—DISTINGUISHING *Gardiner v. London, C. & D. R. Co.*, L. R. 2 Ch. 201.

**9. Non-resident corporations.**—A statute allowing a non-resident railroad company to extend its line into the state of Georgia, and making it liable to be sued in the courts of the state, does not prevent an attachment against it as a foreign corporation. The remedy under the act admitting it to the state is merely cumulative. *South Carolina R. Co. v. People's Sav. Inst.*, 12 Am. & Eng. R. Cas. 432, 64 Ga. 18.

A foreign corporation admitted to do

business in Illinois, and having property there, may be garnished without a previous demand. *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581.—FOLLOWED IN *Fairbank v. Cincinnati, N. O. & T. P. R. Co.*, 54 Fed. Rep. 420, 9 U. S. App. 212, 4 C. C. A. 403; *Wabash R. Co. v. Dougan*, 142 Ill. 248.

A foreign corporation admitted to do business in the state of New Jersey, and owning property there, is not liable to attachment. *Phillipsburg Bank v. Lackawanna R. Co.*, 27 N. J. L. 206.

In the absence of a statute giving the courts jurisdiction generally, a foreign corporation can be sued in Massachusetts only by attachment. *Andrews v. Michigan C. R. Co.*, 99 Mass. 534.

Under the Missouri Attachment Act of 1855 foreign corporations can only be proceeded against by attachment where their chief office or place of business is out of the state. An attachment will not lie against a corporation that has its chief office or place of business in the state. *Farnsworth v. Terre Haute, A. & St. L. R. Co.*, 29 Mo. 75.—REVIEWED IN *Robb v. Chicago & A. R. Co.*, 47 Mo. 540.

The Mobile and O. R. Co., a corporation created by the state of Alabama, by "an act to authorize the Mobile & O. R. Co. to extend their railroad from the south boundary line of the state of Kentucky to the Mississippi or Ohio river," passed by the general assembly of Kentucky, and approved Feb. 26, 1846 (Sess. Acts, 1847-8, p. 344-5), had conferred on said corporation the right of extending the road through Kentucky; and the said act further provided that said corporation "shall be entitled to all the privileges, rights, and immunities, and subject to all such restrictions as are granted, made, and prescribed for the benefit, government, and direction of said company as is conferred on it by the act of incorporation passed by the legislature of Alabama." In a suit in the Hickman circuit court, in Kentucky, against said corporation to coerce the payment of some bonds issued by it, the plaintiff sued out an attachment against the defendant on the ground that it was a foreign corporation. The circuit court dismissed the attachment. On this appeal that judgment was affirmed. *Martin v. Mobile & O. R. Co.*, 7 Bush (Ky.) 116.—DISTINGUISHING *Ohio & M. R. Co. v. Wheeler*, 1 Black (U. S.) 295.

**10. Non-resident lessee of road.**—A non-resident who leases a railroad in Georgia may be proceeded against by attachment as other non-residents, though he is liable to be sued the same as the railroad company might be. *Breed v. Mitchell*, 48 Ga. 533.

#### 2. As garnishee or trustee.

**11. In general.**—A corporation is subject to be made garnishee under the laws of Iowa. *Taylor v. Burlington & M. R. R. Co.*, 5 Iowa 114.

The same considerations of public policy which exempt other public officers and agents in the discharge of their official duties from the operation of garnishment laws extend to common carriers, whenever the application of the statute would manifestly and necessarily interfere with the proper discharge on the part of the carrier of its public duties and functions. *Michigan C. R. Co. v. Chicago & M. L. S. R. Co.*, 1 Ill. App. 399.

Where railroads, canals, or other companies for transportation of freight or passengers have mutual dealings for the promotion of their business or public convenience, the relation of debtor and creditor must depend upon the course of such dealings; and the liability of one to garnishment will depend on the nature of such dealings. *Baltimore & O. R. Co. v. Wheeler*, 18 Md. 372.

Where goods are shipped over two roads the consignee is not liable in attachment as trustee to the road delivering the goods, for the freight due to the other road. *Gould v. Newburyport R. Co.*, 14 Gray (Mass.) 472.

A Massachusetts railroad that has an arrangement with other lines that form a connection to settle and pay accounts monthly with the company whose road joins it, which payments are to include any amounts due the roads still beyond, is not liable as trustee in foreign attachment to the corporation immediately connecting with it for moneys due the other corporations under the agreement. *Chapin v. Connecticut River R. Co.*, 16 Gray (Mass.) 69.

Under the Va. Code, ch. 151, § 2, which authorizes a plaintiff in an action at law to obtain an attachment if the suit be to recover money for a claim, or damages for a wrong, a corporation may be summoned as garnishee. *Baltimore & O. R. Co. v. Galahue*, 12 Gratt. (Va.) 655.

Under Wisconsin statutes officers of a railroad company who have money or property of the company in their possession are liable to garnishment. *Everdell v. Sheboygan & F. du L. R. Co.*, 41 Wis. 395.

The Boston and Maine Railroad is a corporation in New Hampshire, amenable to the process and subject to the jurisdiction of the courts of the state, and answerable for funds collected for the principal defendants in another state, without any express stipulation as to the place of their payment. *Smith v. Boston, C. & M. R. Co.*, 33 N. H. 337.—FOLLOWED IN *Littleton N. Bank v. Portland & O. R. Co.*, 58 N. H. 104.

Where a railroad company contracts with a person that he shall furnish at a given sum per mile its right of way at his own expense, purchasing and condemning in the name of the company, the public and landowners are not bound to take any notice of the intermediate contractor; as to them the company is the only responsible party: and where a right of way had been condemned by the contractor and the award paid to the sheriff, but the landowner had taken an appeal, and the company had been garnished by a judgment-creditor of the landowner—held, that the contractor was bound to take notice of the garnishment, and that his payment of an additional sum to the landowner in settlement of the appeal, and for a deed for the right of way in question, did not exonerate the company from liability, as garnishee, to account for the additional sum so admitted to be due to the landowner, and that judgment in this case had been properly rendered against it as garnishee for such sum. *Buchanan County Bank v. Cedar Rapids, I. F. & N. W. R. Co.*, 20 Am. & Eng. R. Cas. 417, 62 Iowa 494, 17 N. W. Rep. 737.

**12. Foreign Corporations.**—A railroad company incorporated under the laws of another state, operating a railroad in Ohio with the assent of the legislature, is liable to the process of garnishment prescribed by the Ohio Civil Code, § 200; and such process may be served as upon domestic corporations. *Pennsylvania R. Co. v. Peoples*, 31 Ohio St. 537.—REVIEWING *McGregor v. Erie R. Co.*, 35 N. J. L. 118.

A corporation created by the laws of another state, but having an office in Massachusetts for its president and treasurer, where the principal business of the company relating to such offices is transacted, is lia-

ble to be garnished, under the act of 1870, ch. 194, providing that non-residents and corporations established by the laws of another state may be summoned as trustees if they have their usual place of business in this commonwealth. *National Bank of Commerce v. Huntington*, 129 Mass. 444.

The fact of a receiver of a railway corporation being non-resident is immaterial, where the receiver is operating a portion of the railway within the jurisdiction of the court issuing the garnishee process, and where the sum due the judgment debtor is payable. *Phelan v. Ganebin*, 5 Colo. 14.

A foreign railroad corporation coming into Kansas and leasing and operating a line of railroad there may be garnished for a debt due to one of its employes, although such employe is not a resident of this state, and although the debt was contracted outside of the state. *Burlington & M. R. R. Co. v. Thompson*, 16 Am. & Eng. R. Cas. 480, 31 Kan. 180, 47 Am. Rep. 497, 1 Pac. Rep. 622.—APPROVED IN *Carson v. Memphis & C. R. Co.*, 88 Tenn. 646.

A foreign railroad corporation that has accepted the privilege of extending its works through New York state, upon the condition that it keeps at least one manager or other officer resident within the state, on whom process in actions against the company may be served, may be made garnishee in an attachment execution, in respect to a debt owing by it to a non-resident. *Fithian v. New York & E. R. Co.*, 31 Pa. St. 114.

A foreign corporation having no property of the debtor in Nebraska, nor owing money to him payable therein, is not subject to garnishment in that state. *Wright v. Chicago, B. & Q. R. Co.*, 25 Am. & Eng. R. Cas. 427, 19 Neb. 175, 27 N. W. Rep. 90.

Where a debt is contracted in Iowa, the parties residing there, and a creditor of the debtor is not subject to garnishment in that state, the exemption will continue in New Hampshire in case an action is brought on the claim. *Wright v. Chicago, B. & Q. R. Co.*, 25 Am. & Eng. R. Cas. 427, 19 Neb. 175, 27 N. W. Rep. 90.

A foreign corporation cannot be charged by trustee process where it has no existence in Massachusetts except in the operation of leased roads. *Gold v. Housatonic R. Co.*, 1 Gray (Mass.) 424.—FOLLOWING *Danforth v. Penny*, 3 Met. (Mass.) 564.

**13. Railway company chartered in two states.**—A railway company doing business in Illinois and another state may be garnished in Illinois by a resident of such other state for a debt owing by such company to another resident of that state; and the motives of the garnishing creditor seeking the collection of a just debt by means of remedies in Illinois are wholly immaterial. *Wabash R. Co. v. Dougan*, 142 Ill. 248, 31 N. E. Rep. 594; affirming 41 Ill. App. 543.—FOLLOWING *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249; *Mineral Point R. Co. v. Barron*, 83 Ill. 365. RE-VIEWING *Drake v. Lake Shore & M. S. R. Co.*, 69 Mich. 168.

A railroad corporation that owns and operates under one management a continuous line through Tennessee and two other states, having separate charters from each of the three states,—that obtained in Tennessee being the youngest,—is a resident and domestic corporation of Tennessee, and subject, as such, to be made garnishee in the courts of that state. *Mobile & O. R. Co. v. Barnhill*, 50 Am. & Eng. R. Cas. 646, 91 Tenn. 395, 19 S. W. Rep. 21. *Holland v. Mobile & O. R. Co.*, 16 Lea (Tenn.) 414.

Such corporation is subject to garnishment, by a citizen of Tennessee, in the courts of that state, although the debt sought to be reached is due to a non-resident, and was contracted in one of the other states where the company is chartered. *Mobile & O. R. Co. v. Barnhill*, 50 Am. & Eng. R. Cas. 646, 91 Tenn. 395, 19 S. W. Rep. 21.

**14. Carrier holding goods after transit is completed.**—A railway company, after the termination of the transportation of property, and while it is holding the same only as a warehouseman, is liable to garnishment in respect to such property. Such a garnishment, at the suit of a stranger to the contract of carriage, while it remains in force, excuses the company from delivering the property to the shipper or consignee. *Cooley v. Minnesota Transfer Co.*, 55 Am. & Eng. R. Cas. 616, 53 Minn. 327, 55 N. W. Rep. 141.

**15. Person employed to secure subscriptions to stock.**—Where B. was employed to secure subscriptions to railroad stock, his compensation "to be paid as the subscriptions to its stock shall be paid in," and a large amount of stock was afterwards

forfeited for nonpayment, including the subscriptions procured by B., the company not having remitted the forfeitures nor attempted to sell the forfeited stock, nor even instituted actions to recover the subscriptions—*held*, that B. had no credits in the company's hands with respect to such forfeited shares, which were subject to attachment. *Maryland Agric'l College v. Baltimore & P. R. Co.*, 43 Md. 434.

**16. Cashier or treasurer.**—The treasurer of a railroad company cannot be garnished as such as to the funds of the company in his hands. *McGraw v. Memphis & O. R. Co.*, 5 Coldw. (Tenn.) 434.

A cashier and auditor of a railway construction company, who had certain funds under his control at the time he was garnished, surrendered the key of the safe, after service of process, to another employé, who took the funds from the safe while acting for the company. *Held*, that the cashier was liable as garnishee. *First Nat. Bank v. Davenport & St. P. R. Co.*, 45 Iowa 120.

**17. Public agents.**—The superintendent of the Western & Atlantic Railroad is a public agent of the state, and is not liable, as such, to the process of garnishment. *Dobbins v. Orange & A. R. Co.*, 37 Ga. 240.

A post-office inspector who holds a check issued by the postmaster-general, payable to the assistant-superintendent of a railway, to pay the indebtedness of the government to the company, is not liable to trustee process in a suit against the company. *Ruel v. Consolidated European & N. A. R. Co.*, 16 New Brun. 481.

**18. Station agents.**—A station agent of a railroad company, in a suit against it, is chargeable as trustee for money collected from the sale of passenger tickets and for freight carried. *Littleton Nat. Bank v. Portland & O. R. Co.*, 58 N. H. 104.—FOLLOWING *Smith v. Boston, C. & M. R. Co.*, 33 N. H. 337.

**19. Trustees under railway mortgage.**—The principle that a party who obtains possession of a definite sum of money belonging to another, which he has no right in justice or equity to retain, may be garnished as his debtor for such sum by a creditor of the latter—*held*, to apply to the net earnings of trustees in possession of a railroad under a power in the mortgage. *De Graff v. Thompson*, 24 Minn. 452.—FOLLOWING *Galveston, H. & H. R. Co. v. Cow-*

\* See also *post*, 25.

drey, 11 Wall. (U. S.) 459; *Gilman v. Illinois & M. Tel. Co.*, 91 U. S. 603; *American Bridge Co. v. Heidelberg*, 94 U. S. 798.

#### IV. WHAT MAY BE REACHED. EXEMPTIONS.

##### 1. What property or interests may be reached.

**20. In general.**—The property of a foreign railroad corporation found in the state of Georgia may be attached. *South Carolina R. Co. v. McDonald*, 5 Ga. 531.

The property of a corporation, incorporated by any other state, situated in Massachusetts, may be attached by trustee process. *Ocean Ins. Co. v. Portsmouth M. R. Co.*, 3 Met. (Mass.) 420.

If a foreign receiver of a railroad corporation brings property of the company, in the course of business, into California, it is subject to attachment by a creditor of the company residing in that state, and thereafter the rights of the receiver will depend upon the comity of the laws of California. (THORNTON, J., and MCFARLAND, J., dissenting.) *Humphreys v. Hopkins*, 81 Cal. 551, 22 Pac. Rep. 892.

Property under attachment by garnishee process at the suit of one creditor cannot be attached specially by another creditor. *Kendrick v. Boston & N. Y. C. R. Co.*, 3 R. I. 235.

A statute provided that the state should take one-half of the stock of railroad companies and should have a lien on the companies' property to secure the whole of the stock. *Held*, that the property of the company was not subject to attachment until the lien of the state was extinguished. *State v. Lagrange & M. R. Co.*, 4 *Humph.* (Tenn.) 488.—DISTINGUISHING *Bank of the U. S. v. Planter's Bank of Ga.*, 9 Wheat. (U. S.) 904.

A railway company pledged twenty-eight of its bonds as security for a debt, which bonds were included in a subsequent foreclosure decreed in a suit in behalf of all the bondholders, and a committee of certain holders of bonds purchased the property, for the costs of the suit, for the benefit of the bondholders contributing towards the payment of the costs, not including the company, to whom the twenty-eight bonds had been surrendered by the bank, and upon which bonds no assessment had been paid; and a new company was formed by the persons interested in the purchase. *Held*, that the origi-

nal company took no interest in the purchase as a holder of its own bonds so taken up, and had no property in the purchase liable to be reached by garnishment. *Galena & S. W. R. Co. v. Stahl*, 103 Ill. 67.

**21. Baggage.**—A passenger's route took him over the line of an Alabama railroad, but starting from a point in Georgia and running through Alabama and back into Georgia in a county different from the one where he started. While the passenger was en route in Alabama an attachment was served upon the company's agent at the starting-point in Georgia, attempting to attach the passenger's trunk. It did not appear that the agent upon whom the process was served had any power to dispose of the trunk at the terminus of the route. *Held*, that the attachment did not bind the company. (JACKSON, J., dissenting.) *Western R. Co. v. Thornton*, 60 Ga. 300.—APPROVED IN *Bates v. Chicago, M. & St. P. R. Co.*, 14 Am. & Eng. R. Cas. 700, 60 Wis. 296.

**22. Bonds.**—Railroad bonds of a debtor, payable to bearer, are not attachable by process of foreign attachment in the hands of a third party holding the same; and where certificates of stock of a foreign railroad corporation are so held, the stock cannot be reached by either foreign or domestic attachment. *Tweedy v. Bogart*, 56 Conn. 419, 15 Atl. Rep. 374.

Bonds of a railroad company, not sold and negotiated, but merely pledged by it as collateral security, when discharged and surrendered are not property of the company liable to be reached by garnishment against an officer of the company receipting for the same, but who in fact never received them. *Galena & S. W. R. Co. v. Stahl*, 103 Ill. 67.

Where the revenues and property of a railroad are mortgaged to secure outstanding bonds, and the revenues are insufficient to pay the interest on said bonds, they cannot be attached at the suit of ordinary creditors; and, if necessary, attachment or execution thereon will be restrained by injunction. *Dunham v. Iselt*, 15 Iowa 284.—NOT FOLLOWED IN *Smith v. Eastern R. Co.*, 124 Mass. 154.

Bonds of a foreign corporation in the hands of an agent for sale are not liable to attachment against the corporation. *Coddington v. Gilbert*, 17 N. Y. 489; affirming 2 Abb. Pr. 242, 5 Duer 72.

Where, pending the foreclosure of a rail-

way mortgage, a contract was proposed whereby certain bonds were to be distributed among the stockholders of the corporation in return for their certificates of stock, which contract was never executed, but a declaration of trust was afterwards made referring to the contract, and proposing to distribute the bonds as contemplated in the contract, and reciting the receipt of the certificates of stock which were to constitute the consideration for said bonds—*held*, that the bonds were held by the trustee subject to the debts of the company, and were liable to garnishment in his hands. *Warren v. Booth*, 51 Iowa 215.—ADHERED TO IN *Warren v. Booth*, 53 Iowa 742.

**23. Coupons.**—Coupons given for the payment of interest on railroad bonds, being choses in action, cannot be taken by trustee process or sold on execution. One holding such coupons as collateral security does not come within the provisions of Me. Rev. St. 1841, ch. 119, § 58, as that section applies only to property not exempt from attachment. *Smith v. Kennebec & P. R. Co.*, 45 Me. 547.

**24. Earnings of road.**—The earnings of a railroad company in the hands of a trustee, as receiver of a connecting road, are attachable. *First Nat. Bank v. Portland & O. R. Co.*, 2 Fed. Rep. 831.

The earnings of a railway company from the operation of its road, though mortgaged to secure the payment of certain bonds, before foreclosure or possession taken by the trustee may be reached by other creditors of the company, and are liable to garnishment when the mortgage provides that, until default, the company may possess and use the road, etc., and receive the rents, profits, and increase arising therefrom. *Mississippi V. & W. R. Co. v. United States Exp. Co.*, 81 Ill. 534.—DISTINGUISHING *Galena & C. U. R. Co. v. Menzies*, 26 Ill. 121. QUOTING *Gilman v. Illinois & M. Tel. Co.*, 91 U. S. 603.

Where by the terms of a contract one-fourth of the earnings of a railroad employé is to be held by the company as a forfeiture if the contract is not completed, such reserved fund is not attachable by trustee process so long as the contract is incomplete. *Williams v. Androscoggin & K. R. Co.*, 36 Me. 201.—DISAPPROVED IN *Elizabethtown & P. R. Co. v. Geoghegan*, 9 Bush (Ky.) 56. QUOTED IN *Ricker v. Fairbanks*, 40 Me. 43.

## 25. Goods in hands of carrier.\*—

Common carriers cannot be held as garnishees for property in their hands for the purpose of transportation, where such property is in actual transit at the time of service of garnishee process. *Bates v. Chicago, M. & St. P. R. Co.*, 14 Am. & Eng. R. Cas. 700, 60 Wis. 296, 19 N. W. Rep. 72, 50 Am. Rep. 369.

Property placed in the hands of a railroad company for transportation, and already in transit and beyond the limits of the county, cannot be garnished. *Illinois C. R. Co. v. Cobb*, 48 Ill. 402.—QUOTED IN *Michigan C. R. Co. v. Chicago & M. L. S. R. Co.*, 1 Ill. App. 399. QUOTED AND APPROVED IN *Bates v. Chicago, M. & St. P. R. Co.*, 14 Am. & Eng. R. Cas. 700, 60 Wis. 296.

A carrier who receives goods under an engagement to forward them to the consignee cannot hold them to answer an attachment at the suit of a creditor of the shipper, previously served upon him; nor is he liable in respect to them upon the attachment. *Bingham v. Lamping*, 26 Pa. St. 340.

Con. St. c. 37, § 65, was intended for the protection of carriers against actions which might be brought or threatened by rival claimants to goods, and does not extend to goods in the possession of a carrier seized by an officer under legal process. *Merchants' Bank v. Peters*, 1 Man. 372.

Persons in New Orleans ordered goods manufactured in New York and shipped to them, to be paid for on delivery. The goods were accordingly manufactured and placed in the hands of a carrier, directed to the parties ordering them at New Orleans. *Held*, that the title did not pass to the consignees until the delivery of the goods at place of consignment, and that therefore they were not attachable in a suit against the consignees while they were still in New York. *Bates v. New Orleans, J. & G. N. R. Co.*, 4 Abb. Pr. (N. Y.) 72, 13 How. Pr. 516.

**26. Judgments.**—A judgment due by a foreign railroad company doing business in Pennsylvania is subject to attachment in the courts of that state. *Fithian v. New York & E. R. Co.*, 2 Phila. (Pa.) 318.

A debt established by judgment may be attached, even though it be the judgment

\* Attachment of goods in hands of carrier, see note, 14 AM. & ENG. R. CAS. 709. See also *ante*, 14.



of the court of another state. *Jones v. New York & E. R. Co.*, 1 *Grant Cas. (Pa.)* 457. *Fithian v. New York & E. R. Co.*, 31 *Pa. St.* 114.

A judgment obtained by a husband and wife against a railway company for injuries sustained by the wife cannot be attached for a debt due by the husband, being exempted from execution in virtue of section 43 of article 3 of the constitution, which provides that "the property of the wife shall be protected from the debts of the husband." *Clark v. Wootton*, 63 *Md* 113.

**27. Money.**—(1) *When subject to attachment.*—Money collected by a railroad company through its agents for connecting lines, as their share of the business, is the money of the company collecting it, and is liable to a judgment against such company. *Everdell v. Sheboygan & F. du L. R. Co.*, 41 *Wis.* 395.

Money deposited by an officer of a railway company with private bankers in his own name, but which is known to be the funds of the company, creates the relation of debtor and creditor between the company and the banker, and the funds may be attached at the suit of a creditor of the company. *Ruel v. Consolidated European & N. A. R. Co.*, 16 *New Brun.* 481.

The funds of an insolvent corporation in the hands of a banker are liable to execution attachment by a creditor of the corporation, and it is no defense that the banker is also a creditor of the corporation to an amount exceeding the funds in his hands. *Penrose v. Erie C. Co.*, 3 *Phila. (Pa.)* 198.

Under the Common-Law Procedure Act, 1864, § 61, money due to a railway company as rent from another railway company may be attached by judgment creditors in the hands of the latter company. *Bouch v. Sevenoaks, M. & T. R. Co.*, *L. R. 4 Exch. D.* 133, 48 *L. J. Exch. D.* 338, 40 *L. T. N. S.* 560, 27 *W. R.* 507.

Under 38 *Vic. c. 5*, declaring that "when any action is commenced in respect to any cause of action for which a writ of attachment may issue, and any debt or sum of money is due or owing to the debtor from any other party, it shall be lawful for the party for whom such first cause of action subsists to attach and recover any debt or sum of money due or owing to his debtor from any other party, or sufficient thereof to satisfy the claim of the primary creditor," money received by an agent of a railway

company is liable to attachment by a creditor of the company, though the money is received by him in the course of his employment and is held subject to the orders of the company. *Ruel v. Consolidated European & N. A. R. Co.*, 16 *New Brun.* 481.

An officer of a railroad company deposited money in bank to his own credit, but with the abbreviation "Supt." after his name. *Held*, that where it fully appeared that the depositor was the company's superintendent, and that the money belonged to the company, it was liable to garnishment as the property of the company. *Gregg v. Farmers' & M. Bank*, 80 *Mo.* 251.—DISTINGUISHING *McPherson v. Atlantic & P. R. Co.*, 66 *Mo.* 103.

A railroad was leased to another road which was mortgaged. The trustee in the mortgage took possession of both roads, but notified the parties interested in the leased line that he would not ratify the lease and would only operate the road temporarily. *Held*, that a fund coming to his hands while thus operating the road was the property of the leased road and could be garnished in his hands at the suit of one of the creditors of said road. *Milwaukee & N. R. Co. v. Brooks Locomotive Works*, 30 *Am. & Eng. R. Cas.* 499, 121 *U. S.* 430, 7 *Sup. Ct. Rep.* 1094.

(2) *When not subject to attachment.*—Money set apart before it is earned, for the payment of interest on railroad mortgage bonds and to raise a sinking fund for their redemption, is not subject to garnishee process at the suit of an ordinary creditor of the corporation. *Galena & C. U. R. Co. v. Menzies*, 26 *Ill.* 122.—DISTINGUISHED IN *Mississippi V. & W. R. Co. v. United States Exp. Co.*, 81 *Ill.* 534; *Smith v. Eastern R. Co.*, 124 *Mass.* 154.

Money, etc., belonging to a railroad company cannot be attached or brought under a lien by a judgment-creditor of the company by a proceeding under § 474 of the Civil Code and the service of a summons on the president of the company, with notice indorsed thereon of the object of the action, as provided in § 477. *Newport & C. Br. Co. v. Douglass*, 12 *Bush (Ky.)* 673, 18 *Am. Ry. Rep.* 221.

Funds in possession of the president, officers, and agents of a railroad company are in the possession of the company, and are not subject to garnishment in an ordinary action by a creditor against the company.

The appropriate action is by application to a court of equity, seeking a discovery as to the condition of the company; and upon the failure of the chief officer or officers of the company to pay when directed they may be imprisoned for contempt, and the chancellor will take possession of the road by placing it in the hands of a receiver, and will apply the net income or any surplus fund to the payment of the creditor's claim. By giving the creditor the income of the road, retaining enough to defray the necessary expenses of the corporation, the chancellor gives him all that he has a right to demand, and at the same time preserves the corporate property for private and public use. This ruling does not prevent a corporation from being garnished as the debtor of a third party whose creditor is seeking to recover his debt. In such a case, however, the court will require payment to be made in the same manner as if the company was the real debtor. It is not decided that a debt due to the corporation cannot be attached or garnished. *Wilder v. Shea*, 13 *Bush* (Ky.) 128, 17 *Am. Ry. Rep.* 57.

A conveyance of all the property of a railroad company to trustees, to secure the payment of certain debts, will cover funds in the hands of the treasurer at the time of the conveyance, and they cannot be held by a creditor of the company by attachment as against the trustees, though the trustees may permit the company to manage the road. *Woodman v. York & C. R. Co.*, 45 *Me.* 207.—NOT FOLLOWED IN *Smith v. Eastern R. Co.*, 124 *Mass.* 154.

Money in the hands of a railroad agent, collected from the passenger and freight business of the company, cannot be taken under trustee process in a suit against the company, under the Maine statutes of 1821, ch. 61. *Pettingill v. Androscoggin R. Co.*, 51 *Me.* 370.

An attachment execution against a railroad company cannot be levied on money in the hands of its ticket agents, arising from the sale by them of tickets to passengers. *Fowler v. Pittsburgh, Ft. W. & C. R. Co.*, 35 *Pa. St.* 22.—APPROVED IN *McGraw v. Memphis & O. R. Co.*, 5 *Coldw. (Tenn.)* 434.

Where, after notice to treat by a railway company to a landowner, the purchase-money has been fixed by the verdict of a jury and the judgment of the sheriff, under §§ 49 and 50 of the Lands Clauses Act, such

purchase-money cannot be attached by a garnishee order *not* served upon the railway company by the judgment-creditor of the landowner after the verdict but before execution or tender of a conveyance. *Howell v. Metropolitan D. R. Co.*, L. R. 19 *Ch. D.* 508, 51 L. J. Ch. D. 158, 45 L. T. 707, 30 *W. R.* 100.

**28. Property of stockholders.**—The private property of stockholders in corporations created after February 16, 1836, excepting banking corporations, is not made subject to attachment on a writ against the corporation. The creditor must obtain judgment against the corporation before he can have his remedy against the corporators. *Drinkwater v. Portland Marine R. Co.*, 18 *Me.* 35.

**29. Rolling stock.\***—Railroad cars, for the purpose of attachment, are regarded as personal property under *Mass. Pub. St.* ch. 161, §§ 38, 39. *Hall v. Carney*, 140 *Mass.* 131, 3 *N. E. Rep.* 14.

The locomotive engines and freight and passenger cars of a railroad corporation are liable to attachment, like other personal property, when not in actual use. *Boston, C. & M. R. Co. v. Gilmore R. Co.*, 37 *N. H.* 410.—DISTINGUISHING *Worcester v. Western R. Corp.*, 4 *Met. (Mass.)* 564; *Pierce v. Emery*, 32 *N. H.* 503; *Willink v. Morris C. & B. Co.*, 4 *N. J. Eq.* 377.—QUOTED IN *Coe v. Columbus, P. & I. R. Co.*, 10 *Ohio St.* 372; *Hill v. La Crosse & M. R. Co.*, 11 *Wis.* 214. REVIEWED AND APPROVED IN *Dinsmore v. Racine & M. R. Co.*, 12 *Wis.* 649.

A railroad company cannot be garnished for the debt of another company because it has in its possession cars of the debtor company, which it is using under an arrangement between the companies for a mutual exchange of through freight cars, instead of unloading and transferring the freight in the cars at the point of connection. *Michigan C. R. Co. v. Chicago & M. L. S. R. Co.*, 1 *Ill. App.* 399.—QUOTING *Illinois C. R. Co. v. Cobb*, 48 *Ill.* 402.

**30. Salaries of officers.**—The salary of an officer of a railroad company which exceeds five hundred dollars per annum is subject to garnishment. The act of 1850, which declares the salaries of all officers of all corporations, except municipal corpora-

\* Cars are personal property for the purposes of attachment, see 25 *AM. & ENG. R. CAS.* 274 *abstr.*

tions, where the salary exceeds five hundred dollars, to be subject to garnishment (Cobb's Dig. 88), has not been repealed by any subsequent act. *Bailie v. Mosher*, 72 Ga. 740.

**31. Shares of stock.\***—Shares of stock in corporations are subject to execution and sale under a process of garnishment. *Baker v. Wasson*, 53 Tex. 150.

The shares of a stockholder in a railroad company are liable to attachment; and, by virtue thereof, the attaching creditor acquires a claim superior to that of a subsequent *bona-fide* purchaser of those shares for value without notice of the attachment. *Shenandoah Valley R. Co. v. Griffith*, 13 Am. & Eng. R. Cas. 120, 76 Va. 913.—FOLLOWING *Chesapeake & O. R. Co. v. Paine*, 29 Gratt. (Va.) 502.

The shares of a stockholder in a joint stock company incorporated by and conducting its operations, in whole or in part, in the state, are such estate as is liable to be attached in a proceeding instituted for that purpose by one of the creditors of such stockholder; and, for the purpose of such proceeding, such estate may properly be considered as in the possession of the corporation. *Chesapeake & O. R. Co. v. Paine*, 29 Gratt. (Va.) 502.

Of such a proceeding a court of law has jurisdiction as well as a court of equity. *Chesapeake & O. R. Co. v. Paine*, 29 Gratt. (Va.) 502.

If, in such a proceeding, the stock should appear to be liable to the lien of the attachment, it ought to be sold for the satisfaction of the same under an order of the court made for that purpose in the attachment proceeding; but it is error for the court to render a judgment against the garnished corporation for the value of the stock, unless it appears that the lien of the attaching creditor on the stock was lost by the act of the corporation. *Chesapeake & O. R. Co. v. Paine*, 29 Gratt. (Va.) 502.

While a railroad company is in existence it is required to pay its stockholders nothing but dividends on the stock; therefore the stock itself cannot be garnished in the hands of the company for the debts of the stockholders. *Ross v. Ross*, 25 Ga. 297.

**32. Subscriptions to stock.**—A subscription for stock in a private corporation,

payable on call by the board of directors, and for which no call has been made, is not subject to garnishment at law at the suit of a creditor of the corporation, though it has become insolvent and practically dissolved. *Teague v. Le Grand*, 85 Ala. 493, 5 So. Rep. 287.

**33. Unliquidated demands.**—A claim for unascertained, unliquidated damages in a suit for breach of a contract for the purchase of railroad stock is not subject to attachment by trustee process. *Rand v. White Mountains R. Co.*, 40 N. H. 79.

Where a railroad entered upon land without making compensation or giving bond to the owner, the unliquidated damages the owner may be adjudged entitled to cannot be attached in the hands of the company on a judgment against the landowner. *Selheimer v. Elder*, 98 Pa. St. 154.

Under the terms of an agreement between a company and its contractor, the estimates of the work were to be made monthly, by an engineer, on the 20th of each month, payment to be made about the 10th of the following month; but it was provided that these estimates might be forfeited from month to month for various causes specified. *Held*, that there was nothing due by the company on the 14th of any month that could be attached. *Baltimore & O. R. Co. v. Gallahue*, 14 Gratt. (Va.) 563.—REVIEWING *Baltimore & O. R. Co. v. McCullough*, 12 Gratt. (Va.) 595.—REVIEWED IN *Strauss v. Chesapeake & O. R. Co.*, 7 W. Va. 368.

The garnishees had given the judgment-debtors a bond, conditioned that one A., a station master in their employment, should duly pay over all moneys received. *Held*, that the liability incurred under this bond, if established, would not be a debt which could be attached under the 194th section, and an order to proceed under § 197 was refused. *Griswold v. Buffalo, B. & G. R. Co.*, 2 Prac. (Ont.) 178.

**34. Wages of employees.\***—(1) *When subject to attachment.*—A debt due to a mechanic for wages may be attached under S. C. Gen. St. § 252. *McKelway v. South Carolina R. Co.*, 6 So. Car. 446.

Wages of labor earned and due to a citizen of Pennsylvania may be attached for a debt in another state where no law exists prohibiting the attachment of wages. *Bolton*

\* Attachment of shares of stock, see note, 13 AM. & ENG. R. CAS. 128.

\* See also *post*, 36-39.

*v. Pennsylvania Co.*, 88 Pa. St. 261.—FOLLOWING *Morgan v. Neville*, 74 Pa. St. 52.

A foreign railroad company, leasing property and doing business in Kansas, may be garnished for the debt of a non-resident employé contracted out of the state. *Burlington & M. R. R. Co. v. Thompson*, 16 Am. & Eng. R. Cas. 480, 31 Kan. 180, 47 Am. Rep. 497, 1 Pac. Rep. 622.—DISTINGUISHED IN *Missouri Pac. R. Co. v. Maltby*, 25 Am. & Eng. R. Cas. 421, 34 Kan. 125; *Kansas City, St. J. & C. B. R. Co. v. Gough*, 35 Kan. 1; *Missouri Pac. R. Co. v. Sharitt*, 44 Am. & Eng. R. Cas. 657, 43 Kan. 375, 387.

The wages of an employé of the Union Pac. R. Co., a corporation organized under the laws of the United States, where the wages are earned in Nebraska, and both the employé and his creditor reside there, may be garnished in Iowa; and the court will acquire jurisdiction by personal service on the railroad company in Iowa. *Mooney v. Union Pac. R. Co.*, 60 Iowa 346.—APPROVED IN *Carson v. Memphis & C. R. Co.*, 88 Tenn. 646. FOLLOWED IN *Oberfelder v. Union Pac. R. Co.*, 60 Iowa 755.

Under Me. Rev. St., ch. 86, § 55, providing that "no trustee shall be charged by reason of any money or other thing due from him to the principal defendant, unless at the time of the service of writ upon him it is due absolutely, and not on any contingency," the price of labor contracted to be paid for upon estimates being made, fixing its amount and value, is not exempt from attachment, as no such contingency as the statute contemplates exists. *Ware v. Gowen*, 65 Me. 534.

Under the terms of the contract between a railroad company and an employé, the employé was to be paid about the middle of one month for the work of the preceding month, on an estimate and certificate of the company's engineer. On the 4th of a month the company was served with trustee process, attaching the former month's wages, but the estimate and certificate of the engineer were not completed until the 10th of the month, after such process. *Held*, that the debt was due "absolutely," within the meaning of the statute, and that the company was therefore chargeable as trustee. *Ware v. Gowen*, 65 Me. 534.

(2) *When not subject to attachment.*—A debt due by a corporation organized under the laws of Kentucky, to one of its employés in that state, cannot be reached by a creditor

in Alabama by attachment against the debtor and garnishment against the corporation. *Louisville & N. R. Co. v. Dooley*, 78 Ala. 524.

Where at the time of service of garnishee process the defendant is in the employ of the garnishee, and continues thereafter in such employment, the garnishee proceedings bind only the amount due at the date of the service of process, and do not reach to amounts subsequently earned, even under a prior contract of employment. *Burlington & M. R. R. Co. v. Thompson*, 16 Am. & Eng. R. Cas. 480, 31 Kan. 180, 47 Am. Rep. 497, 1 Pac. Rep. 622.

Where by the terms of a contract the whole month's work of a railroad employé is to be estimated by the engineer and certified after the end of the month, no debt arises that is attachable during the month, and such earnings cannot be garnished in the hands of the company by serving process before the end of a month. *Williams v. Androscoggin & K. R. Co.*, 36 Me. 201.

Under the terms of an agreement between a street railway company and a conductor, the latter was required to account for the tickets intrusted to him for sale each month, before any wages were due him. At the time when a trustee process was served on the corporation he had in his hands money and tickets which would exceed his monthly salary. *Held*, that there was nothing due to him "absolutely and without any contingency," within the meaning of Mass. Gen. St. ch. 142, § 24. *Fellows v. Smith*, 131 Mass. 363.

By the provisions of a construction contract the monthly estimate was to be paid as agreed upon between the parties and where the contractor might appoint. There were no written regulations, but by the method pursued for several months the laborers were paid monthly, under the supervision of an officer of the company, with the acquiescence of the contractor. Upon the company being garnished by a creditor of the contractor—*held*, that the creditor was bound by the method of payment adopted, and could not claim that payments thereunder to the laborers after service of the writ were unauthorized. *Dawson v. Iron Range & H. R. R. Co.*, 97 Mich. 33, 56 N. W. Rep. 106.

## 2. Exemptions.

**35. Law of place.**—Exemption from garnishment in another state in which the debtor resides cannot be pleaded by a gar-

nishee in this state, unless the amount due to the debtor from the garnishee is also exempt by the laws of Iowa. *Leiber v. Union Pac. R. Co.*, 49 Iowa 688.—DISTINGUISHING *Moore v. Chicago, R. I. & P. R. Co.*, 43 Iowa 385.—APPROVED IN *Missouri Pac. R. Co. v. Maltby*, 25 Am. & Eng. R. Cas. 421, 34 Kan. 125.

It is the settled rule that in a garnishment proceeding in Iowa the exemption laws of another state or territory cannot be pleaded or relied on as a defense by either the garnishee or the judgment-debtor. *Broadstreet v. Clark*, 65 Iowa 670, 22 N. W. Rep. 919.

Where a citizen of Kansas attempts by a proceeding in garnishment against a foreign railroad corporation to subject to the payment of his claim in the courts of that state the personal earnings of a citizen of another state, which personal earnings are, by the laws of Iowa and also of such other state, exempt from being so applied, the earnings of such debtor are exempt from such process. *Kansas City, St. J. & C. B. R. Co. v. Gough*, 35 Kan. 1, 10 Pac. Rep. 89.—DISTINGUISHING *Burlington & M. R. R. Co. v. Thompson*, 16 Am. & Eng. R. Cas. 480, 31 Kan. 180.

A resident of Tennessee cannot, when sued in another state, obtain the benefit of exemptions secured to him by Tennessee statutes, and therefore his garnished debtor cannot, in such case, obtain such exemptions for him, and need not endeavor to do so. *Carson v. Memphis & C. R. Co.*, 88 Tenn. 646, 13 S. W. Rep. 588.—APPROVING *Burlington & M. R. R. Co. v. Thompson*, 16 Am. & Eng. R. Cas. 480, 31 Kan. 180; *Mooney v. Union Pac. R. Co.*, 9 Am. & Eng. R. Cas. 131, 60 Iowa 346; *Eichelburger v. Pittsburg, C. & St. L. R. Co.*, (Ohio) 9 Am. & Eng. R. Cas. 158. DISAPPROVING *Pierce v. Chicago & N. W. R. Co.*, 36 Wis. 288.

In a proceeding in garnishment, where all the parties are non-residents of Kansas and residents of Missouri, and the thing attempted to be attached by the garnishment proceedings is a debt created and payable in Missouri, but the garnishee does business in Kansas, and is liable to be garnished in that state, and the other parties come temporarily into Kansas, and, while in Kansas, the plaintiff, who is a creditor of the defendant, who is a creditor of the garnishee, commences an action in Kansas against the defendant, and serves a garnishment summons upon the garnishee, and the debt of the garnishee to the defendant is by the laws of

Missouri exempt from garnishment process, and such debt also seems to come within the exemption provisions contained in § 490 of the Civil Code of Kansas and § 157 of the Justices' Code of Kansas, exempting certain earnings of the debtor from the enforced payment of his debts, such debt is exempt from garnishment process in Kansas. *Missouri Pac. R. Co. v. Maltby*, 25 Am. & Eng. R. Cas. 421, 34 Kan. 125, 8 Pac. Rep. 235.—APPROVING *Leiber v. Union Pac. R. Co.*, 49 Iowa 688. DISTINGUISHING *Burlington & M. R. R. Co. v. Thompson*, 16 Am. & Eng. R. Cas. 480, 31 Kan. 180.

**36. Wages, when exempt, generally.**—The Md. Code, art. 10, § 36, embodies the substance of the acts of 1852, ch. 340, and 1854, ch. 23, by exempting from attachment all wages not actually due, and of wages actually due, the sum of \$10. *House v. Baltimore & O. R. Co.*, 48 Md. 130.

In the act of 1874, ch. 45, the object of which was only to increase the amount of the exemption, the proviso does not enlarge the class of wages or salary subject to attachment, by extending the effect of the attachment to wages not due; but as to debts existing prior to the act of 1874, ch. 45, it limits the exemption to \$10, as under the repealed sec. 36 of art. 10 of the Maryland Code. *House v. Baltimore & O. R. Co.*, 48 Md. 130.

Under How. Ann. St. (Mich.) § 3423, a railroad company may withhold payments for the protection of laborers and materialmen as against a garnishing creditor of the contractor, though no bill of items of material and labor has been furnished, as provided in the statute. *Dawson v. Iron Range & H. B. R. Co.*, 97 Mich. 33, 56 N. W. Rep. 106.—DISTINGUISHING *Dudley v. Toledo, A. A. & N. M. R. Co.*, 65 Mich. 655.

The wages for sixty days' services of laborers, mechanics, or clerks who are heads of families, in the hands of those by whom such laborers, mechanics, or clerks may be employed, are exempt from execution, attachment, or garnishment, whether the employé is a resident of the state or not. Such wages are absolutely exempt. *Wright v. Chicago, B. & Q. R. Co.*, 25 Am. & Eng. R. Cas. 426, 19 Neb. 175, 27 N. W. Rep. 90.—FOLLOWED IN *Turner v. Sioux City & P. R. Co.*, 19 Neb. 241.

Wis. Rev. St. 1858, ch. 79, § 40, exempting railroad employés from garnishment in certain cases, was repealed by implication by

the act of 1858, ch. 148; and the subsequent amendment of such chapter by the act of 1861, ch. 280, limiting the exemption to married persons, makes it apply to railroad employes the same as to all other persons. *Burlander v. Milwaukee & St. P. R. Co.*, 26 Wis. 76.

**37. Wages earned in foreign states.**—Where the wages of a railroad employé, residing in another state, are garnished in Illinois, the exemption given by the laws of the state of his residence has no application, but he will be allowed the same exemption that is allowed a resident of Illinois by the laws of that state. *Mineral Point R. Co. v. Barron*, 83 Ill. 365.—FOLLOWED IN *Wabash R. Co. v. Dougan*, 142 Ill. 248.

Where an employé, whose wages are exempt in Indiana, does not act whereby he subjects himself to the jurisdiction of the courts of Michigan, and where the contract for his services is made and payable in Indiana, and the services are performed there, and no jurisdiction of the person or property of the employé is obtained in Michigan save by the disclosure of the garnishee, and the debt of the employé as also contracted in Indiana, proceedings in attachment and garnishment cannot be successfully maintained in Michigan by an assignee of the claim. *Drake v. Lake Shore & M. S. R. Co.*, 69 Mich. 168, 37 N. W. Rep. 70.

Where a railroad employé is entitled to an exemption of wages under the laws of Mississippi, such exemption cannot be defeated by attaching the wages in the hands of the company in another state. Where both debtor and creditor reside in Mississippi its courts will give effect to its own exemption laws, regardless of the laws of another state. *Illinois C. R. Co. v. Smith*, 70 Miss. 344, 12 So. Rep. 461.

A railroad company, the lines of which extended through Ohio and West Virginia, owed one month's wages to a brakeman resident in Ohio. By the laws of Ohio one month's wages are exempt from attachment and execution. A creditor of the brakeman instituted attachment proceedings against him in West Virginia, attaching the wages due by the company. The brakeman had notice of the proceedings, but did not appear, and the company, under order of the West Virginia court, paid into court the amount in its hands as satisfaction of the debt. An assignor of the brakeman subse-

quently brought suit in Ohio against the company, for the amount of the wages due. *Held*, that the exemption law of Ohio did not extend in this case to West Virginia; that there was no presumption that a similar law existed in such state; that even if the brakeman could have set up such exemption in the West Virginia court it did not appear that the company defendant could have done so; that the company did not appear to have neglected any duty incumbent upon it; that its payment of the amount of the wages due operated as a discharge; and that therefore plaintiff was not entitled to recover. *Eichelburger v. Pittsburgh, C. & St. L. R. Co.*, (Ohio) 9 Am. & Eng. R. Cas. 158.—DISTINGUISHED IN *Pierce v. Chicago & N. W. R. Co.*, 36 Wis. 285; *Chicago & A. R. Co. v. Ragland*, 84 Ill. 375.—APPROVED IN *Carson v. Memphis & C. R. Co.*, 88 Tenn. 646.

**38. Effect of payment of wages by garnishee to creditor.**—If a garnishee pays over money due from him to his employé for wages which are exempt from garnishee process, it seems that he cannot set that fact up in defense to a suit brought by such employé to recover such wages. *Chicago & A. R. Co. v. Ragland*, 84 Ill. 375.

Where the debt due from a railroad garnishee to the defendant in the garnishment is exempt, as, for instance, wages for the previous thirty days, its payment under order of the court to the plaintiff in the garnishment will not entitle the garnishee to subrogation. *Dunn v. Missouri Pac. R. Co.*, 45 Mo. App. 29.

**39.—or failure to make defense.**—Where wages in the hands of a railroad company are not subject to garnishment it is the duty of the company to interpose that defense, and if it fails to do so it cannot have credit for the amount thus unnecessarily paid in the garnishment proceeding in an action by its employé. *Terre Haute & I. R. Co. v. Baker*, 122 Ind. 433, 24 N. E. Rep. 83. *Chicago & A. R. Co. v. Ragland*, 84 Ill. 375.—DISTINGUISHED IN *Eichelburger v. Pittsburgh, C. & St. L. R. Co.*, (Ohio) 9 Am. & Eng. R. Cas. 158.—*Chicago, R. I. & P. R. Co. v. Mason*, 11 Ill. App. 525.—FOLLOWING *Chicago & A. R. Co. v. Ragland*, 84 Ill. 375.—*Wright v. Chicago, B. & Q. R. Co.*, 25 Am. & Eng. R. Cas. 426, 19 Neb. 175, 27 N. W. Rep. 90. *Turner v. Sioux City & P. R. Co.*, 19 Neb. 241.—FOLLOWING *Wright v. Chicago, B. &*



Q. R. Co., 19 Neb. 175.—*Missouri Pac. R. Co. v. Whipsker*, 77 Tex. 14, 13 S. W. Rep. 639. *Pierce v. Chicago & N. W. R. Co.*, 36 Wis. 283.—DISAPPROVED IN *Moore v. Chicago, R. I. & P. R. Co.*, 43 Iowa 385; *Carson v. Memphis & C. R. Co.*, 88 Tenn. 646. DISTINGUISHED IN *Eichelburger v. Pittsburgh, C. & St. L. R. Co.*, (Ohio) 9 Am. & Eng. R. Cas. 158.

A railroad company is not bound to make a defense for an employé in proceedings against him in another state in which the company is summoned as garnishee, and its failure to do so will not render it liable to the employé for wages in its hands. *Chicago, St. L. & P. R. Co. v. Meyer*, 117 Ind. 563, 19 N. E. Rep. 320.

A Missouri corporation having the wages of one of its employés garnished in its hands in Missouri, the wages being earned in Iowa, where they are exempt under the laws of that state, is not bound to interpose the defense of the exemption in Iowa; and a judgment against it in Missouri will constitute a good defense when sued in Iowa to recover the same wages. *Moore v. Chicago, R. I. & P. R. Co.*, 43 Iowa 385.—DISAPPROVING *Pierce v. Chicago & N. W. R. Co.*, 36 Wis. 283. FOLLOWING *Baltimore & O. R. Co. v. May*, 25 Ohio St. 347.—DISTINGUISHED IN *Leiber v. Union Pac. R. Co.*, 49 Iowa 688. RECONCILED IN *Missouri Pac. R. Co. v. Sharitt*, 44 Am. & Eng. R. Cas. 657, 43 Kan. 375, 387.

Where there was no charge of bad faith on the part of the employer in failing to state in the answer in garnishment that the wages were exempt, and the employer, in pursuance of the order of the court, paid the money into court, where the debtor claimed it as exempt, and filed a motion supported by affidavits for its delivery to him, which motion was overruled, the debtor will, so far as the garnishee is concerned, be concluded by the garnishment proceedings, and cannot afterwards bring an action against the garnishee to recover the debt. *Turner v. Sioux City & P. R. Co.*, 19 Neb. 241, 27 N. W. Rep. 103.

#### V. PROCEDURE.

##### 1. Suing out the Writ.

**40. The affidavit.**—An affidavit for an attachment under § 3702, Rev. St., if not made by the plaintiff, must contain a sworn statement that it is made on his behalf. A

mere recital, as "J. K., on behalf of I. S., being duly sworn," etc., is insufficient. *Miller v. Chicago, M. & St. P. R. Co.*, 58 Wis. 310, 17 N. W. Rep. 130.

An affidavit made as the basis of an attachment proceeding against a railroad corporation need not allege the corporate character of the company. *Mississippi C. R. Co. v. Plant*, 58 Ga. 167.

The title of the act incorporating a railroad company need not be stated in an affidavit for attachment against it; and if such statement be necessary, its omission is not a jurisdictional defect, and may be supplied by amendment either before or after judgment. *Ruthe v. Green Bay & M. R. Co.*, 37 Wis.

The authority to issue an attachment rests on facts, the principal of which is the obligation to pay, and the proof of which would be indispensable before a judgment could be obtained and an execution issued; and the affidavit for an attachment should show the liability of the defendant by such evidence as would make out a *prima-facie* case at the trial; so where the facts alleged in an affidavit and complaint are made upon information and belief, but there is nothing stated to show the source of the information or how it was derived, the affidavit and complaint are not sufficient. *Pride v. Indianapolis, D. & W. R. Co.*, 21 N. Y. S. R. 261, 51 Hun (N. Y.) 640, 4 N. Y. Supp. 15.

**41. Time and place of issue.**—A railroad cannot be required to answer a summons of garnishment in any other county than that in which its principal business office is situated, unless it appear from the record that the debt charged is one for which, by statute, it may be sued elsewhere. *Clark v. Chapman*, 45 Ga. 486.

A railway company does not, within the meaning of 32 Vic. ch. 23, § 7, O., providing where garnishee process may issue, "live and carry on business" at any other place than the head office at which its business is carried on. *Ahrens v. McGilligat*, 23 U. C. C. P. 171. *Westover v. Turner*, 26 U. C. C. P. 510.

The fact of the railway company having, in addition to its local station, a factory for the making and repair of the rolling stock used on the road, and employing a number of workmen therein, did not bring such place within the section. *Westover v. Turner*, 26 U. C. C. P. 510.

The defendant, a railroad company, in an

action for a tort is not subject to garnishment until final judgment is recovered. A garnishment issued and served after a first verdict for the plaintiff in the action, which verdict is subsequently set aside and a new trial granted, and answered before a second trial is had, the answer denying any indebtedness, seizes nothing, and forms no lien on the final recovery. *Gamble v. Central R. & B. Co.*, 80 Ga. 595, 7 S. E. Rep. 315.

**42. Form and sufficiency of the writ.**—The C. R. Co., one of the trustees named in the writ, is a foreign corporation. The process alleged that said company "has an authorized agent resident within the state of Vermont at Bellows Falls, in the town of R. and the county of W. and said state." Such allegation is sufficient to give the court jurisdiction when legal service has been made. *Chaffee v. Rutland R. Co.*, 16 Am. & Eng. R. Cas. 408, 55 Vt. 110.

An attachment against the estate of the C. I. Co. summons M., president of the S. V. R. Co., garnishee, to answer what property of the C. I. Co. he has in hand, and a judgment is rendered that the plaintiff recover of M., president of the S. V. R. Co., garnishee of the C. I. Co., a sum of money, are not an attachment and judgment against the S. V. R. Co. as garnishee, and do not bind property in the hands of the latter company belonging to the C. I. Co.; and a sale of the property under execution upon such judgment does not pass title thereto, or bar the C. I. Co. from setting up its claim to such property against the S. V. R. Co., either under the general law, or under the law of Pennsylvania. *Fidelity I., T. & S. D. Co. v. Shenandoah Valley R. Co.*, 43 Am. & Eng. R. Cas. 356, 33 W. Va. 761, 11 S. E. Rep. 58.

Such property being negotiable mortgage bonds, and it not appearing that when judgment was rendered they had been so executed as to be considered in existence as valid mortgage bonds, a sale of them under such proceeding would not pass title thereto under the Pennsylvania law. *Fidelity I., T. & S. D. Co. v. Shenandoah Valley R. Co.*, 43 Am. & Eng. R. Cas. 356, 33 W. Va. 761, 11 S. E. Rep. 58.

## 2. Service, levy, and custody of the property.

**43. Notice to principal defendant.**—Where the property of a non-resident corporation is attached, it is necessary, under the 14th amendment to the constitution of the United States, relating to "due process

of law," to give the company notice of some kind. *Martin v. Central Vt. R. Co.*, 50 Hun (N. Y.) 347, 20 N. Y. S. R. 375, 3 N. Y. Supp. 82.—REVIEWING *Gray v. Delaware & H. C. Co.*, 5 Abb. N. Cas. 131; *Towle v. Wilder*, 57 Vt. 622.

**44. Service upon garnishee—Who may be served.**—A judgment *nisi* in proceedings by garnishment against a railroad company, and a judgment final thereon against such company, cannot be sustained unless they show in the record of such judgments that the court had satisfactory evidence that the person upon whom such garnishment and notice of the judgment *nisi* were served was the president of such railroad company at the time of such service, when there is no appearance on behalf of said company. *Montgomery & E. R. Co. v. Hartwell*, 43 Ala. 508.

Under the Georgia statute service of garnishment on a domestic corporation must be upon the president, if he is in the state, and the temporary absence of such officer will not justify service upon a subordinate officer or agent. *Steiner v. Central R. Co.*, 60 Ga. 552.

Where a state designates the officer of a corporation upon whom process may be served, service cannot be upon the company's attorney, who is not mentioned as such officer, neither can he accept service for the corporation. *Northern C. R. Co. v. Rider*, 45 Md. 24.

In Michigan garnishee process issued by a justice of the peace against a railroad company must be served on the company's general agent or principal officer; service on a local agent is not sufficient. *Detroit, H. & J. R. Co. v. Younghaus*, 2 Mich. (N. P.) 143.

Where the law authorizes service of garnishee process upon one officer of a corporation, while the property sought to be reached is in the actual possession of another officer or employé, if the latter delivers such property to a person authorized to receive the same before such other officer or employé can, with reasonable diligence on the part of the officer served, be notified by the latter to retain possession thereof, the corporation is not liable as garnishee. *Bates v. Chicago, M. & St. P. R. Co.*, 14 Am. & Eng. R. Cas. 700, 60 Wis. 296, 19 N. W. Rep. 72, 50 Am. Rep. 369.—APPROVED IN *Pennsylvania R. Co. v. Pen-nock*, 51 Pa. St. 244; *Western R. Co. v.*

Thornton, 60 Ga. 300; Wheat v. Platte City & Ft. D. M. R. Co., 4 Kan. 317; Illinois Cent. R. Co. v. Cobb, 48 Ill. 402.

**45. Place of service.**—Where a judgment is rendered in the circuit court, process of garnishment can be sent to any county in the state where the garnishee may be found, and in this respect there is no difference between natural persons and corporations. Either may be served as garnishee. *Toledo, W. & W. R. Co. v. Reynolds*, 72 Ill. 487.

**46. Officer's return of service.**—The service of a garnishment against a railroad company returned in these words: "Served on the Montgomery & Eufaula Railroad Company, the garnishee, by leaving a copy of the garnishment with Lewis Owen, president of said road," is insufficient to authorize a judgment *nisi* on failure to answer, against said company, at the time of said service, if there is no appearance for said company; and this proof must be made a part of the record of the judgment. *Montgomery & E. R. Co. v. Hartwell*, 43 Ala. 508.

The service of notice of such judgment *nisi* in these words, "Executed by leaving a copy of the within with Lewis Owen, president of the Montgomery & Eufaula Railroad Company, this 4th day of May, 1868," is insufficient to sustain a judgment final on said judgment *nisi*, on failure to answer, without proof that Owen was such president at the date of service. *Montgomery & E. R. Co. v. Hartwell*, 43 Ala. 508.

By the act of October 16th, 1885 (Ga. Acts 1884-5, p. 99), service of summons of garnishment may be made upon the agent in charge of the office or business of a corporation in the county or district at the time of the service, but not upon any other agent of the corporation. It follows that the officer's return designating the person served merely as "agent," without describing him as the agent in charge of the office or business of the railroad corporation in the county or district, will not afford a basis for taking judgment against the corporation for failure to answer. *Hargis v. East Tenn., V. & G. R. Co.*, 90 Ga. 42.

Under the Maryland statute providing that process against a corporation shall be served on its "president or any director, manager, or other officer of the company," it is necessary that the return show that a garnishee process was served upon an officer designated by the statute, and a return merely

that it was served upon the corporation is not sufficient. *Northern C. R. Co. v. Rider*, 45 Md. 24.

A justice does not acquire jurisdiction in garnishment over a railroad company on return of service upon a specified person described merely as "agent of the within-named defendant," and the appearance of some person of a different name describing himself as "ticket agent of said road." *Lake Shore & M. S. R. Co. v. Hunt*, 39 Mich. 469.

A return on a writ of attachment which shows nothing more than that the officer summoned a garnishee is not sufficient to give the court jurisdiction over the *res* or to authorize a procedure to judgment against the defendant. Such an irregularity is not aided by a full return on the notice of garnishment, that not being a judicial writ. *Todd v. Missouri Pac. R. Co.*, 33 Mo. App. 110.

Where return of service of garnishment upon a railroad corporation fails to show that service was had upon the nearest freight or station agent of such company, it authorizes no judgment against the garnishee, and constitutes no bar to the payment by the garnishee of the debt to its debtor; and a payment by the garnishee to the plaintiff in the garnishment under the order of the court would not be compulsory, but voluntary in its character. *Dunn v. Missouri Pac. R. Co.*, 45 Mo. App. 29.

A sheriff's return on an attachment of real estate described the land as a certain tract containing 150 acres, more or less, on which is located the town of M., in L. county, Texas, along the line of a railroad named, including all the right, title, and interest of said railway company in and to any and all town lots and blocks heretofore laid off upon said tract of land, said interest being such as has been deeded, sold, released, or contracted to said company, less such portion of said interest as had been disposed of by them, and less any portion of the tract which had been set apart as a right of way and for depot purposes. Held, that the return was insufficient under Tex. Rev. St., art. 177, requiring the sheriff's return to describe the attached property with sufficient certainty to identify it. *San Antonio & A. P. R. Co. v. Harrison*, 72 Tex. 478, 10 S. W. Rep. 556.

**47. The levy, and its effect.**—By virtue of a levy of attachment, the attaching

creditor obtains no higher or better right to the property than the debtor had at the time of the attachment; and this was held to apply to railroad stocks which the debtor had conveyed by assignment before the levy of attachment. *Haldeman v. Hillsborough & C. R. Co.*, 2 *Handy (Ohio)* 101.

Levying an attachment upon the property of a foreign railroad in Georgia does not of itself render the attachment illegal. *South Carolina R. Co. v. Peoples' Sav. Inst.*, 12 *Am. & Eng. R. Cas.* 432, 64 *Ga.* 18.

The service of an attachment upon a railway company creates no lien upon property not within the county at the time it is served. *Sutherland v. Second Nat. Bank*, 6 *Am. & Eng. R. Cas.* 368, 78 *Ky.* 250.

**48. Necessity that officer take actual possession.**—Where the property to be attached is susceptible of seizure, the officer must take possession in order to bind it. So where such property of a railroad is in another county, mere service of garnishee process upon the company will not hold it. *Pennsylvania R. Co. v. Pennock*, 51 *Pa. St.* 244.—APPROVED IN *Bates v. Chicago, M. & St. P. R. Co.*, 14 *Am. & Eng. R. Cas.* 700, 60 *Wis.* 296.

To constitute a valid levy of attachment upon railway bonds in the hands of a depositary, it is necessary that the officer take them into actual custody; but where such depositary refuses to surrender them, but exposes them to the officer, who takes possession and then agrees to leave them with the depositary for the officer, it is a sufficient compliance with the law. *Coffin v. Northwestern C. Co.*, 19 *Abb. N. Cas. (N. Y.)* 383.

Where a statute provides that personal property capable of manual delivery may be attached by taking it into custody, goods in the hands of a railroad company to be shipped are not properly attached by service of notice upon the company without any manual delivery; and upon the consignee becoming insolvent the seller may claim them under his right of stoppage *in transitu* as against the attaching creditor. *Kiesel v. Union Pac. R. Co.*, 6 *Utah* 128, 21 *Pac. Rep.* 499.

The levy of an attachment upon goods in the hands of a railroad for transportation, by tacking a copy of the order of attachment upon the goods and notifying an agent of the road thereof, is insufficient. *Louisville & N. R. Co. v. Spalding*, (Ky.) 22 *Am. & Eng. R. Cas.* 418.

Under the Ohio Code the stock of non-resident stockholders in a railroad company is taken in attachment where notice of garnishment is served upon the company. *National Bank v. Lake Shore & M. S. R. Co.*, 21 *Ohio St.* 221.

**49. Preventing levy.**—A railroad company is not liable at the suit of an attaching plaintiff because one of its agents prevented the officer from levying the attachment upon goods already in a train, and by immediately running the train out of the state. *Western R. Co. v. Thomas*, 60 *Ga.* 313.

### 3. Quashing or vacating.

**50. Grounds for Quashing.**—Under *Tex. Rev. St.* 1879, art. 183, an application for a writ of garnishment in a suit where an original attachment was issued must show that an original attachment was issued in the suit, and a failure to so state is ground for quashing the writ, and cannot be cured by amendment. *Scurlock v. Gulf, C. & S. F. R. Co.*, 77 *Tex.* 478, 14 *S. W. Rep.* 148.

An attachment in a suit to collect interest coupons detached from railroad bonds will not be dissolved by showing that the plaintiff had brought a prior suit in equity to compel an accounting of the net income of the road, and to obtain payment of the same coupons, which suit had passed to an interlocutory decree ordering an accounting. As to how far such suit would constitute a defense must be determined at the trial, but it is not ground for abatement or for quashing the attachment. *Seeley v. Missouri, K. & T. R. Co.*, 39 *Fed Rep.* 252.

**51. — or vacating.**—Where it appears, on a motion to vacate an attachment, in an action by a non-resident against a foreign corporation, that the plaintiff has done work for the corporation in building its road, which work was largely in South Carolina, there is no error in sustaining the attachment on the ground that the cause of action arose in that state, at least to such extent as the plaintiff might show at the trial that it did arise in that state. *Central R. & B. Co. v. Georgia, C. & I. Co.*, 32 *So. Car.* 319, 11 *S. E. Rep.* 192, 638.

A railroad company moved to set aside an attachment, on the ground that the property attached was not the property of defendants, being subject to a bill of sale to the Dominion government. *Held*, that the defendant company could not take advan-

tage of the fact that the property belonged to a third party. *Kitchen v. Chatham B. R. Co.*, 17 *New Brun.* 215.

4. *Fixing the liability of the garnishee or trustee.*

**52. In general.**—The liability of a trustee is determined by the state of facts existing at the time of his disclosure and set forth therein. *Smith v. Boston, C. & M. R. Co.*, 33 *N. H.* 337.

A garnishee's liability is determined ordinarily by his accountability to the defendant, and if by any pre-existing *bona-fide* contract that accountability has been removed or modified, the garnishee's liability is correspondingly affected. *Baltimore & O. R. Co. v. Wheeler*, 18 *Md.* 372.

**53. What defenses are open, generally.**—It is no defense to an action for a debt that attaching orders have been served upon defendant for the claim, or that he has been ordered to pay it over, under the garnishment clauses of the C. L. P. A. There must be payment on such orders, or execution levied on defendant. *Sykes v. Brockville & O. R. Co.*, 22 *U. C. Q. B.* 459.

If a garnishee duly served delivers property to the receiver of the principal defendant appointed in another suit he does so at his own risk, but he will be allowed to show in defense that the receiver was entitled to the possession of the property as against the plaintiff in garnishment. *Crerar v. Milwaukee & St. P. R. Co.*, 35 *Wis.* 67.

In a garnishment proceeding against a railroad company the company denied having any funds or owing the defendant, but admitted that, at the time of the writ, a certain agent of theirs held certain funds belonging to the debtors, which had been paid to the creditor in the garnishment proceeding, but that such funds were not the funds of the railroad company. *Held*, that the company was not again liable to the creditor. *East Line & R. R. Co. v. Terry*, 50 *Tex.* 129.

**54. Payment of judgment in another state.\***—A judgment in the trustee process, in Massachusetts, against an inhabitant of the state, who owes a debt to a corporation established in another state, will protect the trustee against a suit brought in that state by such corporation to recover

such debt. *Ocean Ins. Co. v. Portsmouth Marine R. Co.*, 3 *Met. (Mass.)* 420.

Where a debt due from a railroad has been garnished in its hands in another state, payment there will constitute a good defense when sued in New York for the same debt. *Duggan v. Lake Shore & M. S. R. Co.*, 1 *Sheld. (N. Y.)* 399.

Where the wages of a railroad employé have been garnished in the hands of the company, which is a foreign corporation, in another state, payment there will constitute a good defense when action is brought against the company in New York. *Dealing v. New York, N. H. & H. R. Co.*, 8 *N. Y. S. R.* 386. *Robarge v. Central Vt. R. Co.*, 18 *Abb. N. Cas. (N. Y.)* 363.

In an action by an employé of an Alabama railroad corporation, whose road was also partly operated in Tennessee, to recover wages or compensation for work done here, plaintiff being then and still a resident of Alabama, a judgment rendered against the company in Tennessee, under a garnishment issued on a judgment there rendered against the plaintiff on personal service, and payment thereof by the garnishee, constitute no defense, in the absence of evidence showing that, by the statutes of Tennessee, the court there had acquired jurisdiction of the debt sought to be reached and subjected. *Alabama G. S. R. Co. v. Chumley*, 92 *Ala.* 317, 9 *So. Rep.* 286. — EXPLAINING *East Tenn., V. & G. R. Co. v. Kennedy*, 83 *Ala.* 462.

**55. Effect of notice to garnishee of assignment of debt.**—If a railroad company answers a foreign attachment of the wages of an employé, after it has notice that such wages have been assigned, admitting that it owes the amount which is garnished in its hands, a judgment in such proceeding is not a good defense to a subsequent action brought by the assignee. *Illinois C. R. Co. v. Bryant*, 70 *Miss.* 665, 12 *So. Rep.* 592.

**56. Garnishee's answer—Who may make.**—Where a railroad company is garnished it may answer by its proper officer under oath. *Oliver v. Chicago & A. R. Co.*, 17 *Ill.* 587.

Where a corporation is garnished it may answer by its chief executive officer under the seal of the corporation, but the answer must be sworn to by some proper officer. *Chicago, R. I. & P. R. Co. v. Mason*, 11 *Ill.*

\* See also *ante*, 2.

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*App. 525.*—FOLLOWING *Oliver v. Chicago & A. R. Co.*, 17 Ill. 587.

Where a corporation is garnished any officer having knowledge of the facts may make the affidavit, but it need not be made by the same officer upon whom the writ was served. *Duke v. Rhode Island Locomotive Works*, 11 R. I. 599.

Under Ala. Code, § 3222, an answer of a corporation as garnishee cannot be made by any person unless he makes affidavit that he is the duly authorized agent of such corporation to make such answer. *Memphis & C. R. Co. v. Whorley*, 74 Ala. 264.

The disclosure of a railroad company, in a garnishment proceeding in a justice's court, purported to have been made by the assistant-treasurer of the company. He testified that he was such officer, and that he made the disclosure in behalf of the company, and that he had knowledge of the facts therein stated. *Held*, that sufficient authority is shown to make such disclosure. *Whitworth v. Pelton*, 81 Mich. 98, 45 N. W. Rep. 500.

**57. Form, filing, and service of answer.**—When a corporation is proceeded against as a garnishee, its answer is to be received in the only mode in which a corporation can answer—under its corporate seal. *Baltimore & O. R. Co. v. Gallahue*, 12 Gratt. (Va.) 655.

There is nothing in Wis. Rev. St. ch. 130, § 49, providing that "the affidavit for process and garnishment shall be deemed the complaint in the action against the garnishee, and his answer taken on his examination shall be the answer in such action," forbidding the court to allow the filing of an amended answer by the garnishee when it will be in furtherance of justice. *Crerar v. Milwaukee & St. P. R. Co.*, 35 Wis. 67.

A railroad company having its business office in the city of Detroit, and being proceeded against as garnishee-defendant before a justice of the peace of the city of Grand Rapids, may transmit its sworn disclosure by mail, under act No. 175, Laws of 1885. *Whitworth v. Pelton*, 81 Mich. 98, 45 N. W. Rep. 500.

**58. Effect of garnishee's answer.**—The answer of a garnishee, that he had been informed and that he believed that the corporation ceased to have "any legal existence" previous to the issuing of the garnishment, is equivalent to the assertion that it was dissolved; and, if not negatived in

the manner prescribed by the statute, will be taken to be true. *Paschall v. Whitsett*, 11 Ala. 472.

Under the Kansas statute, making the possession by a foreign corporation of property or debts in that state a prerequisite to service thereon by publication, no jurisdiction is acquired by garnishing one of its officers, if it turns out upon answer that he has no money or property of the corporation in his hands. *Wheat v. Platte City & Ft. D. M. R. Co.*, 4 Kan. 370.—DISAPPROVING *Childs v. Digby*, 24 Pa. St. 23.—APPROVED IN *Bates v. Chicago, M. & St. P. R. Co.*, 14 Am. & Eng. R. Cas. 700, 60 Wis. 296.

A corporation is not liable as trustee in attachment for a balance appearing on its books as due the debtor, if it appears from the answer that the balance resulted from fraudulent or erroneous entries. *Bigelow v. York & C. R. Co.*, 37 Me. 320.

Where a person receiving freight from a railroad company is garnished for the amount of such freight for a debt owing by the company delivering the freight, and it appears from the answer that the freight was carried over two roads, and only a part of the whole is due to the debtor company, such party is only liable as trustee for such portion of the freight as is due to the debtor company. *Bowler v. European & N. A. R. Co.*, 67 Me. 395.

An attachment was issued against a non-resident debtor, and a summons of garnishment was served on the East Tennessee, V. & G. R. Co. by serving a station agent in Georgia. The answer to the summons showed that the corporation acted under charters from each of the states through which its road passes and in which it transacts business, and that it was indebted to the defendant in attachment for wages as a day laborer, working for it in Tennessee, where he resided and where it conducted its operations; that by the laws of that state the amount of wages due to him was exempt from the payment of his debts; that he had sued it for this amount in Tennessee, and though the garnishment was pleaded as a defense, had recovered judgment against it. The answer denied any indebtedness in Georgia to the defendant, or that he had ever rendered any service to the corporation in that state, or that it had any effects of his, etc. *Held*, that, under this answer, the debtor has neither effects nor a debt due to him



from the garnishee in Georgia; nor has he any effects on which an attachment could be levied or to which the jurisdiction of the courts of that state could attach. *Wells v. East Tenn., V. & G. R. Co.*, 74 Ga. 548.

At the time of service of trustee process on two persons constituting a firm, it appeared from the disclosure that they were indebted to the defendant railroad company for a considerable sum, and that prior to service one of the firm received a note from the company for a smaller sum than the amount of the firm's indebtedness, which note was payable after service of trustee process, but before any disclosure was made. Before disclosure the note was taken up and credited on the firm's indebtedness. *Held*, that the firm were properly chargeable as trustees for the whole amount of their indebtedness, without deducting the amount of the note. *Donnell v. Portland & O. R. Co.*, 76 Me. 33.

A railway company, being garnished, disclosed by its agent that as common carrier it had in its possession goods consigned to the principal defendant, but that the agent did not know whether they belonged to such defendant and had no personal knowledge of his business or of other consignments. *Held*, insufficient to make the company liable as garnishee in a proceeding before a justice. *Walker v. Detroit, G. H. & M. R. Co.*, 9 Am. & Eng. R. Cas. 251, 49 Mich. 446, 13 N. W. Rep. 812.

#### 59. Entry of judgment on answer.

—Upon the salary of the president being garnished in the hands of the company, the latter answered, stating that the debtor was its president, but that his salary had not been fixed by the directors, and then stating the amount that former presidents had been paid for the same services. *Held*, that it was proper to render judgment against the company as garnishee for the same amount it had paid former presidents, although the answer stated that its president had large sums of money belonging to the company in his hands, but where it clearly appeared that he was not in default. *South & N. Ala. R. Co. v. Falkner*, 49 Ala. 115.—QUOTED IN *People v. Remington*, 10 N. Y. S. R. 310.

#### 60. Examination—Interrogatories.

—A provision of the Alabama Code, § 3293, providing that a garnishee may, if required by plaintiff, be examined orally in the presence of the court, is mandatory, and, by § 3267, is made expressly applicable to cor-

porations, which changes the common-law rule and makes corporations liable to be dealt with in the same manner as natural persons; that is, that they may be required to answer orally, to have their answer rejected if they refuse to answer orally when so ordered, and to have judgment rendered against them for want of an answer. *Ex parte Cincinnati, S. & M. R. Co.*, 78 Ala. 258.

Where a garnishee answers, admitting an indebtedness for services rendered by the defendant under a continuing contract, to which a claim of exemption is thereupon interposed by the defendant, and on appeal, an oral explanation being required, he admits a further indebtedness which has accrued under the contract since his first answer was filed, this indebtedness is not included in the claim of exemptions already filed, and is liable to the plaintiff's demand unless a new claim is interposed. *Craft v. Louisville & N. R. Co.*, 93 Ala. 22.—REVIEWED IN *Young v. Louisville & N. R. Co.*, 95 Ala. 454.

Simple denials of indebtedness by a garnishee are not sufficient, but no rule can be given applicable to all cases as to how far he may be subjected to interrogatories, but such subjection is limited to good faith on the part of the plaintiff as well as the garnishee in making a full but pertinent disclosure. So where a railroad company was garnished, interrogatories propounded which tended to show not so much that money was in the hands of the company as that by proper management it would have been, were held improper. *Rhine v. Danville, H. & W. R. Co.*, 10 Phila. (Pa.) 336.—REVIEWING *Corbyn v. Bollman*, 4 Watts & S. (Pa.) 342.

**61. Evidence.**—Where suit is brought against a contractor and the railroad company as garnishee, the burden is on the plaintiff to show such facts as would enable the contractor himself to recover against the company. *Reagan v. Pacific R. Co.*, 21 Mo. 30.

A judgment against a railroad company, as garnishee of one of its employés, cannot be sustained where it appears that the company was running a quarry in a remote place; that it had established a boarding-house and store for its employés, the company being answerable for their bills, and deducting them from their wages; that at the time of the garnishment the debtor had

worked for the company fifteen days; and that his bill for supplies and board exceeded the amount which he had earned. Such proof fails to show affirmatively, as required by law, any indebtedness against the company. *Union Pac. R. Co. v. Gibson*, 15 *Colo.* 299, 25 *Pac. Rep.* 300.

The jurisdiction of the court, in case of the garnishment of the stock of a non-resident stockholder, is complete when the notice of garnishment has been served upon the corporation, and cannot be ousted by the subsequent answer of the garnishee denying any knowledge of such property, or by denying that the defendant in attachment is a stockholder therein; but in such case it is competent for the court to hear testimony, and, having found in favor of its jurisdiction, a final judgment and order in the case are not void. *National Bank v. Lake Shore & M. S. R. Co.*, 21 *Ohio St.* 221.

A railroad company being summoned as a garnishee, and a jury having been impanelled to try whether it has made a full disclosure of its indebtedness to the defendant in the action, the statements of a division engineer to a third person in relation to the indebtedness of the company to the defendant are not competent evidence, it not appearing that said engineer was the agent of the company having any authority on this subject, or that, at the time of making the statements, he was engaged as agent about the business referred to, so as to make his statements part of the transaction, and explaining the nature thereof. *Baltimore & O. R. Co. v. Gallahue*, 12 *Gratt. (Va.)* 655.

**62. Discharge or release of garnishee.**—The existence of a contingent liability on the part of a trustee for the principal defendant furnishes no valid ground for the discharge of the trustee; nor will the court, after disclosure completed, direct a suit to be continued to await the result of such contingent liability. *Smith v. Boston, C. & M. R. Co.*, 33 *N. H.* 337.

A railroad garnishee of an attachment defendant, summoned to appear before a justice of the peace, is released from the claims of such defendant if he pays to the constable the amount due from him to such defendant, in conformity with Rev. St. Mo. 1879, § 2551, and the exoneration or release of the garnishee from such claims is not affected by the subsequent misapplication of the fund by the constable. *Melton v.*

*Kansas City, Ft. S. & M. R. Co.*, 39 *Mo. App.* 194.

Both the plaintiff and defendant resided in the state of New York; the contract upon which the suit was brought and the contract upon which it was sought to charge the trustee were made in that state; the debt was for services rendered there, and was due and payable there; and the trustee was a body corporate existing under the laws of New York, operating a continuous line of railroad from Troy, N. Y., to Rutland, Vt. *Held*, on these facts and others agreed to, that the trustee should be discharged. *Towle v. Wilder*, 57 *Vt.* 622.—REVIEWED IN *Martin v. Central Vt. R. Co.*, 50 *Hun (N. Y.)* 347, 20 *N. Y. S. R.* 375, 3 *N. Y. Supp.* 82.

**5. Claims of third persons; Priority; Intervention.**

**63. In general.**—Where a strip of land with a railroad track thereon is attached by a creditor in a proceeding against a foreign corporation, with no charter privilege from the state (West Virginia) in which the road is situated, and it does not appear in the record that any railroad chartered in that state has any interest therein, the court will regard the strip of land so attached as ordinary real estate; but no decree with reference thereto or sale of the land thereunder can affect the rights of any railroad chartered in that state, or any interest of such railroad in such land, of whatever character that interest may be, such road not being a party to the suit. *Chapman v. Pittsburgh & S. R. Co.*, 9 *Am. & Eng. R. Cas.* 484, 18 *W. Va.* 184.

When there has been a foreign attachment suit in equity and an ascertainment of the amount of the indebtedness due from the defendant to the plaintiff, and the debtor appeals from the decree so ascertaining the amount, which is affirmed, and the court below is proceeding to execute the decree by selling the attached property, it is too late for a claimant of the property to dispute the debt. *Chapman v. Pittsburg & S. R. Co.*, 26 *W. Va.* 324.

Because *pendente lite* a defendant railroad company has taken possession of a strip of land attached, on which was a roadbed and railroad track at the time the attachment was levied, it has no right to insist that a section of a railroad cannot be sold. It takes the property, if at all, *cum onere*. *Chapman v. Pittsburg & S. R. Co.*, 26 *W. Va.* 299.

**64. Priority.\***—A railroad was mortgaged to trustees to secure bonds of the company, and subsequently, under a vote of the directors, a further deed was made surrendering the mortgaged property to the trustees, "to be held solely for the use and purposes for which it was conveyed." Immediately the trustees took possession they gave notice to the employés and to all persons having any of the company's property in their possession. *Held*, that this was such "open, visible, and exclusive possession" as the law required to enable them to hold it against subsequent attaching creditors; and the fact that the employés were retained by the trustees was not calculated to so deceive the public as to affect the validity of the delivery. *Henshaw v. Bank of Bellows Falls, 10 Gray (Mass.) 568.*

A creditor of a railroad company attached its property and receipted to the officer for the same. Subsequently the company executed a lease of its property to the creditor, with a provision that he should hold it as security for his liability as receiver of it, and he took possession under the lease. Afterward other creditors sued the company and summoned the lessee as trustee. Still later other creditors sued out executions on judgments against the company, and the officer took the road out of the lessee's hands and sold it on execution. The question made on a bill filed was as to the priority of the different claims, and as to the right to attach the property under trustee process. *Held*, that the trustee process was a proper remedy, and that when prior specific attachments had been satisfied by the sheriff out of the property he should restore any surplus to the lessee, who might hold it subject to his rights as lessee and his liability as trustee. *Bank of Middlebury v. Edgerton, 30 Vt. 182.*

**65. Intervention.**—Where a foreign corporation extends its road into Georgia and its property is there attached, and a receiver is afterward appointed in the state where the corporation is created, if he wishes to defend the attachment suits he must apply to the court where they are pending, to be made a party; it is not proper to petition the court for an order discharging the property from the levy and

ordering it to be turned over to the receiver. *South Carolina R. Co. v. People's Sav. Inst., 12 Am. & Eng. R. Cas. 432, 64 Ga. 18.*

Where other creditors have made themselves parties to a suit in which an attachment has issued, there is no "final adjustment," within the meaning of Ind. Rev. St. 1881, § 943, until all the pending claims have been settled by judgment, and an order for the sale of the attached property has been made, and until then other creditors may continue to come in. *Lexington & B. S. R. Co. v. Ford Plate Glass Co., 84 Ind. 516.*—*Quoting Cooper v. Metzger, 74 Ind. 544.*

**66. Interpleader.**—The wages of a minor, his father being dead, belong to his mother; and where, in a garnishment proceeding against a railroad (the employer of the minor) in favor of the minor's judgment-creditor, the mother interpleads for the wages in question, but fails to prosecute the interplea, and an order is made to pay the wages into court for such judgment-creditor, the minor cannot in a subsequent action recover such wages from the garnishee. *Dooley v. Missouri Pac. R. Co., 45 Mo. App. 308.*

6. *The judgment: how enforced and how reviewed.*

**67. Form and sufficiency of the judgment.**—In an action at law against a non-resident railroad company, in which an attachment has been sued out, if the absent defendant does not appear in the case, and has not been served with process, there should not be a personal judgment against him; the attached effects alone are subjected. But if he does appear to the action there may be a personal judgment only against him, or there may be both a personal judgment and an order and judgment subjecting the attached effects. *Mahany v. Kephart, 15 W. Va. 609.*

Where an attachment is sued out against a non-resident corporation which has the equitable title to real estate attached in the cause, a personal decree may be rendered against such non-resident corporation which appears in the cause; but the attached property will not be sold in the absence of trustees who hold the legal title; they must either be served with process, or, if non-residents, an order of publication must issue against them and be duly published. *Chapman v. Pittsburgh & S. R. Co., 9 Am. & Eng. R. Cas. 484, 18 W. Va. 184.*

A debt due to a contractor by a passenger

\* Right to possession of property as between receiver and execution- or attachment-creditor, see note, 20 L. R. A. 392.

railroad company, which was payable in their own bonds, was attached by writ of foreign attachment by a creditor of the contractor. After judgment, upon interrogatories answers were filed by the company admitting a much larger indebtedness than plaintiff's demand; afterward the company settled with the contractor, paying him in bonds as agreed upon, and retaining enough of them, if taken at par, to pay plaintiff's claim, which facts were set out in amended answers. Judgment being entered on the answers for the amount of the claim at the time of the attachment, excluding the interest accrued, payable in the bonds of the company at par—*held*, that the judgment was erroneous; that, as the company had admitted that there was enough in their hands to pay the claim of plaintiffs which they had not retained, judgment should have been against them, *de bonis propriis*, for the full amount of the claim with interest and costs. *Frederick v. Easton*, 40 Pa. St. 419.

**68. — and how enforced.**—When two garnishment suits are pending against the same defendant and the same garnishee, but in favor of different plaintiffs, the court will not look to the record of one case on the trial of the other, except as it is offered in evidence; and if it appears that the debtor filed a claim of exemption in the second case, and that it was not contested, the plaintiff in that case cannot complain that the court ordered the older judgment to be first satisfied, and awarded him only the admitted balance remaining in the hands of the garnishee. *Young v. Louisville & N. R. Co.*, 95 Ala. 454, 11 So. Rep. 121.—REVIEWING *Craft v. Louisville & N. R. Co.*, 93 Ala. 22.

**69. Sale and rights of purchaser.**—The title to personal property passes to the purchaser upon a sale by an officer, even before the purchase-money is paid. So where personal property of an express company was taken on mesne process and sold by the sheriff, but was seized by a United States collector of internal revenue for the non-payment of taxes before the purchasers had obtained possession of the same, or paid the purchase-price—it was *held* to belong to the purchasers as against the collector. *Abbott v. McCartney*, 1 Holmes (U. S.) 80.

**70. Writ of error.**—In a suit against a garnishee by *scire facias*, and judgment therein by default, it cannot be alleged on error that the writ of attachment, as ap-

pears by the record of the proceedings against the defendant in attachment, was not duly served on such garnishee. The recital in the *scire facias* that the writ was duly served on the garnishee and the judgment by default are conclusive against him. *Young v. Delaware, L. & W. R. Co.*, 38 N. J. L. 502.

An issue in a garnishee proceeding against a railroad was tried by a jury which found a verdict for the creditor. Before judgment was signed the railroad company moved to expunge the judgment and to arrest it, which motion was overruled and exception taken. No bill of exceptions was taken in regard to the trial. *Held*, that the action of the court in overruling the motion in arrest of judgment could not be reviewed on a writ of error. *Canal & C. St. R. Co. v. Hart*, 114 U. S. 654, 5 Sup. Ct. Rep. 1127.

### ATTORNEY-GENERAL.

When information must be filed by, see *Quo Warranto*, 5.

**1. Power to proceed against corporations.**—The Illinois statutes do not change the common-law powers and duties of an attorney-general to institute proceedings in equity to abate nuisances, etc.; and a bill may properly be filed by the attorney-general to restrain the operation of cars upon streets of a large city, on the ground that they are a nuisance. *Hunt v. Chicago & D. R. Co.*, 20 Ill. App. 282; *affirmed in part and reversed in part* in 121 Ill. 638.—QUOTING *Attorney-General v. Chicago & E. R. Co.*, 112 Ill. 520.

The attorney-general is not authorized to maintain a suit to prevent the payment of bonds issued by a railroad company without authority where public interest is no further involved than that the increase of indebtedness may require higher charges for passengers and freight, by § 22, art. 4, Tex. Const., giving him the power to bring suit to prevent the exercise of unauthorized powers by corporations, or the demanding or collecting of any species of tax, tolls, freight or wharfage not authorized by law. *State v. Farmers' L. & T. Co.*, 50 Am. & Eng. R. Cas. 683, 81 Tex. 530, 17 S. W. Rep. 60.—FOLLOWED IN *State v. Kennedy*, 81 Tex. 553.

**2. Election of remedies.**—Where a railroad company is charged with a viola-

tion of legal duty, the attorney-general may proceed against it either by an information in the nature of a *quo warranto* or by injunction, but he cannot proceed by both remedies. *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.

**3. Power to bind state.**—The authority conferred upon the attorney-general by the So. Car. act of 1871, authorizing him to institute actions against railroads which were in default in paying interest on their bonds guaranteed by the state, to bind the state by appearing in an action against a railroad company, must be confined to cases similar to those which, by the same act, he was authorized to bring against railroad companies. *Ex parte Dunn*, 8 So. Car. 207.

Where the constitution of a state does not make it liable to be sued, an action cannot be maintained against it except as provided by the constitution of the United States. The mere consent of the attorney-general, by appearing to the action and answering the complaint in the name of the state, does not bind it. *Ex parte Dunn*, 8 So. Car. 207.

The attorney of the commonwealth for the county of Suffolk, after the Massachusetts act of 1843, ch. 99, abolishing the office of attorney-general, and previous to that of 1849, ch. 186, re-establishing that office, was authorized by law, upon the requisition of the governor, to institute proceedings before the proper tribunal, for the recovery of damages sustained by the commonwealth for land taken for a railroad, and to prosecute the same to their final termination; and such attorney had a right, also, with the permission of the court or tribunal in which the proceedings were pending, and for sufficient cause, to avail himself of the aid of other suitable counsel, in conducting and managing the same, under his direction and control and upon his responsibility. *Commonwealth v. Boston & M. R. Co.*, 3 Cush. (Mass.) 25.

**4. Enforcement of penal laws by.**—A state's attorney should not be permitted to prosecute actions, in the name of the state, for his own benefit, to recover the penalty prescribed by Ill. St. ch. 114, §§ 63, 64, against conductors and engineers for leaving cars on the track at highway crossings, to be prosecuted for in the name of the state for the use of the person who may sue for the same. *People v. Wabash, St. L. & P. R. Co.*, 12 Ill. App. 263.—QUOTING *Peo-*

*ple ex rel. v. North Chicago R. Co.*, 88 Ill. 537.

**5. Intervening in suits against corporations.**—The attorney-general was asked to intervene in an application for an injunction to restrain the building of an electric railway through the Gettysburg battlefield grounds. *Held*, that, so far as the question involved the good taste or sentiment in building a road through such grounds, the attorney-general would not express an opinion. *Gettysburg B. F. Assoc. v. Gettysburg E. R. Co.*, 2 Pa. Dist. 659.

## ATTORNEYS.

**Advice of, as a defense, see CONTEMPT, 6; MALICIOUS PROSECUTION, 13.**

**Employment of physicians by, see MEDICAL SERVICES, 4.**

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### I. EMPLOYMENT OF AND RELATION WITH CLIENT.

**1. Power to appoint and how exercised.**—The power to employ attorneys and counsellors-at-law is among the implied powers of the managing officers of a corporation, and a formal resolution authorizing them to do so is not necessary. *Southgate v. Atlantic & P. R. Co.*, 61 Mo. 89.

Where a local attorney is appointed for a railroad company by the company's general manager, it will be liable for his services unless he knew, or by the exercise of ordinary diligence might have known, that the general manager was not authorized to appoint him. *St. Louis, Ft. S. & W. R. Co. v. Grove*, 39 Kan. 731, 18 Pac. Rep. 958.

The appointment of an attorney to a railway company under the charter power given to the directors to appoint and displace any of the officers need not be under seal. *Reg. v. Cumberland (Justices)*, 5 Railw. Cas. 332, 5 D. & L. 431, 12 Jur. 1025, 17 L. J. Q. B. 102.

Plaintiff was general attorney for the defendant company, and in that capacity, but under specific directions from its president, he rendered services in several suits and was paid for the same. After he ceased,

by a tacit understanding, to be such general attorney, and without having been employed as a special attorney, and without knowledge on the part of the defendant's agents, except its attorney, who had no authority to employ him, he also rendered services of some value in the same suits. *Held*, that the plaintiff was discharged from all employment in the suits, and that he could not recover, even on the ground of implied assumpsit. *Safford v. Vermont & C. R. Co.*, 60 *Vt.* 185, 6 *N. Eng. Rep.* 510, 14 *Atl. Rep.* 91.

**2. Eligibility.—Who should be appointed.**—The fact that an attorney who was employed by and rendered service for a railroad company is a stockholder of the company will not prevent him from acting as attorney, or from recovering for services rendered; and where it appears that he rendered services the court will presume that they were legal. *Barker v. Cairo & F. R. Co.*, 3 *T. & C. (N. Y.)* 328.

Where a foreclosure suit is instituted against a railroad company, and pending it a receiver is appointed, an attorney who represents the plaintiff should not be authorized to act as legal counsel for the receiver. *Blair v. St. Louis, H. & K. R. Co.*, 20 *Fed. Rep.* 348.

Where a receiver is appointed in a railroad foreclosure suit, an attorney who is related to the receiver and who comes into the circuit and becomes a member of the bar for the purpose of securing such appointment should not be appointed as legal adviser of the receiver. *Blair v. St. Louis, H. & K. R. Co.*, 20 *Fed. Rep.* 348.

**3. Ratification of previous employment.**—Where an attorney is employed by the company's managing director without authority to do so, acceptance of his services will bind the company to pay for them. *Albert R. Co. v. Peck*, 26 *New Brun.* 191.

A railroad company which succeeds to the rights of another company under a lease, and operates the roads of such other company, and continues to receive the services of attorneys employed by it and ratifies such employment, becomes liable to pay for such services. *International & G. N. R. Co. v. Clark*, 48 *Am. & Eng. R. Cas.* 81, 81 *Tex.* 48, 16 *S. W. Rep.* 631.

**4. Relation with client and third persons.**—The purchase of railroad property at a foreclosure sale by the solicitor of

the company for the benefit of the bondholders will be closely scrutinized, but is not, of itself, void, but will be allowed to stand until impeached. *Pacific R. Co. v. Ketchum*, 101 *U. S.* 289.

An attorney acting through fraud and with the intention of defrauding a third party cannot deny his liability for loss sustained by his wrong act under his privileges as an attorney-at-law. Nor can he deny his liability as an agent, for as such he is not justified in knowingly committing wilful and premeditated fraud upon another. *Poole v. Houston & T. C. R. Co.*, 9 *Am. & Eng. R. Cas.* 197, 58 *Tex.* 134.

## II. AUTHORITY AND POWERS.

**5. In general.**—Where an attorney is employed to attend to a suit he has the implied power to do anything necessary in the suit, which would include the suing out of a commission to take depositions and the employment of competent persons to execute the same. *Fairchild v. Michigan C. R. Co.*, 8 *Ill. App.* 591.

An attorney-at-law employed to prosecute a suit is impliedly authorized to collect the judgment therein. *Conway County v. Little Rock & Ft. S. R. Co.*, 39 *Ark.* 50.

A notice to the general attorney of a railroad company relating to matters connected with its land department, before the institution of any action against the company, is not notice to the company's land department, unless the general attorney has been given special charge of the subject-matter. *Atchison, T. & S. F. R. Co. v. Benton*, 42 *Kan.* 698, 22 *Pac. Rep.* 698.

Neither the Pennsylvania act of May 25, 1887, giving plaintiff's attorney, in an action of trespass, power to sign the statement, nor Court Rule xxxi, authorizes the attorney to swear to the statement. *Warner v. Railroad Co.*, 1 *Pa. Dist.* 247.

**6. Authority to appear in suits.**—A corporation is bound by the acts of an attorney who has appeared for it to the knowledge of the directors, although the attorney's authority has not been given under the seal of the corporation. *Faviell v. Eastern Counties R. Co.*, 2 *Exch.* 344, 6 *D. & L.* 54, 17 *L. J. Exch.* 297, 17 *L. J. Exch.* 223.

The appearance of counsel specially for a railroad, and his moving to dismiss a petition by a creditor for the appointment of a re-



ceiver of its property, do not preclude him from subsequently appearing for the mortgage trustee in a proceeding to foreclose a mortgage of the company. *Shaw v. Bill*, 95 U. S. 10.

**7. Power to bind client, generally.**

—An attorney employed by a railroad company merely to represent it in a condemnation proceeding for right of way across certain land, has no authority to bind the railroad by an agreement for the payment of damages to a person not a party to the suit, on account of interference with a logging road operated by him across such proposed right of way. *Haynes v. Tacoma, O. & G. H. R. Co.*, 7 Wash. 211, 34 Pac. Rep. 922.

In treating with the owner of lands for the right to cross the same by a railway, or in proceedings before arbitrators appointed between him and the company, with a view to ascertain the amount of compensation, the solicitor acting for the company at the arbitration is not qualified to enter into any special agreement binding the company to construct and maintain a crossing. *Wood v. Hamilton & N. W. R. Co.*, 25 Grant Ch. (Ont.) 135.

Plaintiff brought suit against a railroad company to recover the value of certain wool which was claimed to have been destroyed by fire while in the defendant's warehouse. After the company had answered, plaintiff served upon the attorney for the defendant a demand, under Cal. Civ. Code, § 1838, to be informed of the circumstances under which the loss occurred. *Held*, that the attorney was not authorized by virtue of his employment to give such information or to make *in pais* admissions or statements in respect to the circumstances under which the loss occurred, and that his answer was therefore not admissible in evidence against the company. *Wilson v. Southern Pac. R. Co.*, 53 Cal. 735.

Plaintiff, a female passenger, sued a railroad company for the loss of her trunk, and in giving her deposition the company's attorney put a cross-interrogatory to her which she claimed was libellous, and by an amendment she set it up as additional claim for damages. *Held*, that, in the absence of anything to show that the act of the attorney was directed or approved by the company, the latter would not be bound by his act, even if the interrogatory was libellous.

*Galveston, H. & S. A. R. Co. v. Smith*, 81 Tex. 479, 17 S. W. Rep. 133.

**8. — by admissions.**—An admission of service of process, signed by the attorney of a railroad company, and returned with the writ, must be construed as a waiver of service on the company, and a consent by him to appear voluntarily in the cause for the garnishee. The authority of the attorney to waive service and give such consent will be presumed. *Northern C. R. Co. v. Rider*, 45 Md. 24.

Where a railroad company is sued for damages, an admission by the company's attorney as to the amount of plaintiff's damages, in case he was entitled to recover at all, is not binding on the company at a second trial. *Weisbrod v. Chicago & N. W. R. Co.*, 20 Wis. 419.

**9. — by stipulations.**—Where a client intrusts the management of a suit to his attorney, that management is exclusive, and neither the client himself nor his agent can sign a stipulation for a continuance. *Nightingale v. Oregon C. R. Co.*, 2 Sawy. (U. S.) 338.

An attorney employed by a railway company to procure a condemnation of land for a right of way cannot bind the petitioner by his agreement or stipulation as to the plan of constructing the road, in the absence of special authority to do so. *Wabash, St. L. & P. R. Co. v. McDougall*, 36 Am. & Eng. R. Cas. 597, 126 Ill. 111, 18 N. E. Rep. 291, 1 L. R. A. 207.

**10. Power to make compromises.**

—Pending a suit against a railroad company for personal injuries, plaintiff's attorney, acting under a mistake of fact as to his authority, entered into an executory agreement with the company for a compromise of the suit, which was not entered of record. *Held*, that the company could not specifically enforce the agreement against the plaintiff. *New York, N. H. & H. R. Co. v. Martin*, 158 Mass. 313, 33 N. E. Rep. 578. —QUOTING AND FOLLOWING *Moulton v. Bowker*, 115 Mass. 36.

An attorney-at-law cannot bind his client by an unauthorized agreement to compromise a damage suit against a railroad company, and where seasonable application is made the court has power to vacate a judgment entered upon such agreement, and to place the parties *in statu quo*. *Dalton v. West End St. R. Co.*, 159 Mass. 221, 34 N. E. Rep. 261.—APPROVING *New York*,

N. H. & H. R. Co. v. Martin, 158 Mass. 313.

An attorney for a railway company has no authority, when acting under general authority as such, in defending a suit instituted against the company by an employé for damages, to compromise the suit on terms which involve the permanent future employment by the company of the plaintiff. Such a contract can only be valid when made in pursuance of special authority. *East Line & R. R. Co. v. Scott*, 38 Am. & Eng. R. Cas. 16, 72 Tex. 70, 10 S. W. Rep. 99, 298.

In an action for damages for breach of a contract to employ the plaintiff, evidence that the defendant's attorney agreed to a compromise judgment in a suit at plaintiff's instance, that the judgment was paid by defendant, and that the attorney had charge of other suits arising out of the same accident and endeavored to compromise them, is sufficient to warrant the jury in finding that he had authority to make the compromise upon which the action is founded, and, as part thereof, to agree to give the plaintiff employment. *East Line & R. R. Co. v. Scott*, 38 Am. & Eng. R. Cas. 16, 72 Tex. 70, 10 S. W. Rep. 99, 298.

**11. Proof of authority, and when presumed.**—An offer to show that the solicitor of a company had control of its legal business is not sufficient proof of his authority to accept the surrender of a lease or an abandonment of the premises. *James-town & F. R. Co. v. Egbert*, 152 Pa. St. 53, 25 Atl. Rep. 151.

Where a suit for a tort is instituted against a railroad company, and a notice is served on the company, which is signed by an attorney for the plaintiff, and the same attorney signs the declaration and appears in the suit for the plaintiff, in the absence of anything to the contrary the court will presume that the attorney had authority to sign the notice. *Steffe v. Old Colony R. Co.*, 156 Mass. 262, 30 N. E. Rep. 1137.

### III. COMPENSATION AND LIEN.

**12. Compensation, generally.\***—Where a railroad company contracts to pay an attorney reasonable fees for assisting in "trials in cases against the company," the right of the attorney to compensation is not

\* Attorney's fees in stock-killing cases, see note, 30 AM. & ENG. R. CAS. 491.

See also ANIMALS, INJURIES TO, §.

limited to trials in the narrowest technical meaning of the word, but he is entitled to pay for services rendered in actions where no issues of fact were tried. *Louisville, N. A. & C. R. Co. v. Reynolds*, 118 Ind. 170, 20 N. E. Rep. 711.

Where a prosecuting attorney appears before a magistrate at the request of a railroad company, and prosecutes one charged with the commission of a felony, preparing the papers necessary for such purpose, there is no implied contract that such company will pay him for such services. *Cincinnati, S. & C. R. Co. v. Lee*, 37 Ohio St. 479.

The fact that a solicitor in promoting a railway induced persons to sign the subscription contract by assurances that they would incur no liability if the line were not made, does not prevent such solicitor, after the undertaking was abandoned and the company ordered to be wound up, from proving a claim as creditor for professional services in obtaining the act of incorporation. *Brampton & L. R. Co., in re Shaw's Claim*, L. R. 10 Ch. 177, 44 L. J. Ch. 670, 23 W. R. 813, 33 L. T. 5; affirming 44 L. J. Ch. 537, L. R. 20 Eq. 620, 24 W. R. 113, 32 L. T. 592.

It is competent for a railroad company to agree to pay its solicitors a yearly salary instead of paying fees for actual services rendered, whether such contract be for past or future services. *Falkiner v. Grand Junction R. Co.*, 16 Am. & Eng. R. Cas. 591, 4 Ont. 350.

Attorneys for petitioners, where a railroad company is in the hands of a receiver, will not be required to go without any compensation during the pendency of the suit, but intermediate allowances will be small, and will not be allowed as a determination as to what the services up to that time are really worth, or what they would be worth at the final disposition of the case. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 23 Fed. Rep. 675.—FOLLOWED IN *Bound v. South Carolina R. Co.*, 43 Fed. Rep. 404.

Plaintiff, an attorney-at-law, applied for the position of local attorney to a railroad company, but on being informed that he would not be exclusive attorney for the county he said he would not accept the position. He was afterward appointed, and he accepted the position supposing that he was the exclusive local attorney, but the company did not so understand it. Acting under

the belief that he was the exclusive attorney for the county, he appeared in good faith in an action against the company, and rendered certain services, when another attorney was sent to take charge of the case. *Held*, that, the appearance and services being in good faith, he should be allowed compensation therefor. *Boyd v. Chicago & A. R. Co.*, 84 Mo. 615.

**13. Agreements for contingent fees—Champerty.\***—It is not error to exclude testimony showing whether or not the attorney for a plaintiff in a negligence case has taken the case to prosecute on a percentage, and whether or not he is bearing the expenses of the litigation. *Palmer v. Michigan C. R. Co.*, 93 Mich. 363, 53 N. W. Rep. 397.

Advancing money needed to carry on a suit is within 2 N. Y. Rev. St. 288, §§ 71, 72, prohibiting attorneys from buying claims or making advances; but an attorney is not prohibited from agreeing upon any compensation with his client, whether fixed or contingent. Said sections are not repealed by § 303 of the Code. *Coughlin v. New York C. & H. R. R. Co.*, 71 N. Y. 443, 27 Am. Rep. 75; reversing 8 Hun 136.

By contract between a plaintiff in an action and his attorney therein the former agreed to pay the latter for his services a certain sum if he won the cause, and nothing if he failed to do so. The contract contained this further stipulation respecting the agreed compensation: "I hereby agree that he [the attorney] shall receive said money from the Minneapolis & St. Louis R. R. out of the amount due me from said railroad company for running through my land, to be paid when said suit is settled." *Held*, that the agreement was not champertous or illegal. *Canty v. Latternar*, 15 Am. & Eng. R. Cas. 380, 31 Minn. 239, 17 N. W. Rep. 385.

A contract, construed as an equitable assignment of a portion of a chose in action, entitled the attorney to receive the same specifically, the condition respecting payment having been fulfilled. *Canty v. Latternar*, 15 Am. & Eng. R. Cas. 380, 31 Minn. 239, 17 N. W. Rep. 385.

The railroad company having, before the contract was made, but without the knowledge of the parties, deposited in court the

amount of the debt referred to, pursuant to statute, it is considered that the attorney had a right, by force of the contract and without a reformation of it, to recover out of the fund in court the stipulated sum. *Canty v. Latternar*, 15 Am. & Eng. R. Cas. 380, 31 Minn. 239, 17 N. W. Rep. 385.

**14. Agreements for share in subject-matter of litigation.**—The right of attorneys-at-law to contract in good faith for a contingent interest in the subject-matter of the litigation, by way of compensation for professional services, is now recognized. *Stewart v. Houston & T. C. R. Co.*, 62 Tex. 246.

An agreement between an attorney and his client that the former will, for a certain share of the damages, prosecute a suit against a railroad company to recover for personal injuries is not void as champertous. *McDonald v. Chicago & N. W. R. Co.*, 29 Iowa 170.—**DISTINGUISHING** *Boardman v. Thompson*, 25 Iowa 487.—**FOLLOWED IN** *Winslow v. Central Iowa R. Co.*, 71 Iowa 197.

The above rule, applied where the attorney was to pay no costs or expenses except his own personal expenses, is not champertous. *Winslow v. Central Iowa R. Co.*, 71 Iowa 197, 32 N. W. Rep. 330.—**FOLLOWING** *McDonald v. Chicago & N. W. R. Co.*, 29 Iowa 170; *Jewel v. Neidy*, 61 Iowa 299.

A claim by a father and mother against a railroad company for negligently killing their child does not survive to their legal representative; and as only claims which survive are assignable, an attorney cannot take an assignment of a one-half interest in a claim against a railroad company which he is prosecuting to recover for the death of a child, and therefore cannot acquire such an interest in the claim as would prevent a compromise between the railroad company and his clients, and the payment of the whole sum to the clients. *Texas Mex. R. Co. v. Showalter*, 3 Tex. App. (Civ. Cas.) 92.

**15. Compensation out of trust funds or assets.**—The rule that a necessary expense of the legal management of a trust fund, whether incurred by the trustee or the beneficiary, may be charged upon the fund by a decree in equity, is applicable to the property of a business corporation. *Burke v. Concord R. Co.*, 62 N. H. 531.

Though suit may be brought by second-mortgage bondholders for the appointment of a receiver of a railroad, if a receiver is ap-

\* Illegal contracts with attorneys, see note, 15 AM. & ENG. R. CAS. 382.

Law of maintenance and champerty, see note, 11 AM. & ENG. R. CAS. 11.

pointed by the consent of all parties interested, services rendered by the attorneys for the plaintiffs, being for the common good, should be paid for out of the common assets of the company. *Bound v. South Carolina R. Co.*, 43 Fed. Rep. 404.—FOLLOWING *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 23 Fed. Rep. 675.

Where an attorney and counsellor-at-law, employed by trustees of certain mortgaged property to foreclose the mortgages, upon a stipulated retaining fee entered upon such retainer, commenced the suit, prosecuted it until prevented by the civil war, and, after the termination of the war offered to go on with the suit; but in the meantime the trustees having died, a new suit was commenced and prosecuted, without his assistance, by the bondholders (for whose security the mortgages were executed) to foreclose the same mortgages, in which suit a receiver was appointed—*held*, that his claim for his fee was chargeable against the funds obtained by the receiver for the mortgaged property. *Cowdrey v. Galveston, H. & H. R. Co.*, 93 U. S. 352, 9 Am. Ry. Rep. 361.—QUOTED IN *Lyman v. Central Vt. R. Co.*, 59 Vt. 167.

In a proceeding against an insolvent railroad company there were two sets of mortgage bonds, one drawing 6 per cent interest and the other 7 per cent. The former was adjudged to constitute a prior lien. An attorney for a stockholder appeared in the action and successfully resisted the payment of certain taxes claimed from the company, and, acting under directions from the receiver, defeated a claim against certain lands belonging to the company. Another attorney appeared, representing the 7 per cent bonds, and rendered services on behalf of the company. *Held*, that neither was entitled to be paid from the funds belonging to the 6 per cent bondholders. *Hand v. Savannah & C. R. Co.*, 21 So. Car. 162.

A receiver of a railroad company employed an attorney to bring suit against persons holding lands adversely which belonged to the company, agreeing to pay him one-half of the recovery for his services. He recovered the land, which was sold with the other property of the company. *Held*, that the attorney was entitled to compensation out of the fund in the receiver's hands. *Hand v. Savannah & C. R. Co.*, 21 So. Car. 162.

A holder of coupons of 6 per cent bonds

of a railroad company filed a bill against the company to obtain payment, on behalf of himself and all others holding like coupons. Subsequently holders of 7 per cent bonds intervened and made one of the 6 per cent bondholders a defendant in behalf of himself and all other holders of such bonds, who employed counsel; and all creditors of the company were called in by advertisement. The 6 per cent bondholders were adjudged to have the prior lien, and the property was sold for an amount not sufficient to pay their lien. *Held*, that, as the defendant in the intervention suit was made the representative of all the 6 per cent bondholders, only fees to attorneys employed by him should be allowed, though other attorneys for the 6 per cent bondholders rendered valuable services. *Hand v. Savannah & C. R. Co.*, 21 So. Car. 162.—FOLLOWED IN *Finance Co. of Pa. v. Charleston, C. & C. R. Co.*, 52 Fed. Rep. 678. QUOTED IN *Bound v. South Carolina R. Co.*, 51 Fed. Rep. 58.

In such case counsel for plaintiff should be allowed compensation from the common fund, so far as payable on the 6 per cent bondholders' coupons. *Hand v. Savannah & C. R. Co.*, 21 So. Car. 162.

#### 16. The attorney's lien, generally.

—The right to a lien on money due to his client in the hands of the adverse party, given to an attorney by subdivision 3 of § 215 of the Code, is not confined to actions on contract, but exists in all actions where there is a money liability from the adverse party to his client. *Smith v. Chicago, R. I. & P. R. Co.*, 56 Iowa 720, 10 N. W. Rep. 244.—DISTINGUISHING *Coughlin v. New York C. & H. R. R. Co.*, 71 N. Y. 443. QUOTING *Kansas Pac. R. Co. v. Thacher*, 17 Kan. 92.

Where two or more attorneys render legal services for a plaintiff, each one is equally entitled to a lien upon the judgment recovered for such services, and if one has obtained an assignment of the whole of it it cannot be disturbed in favor of the others. *Massachusetts & S. C. Co. v. Gill's Creek Tp.*, 48 Fed. Rep. 145.

17. Upon what the lien attaches.—An attorney for a railroad company may retain papers of the company in his hands under his lien for services rendered and for money advanced to the company. *Finance Co. of Pa. v. Charleston, C. & C. R. Co.*, 52 Fed. Rep. 526.

An attorney who, acting for a railroad company, has negotiated various conveyances and donations of property for right of way, and taken deeds therefor has a lien on the papers for his expenses and salary, and may retain them until paid; but when such salary and expenses are to be paid through a foreclosure suit, the lien will not extend to the *corpus* of the company's property, nor constitute a prior lien in preference to the mortgage bondholders. *Finance Co. of Pa. v. Charleston, C. & C. R. Co.*, 46 Fed. Rep. 426.

Certain unsecured creditors of a railroad instituted proceedings, on behalf of themselves and all others of the same class who might come in and contribute to the expense of the suit, to have their claims made liens on the property, which were successful, but pending a reference to ascertain the liens the company settled with the creditors of that class. The attorneys for complainants then asked for a reasonable allowance in respect to all claims settled except their immediate clients, and to have it declared a lien on the property. *Held*, following the rule of the state law, that the claim was a proper allowance, and that it was proper to make it a lien on the property. *Central R. & B. Co. v. Pettus*, 113 U. S. 116, 5 Sup. Ct. Rep. 387.—FOLLOWING *Trustees v. Greenough*, 105 U. S. 527.—FOLLOWED IN *Chicago, M. & St. P. R. Co. v. Third Nat. Bank*, 134 U. S. 276, 10 Sup. Ct. Rep. 550.

An attorney who had a lien on papers of a railroad company for legal services rendered, refused to deliver them until his services were paid for, whereupon the company moved that he be required to deliver them up, on the ground that he was retained to bring suits against the company on causes of action arising out of matters to which the papers related, and that the possession of such papers by him would give him an undue advantage. No particular suits were specified, and the attorney denied that he was prosecuting any such suits. *Held*, that the order for delivery should be denied. *Finance Co. of Pa. v. Charleston, C. & C. R. Co.*, 48 Fed. Rep. 45.

**18. Notice of lien to adverse party.** Under Kan. Gen. St. p. 110, § 8, giving an attorney a lien for a general balance of compensation upon money due to his client in the hands of the adverse party, upon giving notice to the adverse party a lien may be created in an action for personal injuries

before verdict or judgment; but to create such lien a written notice must be served upon the adverse party personally or on his attorney; and where the adverse party is a railroad company it is not sufficient to give such notice to a depot agent. *Kansas Pac. R. Co. v. Thacher*, 17 Kan. 92.—QUOTED IN *Smith v. Chicago, R. I. & P. R. Co.*, 56 Iowa 720.

Where an attorney is prosecuting a suit against a railroad company, under an agreement that he shall have one-half of the damages recovered for his services, an agreement between the company and the client to settle the action is binding on the attorney when it is made in good faith, and the company has no notice of the agreement between the plaintiff and his attorney. *Walsh v. Flatbush, N. S. & C. R. Co.*, 11 Hun (N. Y.) 190.—DISTINGUISHING *Coughlin v. New York C. & H. R. R. Co.*, 8 Hun 136.

Where, after a judgment has been procured for the plaintiff in an action, his attorneys enter upon the judgment docket notice of their claim for a lien for their fees in the case, such notice creates a lien not only upon the judgment but upon any money due the plaintiff from the defendant in that action. And so, even where the judgment is reversed on appeal, the defendant may not settle with plaintiff and pay him the amount agreed on, and thus defeat the lien of his attorneys. And in this case, where a defendant did so settle and pay—*held*, that it was still liable to the attorneys for their fees. *Winslow v. Central Iowa R. Co.*, 71 Iowa 197, 32 N. W. Rep. 330.

**19. Lien: how affected by compromises and settlements with client.\***—The court will extend its aid to an attorney to prevent his being defrauded of his reasonable compensation by any collusive action between the parties to a suit; but he is called upon to invoke its aid with due diligence, and great and unreasonable delays and laches on his part in asserting his rights will be as fatal to his claim as it would be to the claim of any ordinary suitor. In enforcing such a claim the court will be governed by the analogy of the statute of limitations. *Richardson v. Brooklyn City & N. R. Co.*, 7 Hun (N. Y.) 69.

A party having a cause of action against

\* Settling cause without consent of plaintiff's attorney, see note, 15 AM. & ENG. R. CAS. 390.

a railroad company for damages caused by negligence cannot by any agreement before judgment give his attorney any such interest therein as will defeat a settlement of the suit by the parties themselves. *Coughlin v. New York C. & H. R. R. Co.*, 71 N. Y. 443, 27 Am. Rep. 75; reversing 8 Hun 136.—DISTINGUISHED IN *Smith v. Chicago, R. I. & P. R. Co.*, 56 Iowa 720. REVIEWED IN *Lamont v. Washington & G. R. Co.*, 15 Am. & Eng. R. Cas. 383, 2 Mackey (D. C.) 502.

In Texas an attorney has no lien for his fee except the common-law lien, which does not attach to anything which is not in his possession; therefore an attorney who has agreed to prosecute a damage suit against a railroad, for one-half the damages recovered, has no lien against the railroad company where his clients compromise the suit and receive the whole of the money, though the company knew of the contract at the time, and knew that the clients were insolvent. *Texas Mex. R. Co. v. Showalter*, 3 Tex. App. (Civ. Cas.) 92.

**20. Enforcement of lien by continuance of litigation.**—Where a plaintiff, in an action against a railroad for personal injuries, proposes a compromise, which is effected, in the absence of anything to show collusion leave will not be granted to the plaintiff's attorneys to prosecute the action, regardless of the settlement. *Swanson v. Chicago, St. P. & K. C. R. Co.*, 35 Fed. Rep. 638.

Where there is an agreement between the person suing for personal injuries and the company for a compromise, which is subsequently set aside, and the case is brought to trial, payment by the defendant of the amount which had been agreed upon does not establish the cause of action so as to dispense with evidence of negligence at a trial by the attorney to enforce his lien. *Casucci v. Alleghany & K. R. Co.*, 29 Abb. N. Cas. (N. Y.) 252, 20 N. Y. Supp. 343.

Where an attorney for a railroad company has prosecuted a suit for it to judgment, and has a lien thereon for his costs, a receiver of the company subsequently appointed is not entitled to the amount of the judgment; and if the judgment-debtor pays it to the receiver, with notice of the attorney's lien, he is not protected, and execution may issue against him on the judgment at the instance of the attorney.

*In re Bailey*, 31 Hun (N. Y.) 608, 66 How. Pr. 64.

An attorney in a suit against a railroad company for personal injuries, who had a lien on the damages that might be recovered, had a settlement between his client and the company set aside as to his interest, with leave to prosecute the case to recover the amount of his lien. The settlement had been made after issues had been joined. *Held*, that the attorney could not recover without proofs to establish the issues. *Casucci v. Alleghany & K. R. Co.*, 48 N. Y. S. R. 52, 65 Hun 452, 20 N. Y. Supp. 343, 29 Abb. N. Cas. 252.

Plaintiff brought an action of tort to recover damages for injuries received. Pending the suit, plaintiff and defendant, without the knowledge of plaintiff's attorneys, settled the case. Plaintiff then gave defendant an order on the clerk of the court to dismiss the suit, which being filed, plaintiff's attorneys moved the court to set the cause down for trial notwithstanding, on the ground that the settlement was collusive and had been made with knowledge on the part of the defendant that the plaintiff's attorneys were interested in the case to the extent of their fees for services. An affidavit accompanied the motion showing that the plaintiff had agreed to pay his attorney a contingent fee of thirty-three per cent of the amount that should be recovered. The court thereupon passed an order that defendant should pay to plaintiff's attorneys one-third of the sum for which the case had been settled, and that in default thereof the entry of dismissal should be struck out and the cause set down for trial. On appeal this court reversed the order,—*holding*, that the court will not interfere to enforce in a summary way, through the original suit, the collateral engagement of a client for the compensation of his attorney, but will leave the latter to his common-law remedy. *Lamont v. Washington & G. R. Co.*, 15 Am. & Eng. R. Cas. 383, 2 Mackey (D. C.) 502.—REVIEWING *Pulver v. Harris*, 52 N. Y. 73; *Coughlin v. New York C. & H. R. R. Co.*, 71 N. Y. 443. QUOTING *People v. Tioga C. P.*, 19 Wend. (N. Y.) 73.

**21. Actions for compensation.**—

(1) *General rules.*—Where the plaintiff, an attorney, renders legal services for a defendant railway corporation during a certain year, he is entitled to recover for the value of the same, notwithstanding the fact



that during said period the defendant company carried the plaintiff on its said railroad free of charge on an annual pass issued to him by the receiver of the company. *Ohio & M. R. Co. v. Smith*, 5 Ind. App. 36, 31 N. E. Rep. 371.

An instruction that "no greater fee would be reasonable against a wealthy man or corporation than a poor man for the same services" was properly refused, in an action by an attorney to recover counsel fees from a corporation, where there was no evidence as to the wealth of the parties and no such issue was made. *International & G. N. R. Co. v. Clark*, 48 Am. & Eng. R. Cas. 81, 81 Tex. 48, 16 S. W. Rep. 631—REVIEWING *Hamman v. Willis*, 62 Tex. 507.

Where the details of the services rendered were before the jury, and the court charged that the verdict should be rendered upon all the evidence, it was not error to refuse to charge that the jury were not bound by the opinions of expert witnesses, unless, in view of all the circumstances, they thought such opinions were correct. *International & G. N. R. Co. v. Clark*, 48 Am. & Eng. R. Cas. 81, 81 Tex. 48, 16 S. W. Rep. 631.

The solicitor obtaining a special act incorporating a railway company may recover from it in an action of debt for the expenses incurred in so doing. *Hitchins v. Kilkenny R. Co.*, 9 C. B. 536.

(2) *Illustrations.*—Attorneys agreed to prosecute a suit for a railroad company to recover certain land, and, if successful, they were to be paid what their services were worth, but if not successful they were to receive only their expenses. They brought suit and obtained judgment declaring the fee of the land to be in the company, but a further proceeding was necessary against persons who were holding the land adversely, and in this the decision was against the company. At first the company refused to appeal this decision, and paid the attorneys their expenses, but afterward employed other attorneys and appealed the case and obtained a favorable judgment. *Held*, that the attorneys first employed could maintain an action to recover the value of their services, which should be determined by ascertaining the full value of all services, including the appeal, and deducting therefrom the amount paid counsel in the appeal. *St. Louis, I. M. & S. R. Co. v. Clark*, 51 Fed. Rep. 483, 2 C. C. A. 331.

Attorneys for a railroad company brought

suit to recover several items for legal services rendered. At the time suit was brought a suit was still pending in which they represented the company, and just before trial plaintiffs informed the defendant's attorney that unless their claim was paid they would abandon the suit in which they represented the company and add their fee therein to their claim sued on. *Held*, that, as the services were not complete in the pending suit, they were not authorized to demand the whole of the fee. Neither were they justified in refusing to further prosecute the suit because their fees in other cases had not been paid. *Cairo & St. L. R. Co. v. Koerner*, 3 Ill. App. 248.

Where a railroad company sent the plaintiff an annual pass as compensation for the legal services he might render the company in his county during "the current year" (1885), and the pass was accepted upon the terms stated, the plaintiff may, nevertheless, recover for the value of his services in a case in which he was employed by the general counsel of the company, who stated to him that the case was a very important one, and that while the company could not pay large fees, it ought to pay plaintiff a reasonable fee for defending the suit, to which plaintiff replied that he would help to defend the case and would leave the matter of his compensation to his colleague in the case and to the general counsel of the company, and the general counsel replied that there would be no trouble about that, and for him to go ahead and hunt up the evidence, etc. *Ohio & M. R. Co. v. Smith*, 5 Ind. App. 36, 31 N. E. Rep. 371.

An attorney-at-law sued a railroad company for professional services based upon the following account:

To services in raising subsidy at W. ....	\$1,000
Examination of charter and correction of same. ....	100
Drawing subscription contract in June, 1889. ....	100
Drawing bond for \$40,000 R. R. Co. to directors and Commercial Club. ....	250
Various questions under law of corporations and the Texas R. R. act during July, Aug., and Sept., 1889. ....	500
	<hr/> \$1,950

*Held*, that the account was not sufficiently explicit to require the company to plead thereto. *Weatherford, M. W. & N. W. R. Co. v. Granger*, (Tex. Civ. App.) 22 S. W. Rep. 70.

## IV. PRIVILEGED COMMUNICATIONS.

**22. What communications are privileged.**—An attorney is not obliged to produce a writing intrusted to him by his client, or to disclose its contents, without his consent; but he may be required to state whether he has it in his possession, for the purpose of authorizing the adverse party to give parol evidence of its contents. *Stokoe v. St. Paul, M. & M. R. Co.*, 40 Minn. 545, 42 N. W. Rep. 482.

**23. What are not.**—The protection which the law gives to communications between attorneys and clients does not extend to matters openly communicated or disclosed in the presence of third parties. So held, where an attorney for a railroad company was required to disclose what company had employed and paid him in certain litigation. *Mobile & M. R. Co. v. Yeates*, 67 Ala. 164.

## ATTORNEYS' FEES.

When allowed, generally, see COSTS, I.  
Constitutionality of statutes allowing, see ANIMALS, INJURIES TO, 9.

Demand for, in bill of particulars, see ANIMALS, INJURIES TO, 627.

In stock-killing cases, see ANIMALS, INJURIES TO, 584.

## AUTHORITY.

Of attorneys, see ATTORNEYS, 1-11.

—conductor, see CONDUCTOR, 1, 12.

—president of company, see PRESIDENT, 1-4.

—railway commissioners, see RAILWAY COMMISSIONERS, III.

—referee, see REFERENCE, 3.

—station agents, see STATION AGENTS, 3-8.

To construct tramways, see TRAMWAYS, 2.

To employ physician, see MEDICAL SERVICES, 3, 4.

## AUXILIARY COMPANIES.

## 1. Who liable for negligence of.—

Where a great railroad company, operating a long line of road in the state, aids, as stockholder or bondholder, or as the guarantor of bonds, another railroad company in constructing its road, under the provisions of chapter 105, Laws of 1873, such auxiliary company does not become, on account of such aid, the servant or agent of the parent company; and the parent company is not, on account of being such stockholder or bondholder, or guarantor of bonds, responsible for the negligence or other default of the auxiliary company in constructing its road in its own name. *Atchison, T. & S. F. R. Co. v. Davis*, 34 Kan. 209, 8 Pac. Rep. 530; reversing 25 Am. & Eng. R. Cas. 305, 34 Kan. 199, 8 Pac. Rep. 146. — DISTINGUISHING *Newport & C. B. Co. v. Woolley*, 78 Ky. 523.—EXPLAINED IN *Solomon R. Co. v. Jones*, 34 Kan. 443. FOLLOWED IN *Southern Kansas & P. R. Co. v. Towner*, 41 Kan. 72, 21 Pac. Rep. 221. QUOTED IN *Atchison, T. & S. F. R. Co. v. Cochran*, 41 Am. & Eng. R. Cas. 48, 43 Kan. 225, 7 L. R. A. 414, 23 Pac. Rep. 151.

## AWARD.

In condemnation proceedings, when raises estoppel, see ESTOPPEL, II, 2.

Of damages for land taken, see EMINENT DOMAIN, XI, 14, 16.

Validity and effect, generally, see ARBITRATION AND AWARD, III.

See also REFERENCE.

## B

## BAGGAGE.

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## 1. LIABILITY AS CARRIERS OF, GENERALLY.

### 1. When Liable as Common Carriers.

**1. In general.\***—A common carrier is liable as such for the personal baggage of a passenger delivered to and received by it solely for transportation and not for storage, although, for the convenience of the carrier, the passenger consents to some delay in the transportation. *Shaw v. Northern Pac. R. Co.*, 40 Minn. 144, 41 N. W. Rep. 548.

As regards the passengers' baggage, railroad companies, stage proprietors, steamboat owners, and omnibus proprietors, who carry passengers for hire, are, like common carriers, liable for its loss, unless caused by the act of God or the public enemy. *Dibble v. Brown*, 12 Ga. 217.

A carrier of passengers, by the sale of a passenger ticket, as incident to the contract, without any specific agreement or separate compensation, becomes obligated to carry the baggage of the passenger to a reasonable amount, and to deliver it at the end of the route to the passenger or his duly authorized agent. *Isaacson v. New York C. & H. R. R. Co.*, 16 Am. & Eng. R. Cas. 188, 94 N. Y. 278, 46 Am. Rep. 142; *reversing* 25 Hun 350.—REVIEWED IN *Hyman v. Central Vt. R. Co.*, 49 N. Y. S. R. 313, 66 Hun (N. Y.) 202, 21 N. Y. Supp. 119.

Where it is the custom of common carriers to allow the baggage of passengers to be taken in charge by servants in their employ, to be delivered by them at a certain place and in a certain manner, they will be liable for the loss of baggage arising from the neglect of their employes to make the delivery according to custom. *Fisher v. Geddes*, 15 La. Ann. 14.

A railway company has no authority to make a by-law that it will not be responsible for the care of luggage unless booked

\* Liability of carrier for loss of baggage, see note, 3 L. R. A. 345.

Liability of sleeping-car companies for baggage, see note, 26 AM. ST. REP. 337.

and the carriage paid, where by its charter it is required, without extra charge, to carry personal luggage of certain weight and dimensions. *Williams v. Great Western R. Co.*, 10 Exch. 15.

**2. When liable as insurers.**—Carriers of passengers are responsible for the carriage and safe delivery of such baggage as by custom and usage is ordinarily carried by travellers, and the payment of the usual fare includes in legal contemplation a compensation for the conveyance of such baggage. They are insurers of such baggage in the same manner and to the same extent as for goods or freight. *Oakes v. Northern Pac. R. Co.*, 47 Am. & Eng. R. Cas. 437, 20 Oreg. 392, 26 Pac. Rep. 230. *Merrill v. Grinnell*, 30 N. Y. 594.

The usual contract of a carrier of passengers includes an undertaking to receive and transport their baggage, though nothing be said about it; and if it be lost, even without the fault of the carrier, he is responsible. *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586.—QUOTED IN *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64. REVIEWED IN *Cohen v. Frost*, 2 Duer (N. Y.) 335.

A company using steamboats and railroads for the transportation of passengers and their baggage is liable as a common carrier for damages happening to the baggage of passengers from a defect in the vehicles or machinery used, although the company is not chargeable with actual negligence or want of skill, or with want of care in securing the safety of the baggage; if injury happens to it, nothing will excuse the company but inevitable accident arising from superhuman causes, or from the acts of the enemies of the country. *Camden & A. R. & T. Co. v. Burke*, 13 Wend. (N. Y.) 611.—QUOTED IN *Sager v. Portsmouth, S. & P. & E. R. Co.*, 31 Me. 228.

The same rule does not apply if injury happens to the persons of the passengers. In such cases, if the company has done all that human foresight and care can do to insure the safety of the passengers it is not liable to respond in damages. *Camden & A. R. & T. Co. v. Burke*, 13 Wend. (N. Y.) 611.—CRITICISED IN *Galena & C. U. R. Co. v. Yarwood*, 17 Ill. 509.

**3. Liability when that of carriers of goods.\***—It is now well settled that

\* Liability of a carrier of passengers for loss of merchandise intrusted to it by passenger, see note, 14 L. R. A. 515.

in the carriage of a passenger's baggage the carrier incurs the full responsibility of the common carrier of goods. *Louisville, N. A. & C. R. Co. v. Nicholas*, 4 Ind. App. 119, 30 N. E. Rep. 424. *Dill v. South Carolina R. Co.*, 7 Rich. (So. Car.) 158.

Where a railroad company receives for transportation, in cars which accompany its passenger trains, property of a passenger other than his baggage, in relation to which no fraud or concealment is practised or attempted upon its employes, it assumes, with reference to the property, the liability of a common carrier of merchandise. *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. (U. S.) 262, 1 Am. Ry. Rep. 434.—DISAPPROVED IN *Humphreys v. Perry*, 148 U. S. 627. DISTINGUISHED IN *Pfister v. Central Pac. R. Co.*, 70 Cal. 169. FOLLOWED IN *Metz v. California Southern R. Co.*, 44 Am. & Eng. R. Cas. 433, 85 Cal. 329. QUOTED IN *Waldron v. Chicago & N. W. R. Co.*, 1 Dak. 351. RECONCILED IN *Roderick v. Baltimore & O. R. Co.*, 7 W. Va. 54. REVIEWED IN *Blumantle v. Fitchburg R. Co.*, 127 Mass. 322.

If proprietors of railroads, steamboats, stage coaches, and omnibuses, etc., who are engaged in the business of transporting passengers, holding themselves out to the world as persons exercising a public employment, and as being ready to carry goods for hire, receive goods or extra baggage, to be carried for compensation, they are, as to such extra baggage and goods, liable as common carriers. *Dibble v. Brown*, 12 Ga. 217.

**4. Liability of steamboat companies.**—The provisions of § 7 of the R. & C. Tr. Act, 1854, are by § 16 of the Regulation of Railways Act, 1868, extended to the conveyance by water of luggage by railway companies using steam vessels for the purpose of carrying on a communication between any towns or ports. *Cohen v. South Eastern R. Co.*, 2 Ex. D. (C. A.) 253, 46 L. J. (App.) Ex. 417, 3 Ry. & C. T. Cas. xxv.

The question whether a steamboat company is liable as a common carrier of baggage was not decided by an evenly divided court. *McKee v. Owen*, 15 Mich. 115.—REVIEWED IN *Laffrey v. Grummond*, 37 Am. & Eng. R. Cas. 235, 74 Mich. 186.

#### 2. Extent and Limits of the Liability.

#### 5. In general.—A carrier of passengers

and their baggage is answerable for the baggage if lost, though no distinct price is paid for transporting it, it being included in the care of the passenger. *Orange County Bank v. Brown*, 9 Wend. (N. Y.) 85.

It is not necessary to pay passage-money in advance to render the carrier liable for loss of baggage; and it matters not whether the passenger pays for the transportation himself or whether others pay it for him. *Van Horn v. Kermit*, 4 E. D. Smith (N. Y.) 453.

A railroad company is liable for baggage which is lost through the mistake of one of its agents in sending it over a wrong route. *Isaacson v. New York C. & H. R. R. Co.*, 16 Am. & Eng. R. Cas. 188, 94 N. Y. 278, 46 Am. Rep. 142; reversing 35 Hun 350.—RECONCILED IN *Talcott v. Wabash R. Co.*, 50 N. Y. S. R. 423. REVIEWED IN *Poole v. Delaware, L. & W. R. Co.*, 35 Hun (N. Y.) 29. A railroad company is not liable for goods of a third party shipped in a trunk of a passenger as baggage, where it had no knowledge of such ownership. *Gurney v. Grand Trunk R. Co.*, 37 N. Y. S. R. 155, 14 N. Y. Supp. 321, 59 Hun 625.

The fact that a passenger pays extra fare on a trunk and informs the baggage-master of its contents, but does not inform him that certain articles in it belong to another person, is not sufficient to constitute an implied contract that the company will carry such articles as freight, so as to render the carrier liable to the owner in case of loss. *Talcott v. Wabash R. Co.*, 50 N. Y. S. R. 423, 66 Hun 456, 21 N. Y. Supp. 318.—REVIEWING *Stoneman v. Erie R. Co.*, 52 N. Y. 429; *Sloman v. Great Western R. Co.*, 67 N. Y. 211.

If a common carrier of passengers and of goods and merchandise has reasonable ground for refusing to receive or carry passengers applying for passage, and their baggage and other property, he is bound to insist, at the time, upon such ground, if desirous of avoiding responsibility. If, not thus insisting, he receives the baggage and other property, his liability is the same as though no ground for refusal existed. *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. (U. S.) 262, 1 Am. Ry. Rep. 434.

Section 7 of the Railway and Canal Traffic Act, 1854, which regulates the liabilities of railway companies as to "any articles, goods, or things in the receiving, forwarding, or delivering thereof," applies to passengers'

\* See also *post*, 81.

luggage; and the provisions of that section are, by the Regulation of Railways Act, 1868, § 16, extended to the conveyance by water of such luggage by companies using steam vessels. *Cohen v. South-Eastern R. Co.*, L. R. 2 Exch. D. 253, 46 L. J. Exch. D. 417, 36 L. T. 130, 25 W. R. 475; affirming L. R. 1 Exch. D. 217, 24 W. R. 522, 45 L. J. Exch. D. 298, 35 L. T. N. S. 213. —APPROVED IN *Doolan v. Midland R. Co.*, 37 L. T. 317, L. R. 2 App. Cas. 792.

**6. Presumption against carrier in case of loss.**—Where personal property is received by a railroad company to be transported as baggage, and while it is in the possession of the railroad company, to be so transported, it is lost or stolen, the railroad company is responsible to the owner thereof for its loss. *Chicago, R. I. & P. R. Co. v. Conklin*, 16 Am. & Eng. R. Cas. 116, 32 Kan. 55, 3 Pac. Rep. 762.

The failure of a carrier to deliver baggage to the owner on demand, *prima facie* establishes negligence and want of due care, and casts the onus of accounting for it on the carrier. *Burnell v. New York C. R. Co.*, 45 N. Y. 184, 6 Am. Rep. 61.—DISTINGUISHED IN *Magnin v. Dinsmore*, 3 J. & S. (N. Y.) 182.

If no explanation is given of the disappearance of baggage before delivery, the carrier is liable for the value. *Pelland v. Canadian Pac. R. Co.*, 7 Mont. L. R. (Sup. Ct.) 131.

The proof showed that plaintiff's baggage was delivered to the defendant company in good condition; that it carried it over its road and delivered it to a connecting line, which delivered it to plaintiff damaged from having been wet. It was raining at the time it was delivered to defendant, and the baggage remained for some time in a shed not well covered, and the mould on the articles indicated that they could not have gotten wet later than the delivery to the second carrier. *Held*, that there was sufficient evidence to justify a finding that it was damaged while in defendant's hands. *Estes v. St. Paul, M. & M. R. Co.*, 27 N. Y. S. R. 594, 55 Hun 605, 7 N. Y. Supp. 863.

**7. Law of place.**\*—Where baggage is delivered to a company in Pennsylvania to be carried into New York, if the company fails to deliver in New York its liability will be determined by the law of that state and

not by the law of Pennsylvania. *Curtis v. Delaware, L. & W. R. Co.*, 74 N. Y. 116.

The liability of a New Jersey railroad for loss of baggage between Philadelphia and a point in New Jersey is measured by the law of New Jersey; and this though the baggage is carried across the Delaware river, the common line between the two states, where both exercise equal jurisdiction. *Brown v. Camden & A. R. Co.*, 83 Pa. St. 316, 15 Am. Ry. Rep. 421.

**8. Conversion by carrier.**—A common carrier who has received the baggage of a passenger for transportation and refuses to deliver it at the place of destination, cannot relieve himself of liability for its loss by tendering the baggage more than a year after the demand therefor was made. *Lake Shore & M. S. R. Co. v. Warren*, 21 Am. & Eng. R. Cas. 302, 3 Wyom. 134, 6 Pac. Rep. 724.

A conductor took up a satchel, belonging to a passenger, which had been left in a car and delivered it to the receiver of the road, who delivered it to the wrong person. *Held*, that the company was liable as for a conversion. *Morris v. Third Ave. R. Co.*, 1 Daly (N. Y.) 202, 23 How. Pr. 345.

A passenger who was travelling with his family asked the baggage-master at the place of starting to check several trunks as baggage. The baggage-master claimed an extra charge, which the passenger refused to pay, and demanded his trunks, which were refused, the baggage-master claiming that they were already in the car and that he could not get them out before time for the train to start, but on this point there was a conflict of evidence. The passenger did not leave on the train, but went to the president of the company and obtained an order directing a delivery of the trunks at an intermediate station. The day following he went to the intermediate station and demanded his trunks, but was informed that they had gone on. The company claimed that the passenger assented to this, but on this point also there was a conflict of evidence. Before the passenger reached the end of the route the trunks had been received and placed in the baggage-room, where they were destroyed by fire. *Held*, that there was a conversion at the starting-point, and that the passenger had not so far authorized or approved of the transportation of the trunks to the place where they were destroyed as to prevent his recover-

\* See also *post*, 101.

ing full damages. *McCormick v. Pennsylvania C. R. Co.*, 21 *Am. & Eng. R. Cas.* 296, 99 *N. Y.* 65, 1 *N. E. Rep.* 99, 52 *Am. Rep.* 6; *affirming 30 Hun 87, mem.* But see former appeal, where it was held on slightly different evidence that the passenger had so far assumed control of the baggage as to prevent a recovery of more than nominal damages for the original conversion. *McCormick v. Pennsylvania C. R. Co.*, 80 *N. Y.* 353.—DISTINGUISHING *McCormick v. Pennsylvania C. R. Co.*, 49 *N. Y.* 303. REVIEWING *Hior v. London & N. W. R. Co.*, 48 *L. J. Exch.* 545.

**9. Liability for baggage carried free.**—Where a common carrier undertakes to carry baggage without reward it is liable only as a gratuitous bailee for bad faith or gross negligence. *Rice v. Illinois C. R. Co.*, 22 *Ill. App.* 643.—REVIEWING *Steers v. Liverpool, N. Y. & P. S. Co.*, 57 *N. Y.* 1.

But the rule is different as to carriers of free passengers. *Flint & P. M. R. Co. v. Weir*, 37 *Mich.* 111.—DISTINGUISHED IN *Way v. Chicago, R. I. & P. R. Co.*, 64 *Iowa* 48, 52 *Am. Rep.* 431.

**10. Delay or detention of baggage.**—The act of the 13th Gen. Assembly of Iowa, ch. 165, providing "that for every day's detention to travellers in consequence of damage for delay of baggage and necessary delay in suit for same, common carriers shall pay to the person so delayed not less than \$3, which shall be added to the judgment for damage to property, should the action be sustained," does not authorize a recovery for delay caused to a traveller by the mere detention of baggage, but only for such delay as results from damage to the baggage. *Anderson v. Toledo, W. & W. R. Co.*, 32 *Iowa* 86, 10 *Am. Ry. Rep.* 16.

**11. Effect of non-compliance with carrier's rules by passenger.**—A carrier is not liable for the loss of baggage which occurs through the failure of a passenger to comply with a reasonable regulation of the carrier. *Gleason v. Goodrich Transp. Co.*, 32 *Wis.* 85.—QUOTING *Macklin v. New Jersey Steamboat Co.*, 7 *Abb. Pr. N. S. (N. Y.)* 241, 9 *Am. Law Reg. N. S.* 239.

A common carrier will not be relieved from liability for loss of baggage on the ground that the passenger neglected or refused to comply with a reasonable regulation of the carrier, unless it appears that the passenger had knowledge of such regulation, or that it was so notorious and universally

known that he ought to have known of it. *Macklin v. New Jersey Steamboat Co.*, 7 *Abb. Pr. N. S. (N. Y.)* 229.

**12. Sudden and unforeseen accidents.**—It is a complete defense to an action against a common carrier for loss of baggage to show that the baggage was destroyed by a flood of such unprecedented character as could neither have been anticipated nor provided against, and which amounted to an act of God. *Long v. Pennsylvania R. Co.*, 147 *Pa. St.* 343, 23 *Atl. Rep.* 459.

Where an accident, by which baggage is lost in the hands of a common carrier, is not due to the failure of any of the appliances of transportation, but to flood, amounting to an act of God, there is no presumption of negligence which will shift the burden of proof upon the carrier to show that he was not negligent. *Long v. Pennsylvania R. Co.*, 147 *Pa. St.* 343, 23 *Atl. Rep.* 459.—DISTINGUISHING *Spear v. Philadelphia, W. & B. R. Co.*, 119 *Pa. St.* 61. FOLLOWING *Laing v. Colder*, 8 *Pa. St.* 482; *Pennsylvania R. Co. v. MacKinney*, 124 *Pa. St.* 462.

In such a case, where there is no evidence of want of care on the part of the employes of the common carrier, it is proper for the court to give binding instructions for the defendant. *Long v. Pennsylvania R. Co.*, 147 *Pa. St.* 343, 23 *Atl. Rep.* 459.

Trunks containing samples were received at a depot and checked for transportation, but before they had departed the depot was flooded by the sudden rise of a river, and the samples were injured. *Held*, that the owner's right to recover depended upon whether the rise of the river was so sudden that the trunks could not have been moved by the exercise of reasonable and proper diligence; but that, having been received with knowledge of their contents, if the owner was entitled to recover at all he might recover the value of the samples. *Strouss v. Wabash, St. L. & P. R. Co.*, 17 *Fed. Rep.* 209.

**3. Baggage on One Train, Owner on Another.**

**13. Company not liable where owner and baggage are on different trains.**—A ticket entitles a passenger to safe transportation of himself and baggage on the same train, and nothing more. *Blumenthal v. Maine C. R. Co.*, 34 *Am. & Eng. R. Cas.* 247, 79 *Me.* 550, 5 *N. Eng. Rep.* 355, 11 *Atl. Rep.* 605.

The owner of a portmanteau, who allows his servant to carry it by train as his own



personal luggage, the servant taking and paying for his ticket, and the owner traveling by a later train, cannot maintain an action against the company for the loss of the portmanteau. *Becher v. Great Eastern R. Co.*, L. R. 5 Q. B. 241, 39 L. J. Q. B. 122, 3 Ry. & C. T. Cas. xx, 18 W. R. 627, 22 L. T. 299.

The obligation of a railroad company is to take whatever is delivered and received as baggage, from a passenger, into the baggage-car of the passenger train in which the passenger takes his passage, and to take it along with and deliver it to the passenger at the place of destination, in the usual manner of transporting and delivering baggage. The obligation is the same whether the baggage is within the quantity allowed to a passenger to be carried without extra charge or whether it is an extra quantity, for which an additional charge is made. If it be taken as the baggage of the passenger, whether ordinary or extra, it is to be carried with the passenger, unless there is some agreement to the contrary. *Glasco v. New York C. R. Co.*, 36 Barb. (N. Y.) 557.

The plaintiff sent by a passenger train a quantity of merchandise, expecting to go himself in the same train, but did not. The goods were lost without any gross negligence in the carrier, or any conversion by him. *Held*, that the carrier was not liable for the loss. *Collins v. Boston & M. R. Co.*, 10 Cush. (Mass.) 506.—APPROVED IN *Michigan C. R. Co. v. Carrow*, 73 Ill. 348. RECONCILED IN *Wilson v. Grand Trunk R. Co.*, 57 Me. 138.

**14. Baggage goes as freight in such cases.**—Carriers are only obliged to carry baggage, as such, where it goes on the same train with the passenger; and if received later and carried it goes as freight, and the carrier is entitled to compensation. *Grafjam v. Boston & M. R. Co.*, 67 Me. 234, 15 Am. Ry. Rep. 372.—FOLLOWING *Wilson v. Grand Trunk R. Co.*, 56 Me. 60, 57 Me. 138.—EXPLAINED IN *Blumantle v. Fitchburg R. Co.*, 127 Mass. 322.—*Wilson v. Grand Trunk R. Co.*, 57 Me. 138. *Wilson v. Grand Trunk R. Co.*, 56 Me. 60.—APPLIED IN *Curtis v. Delaware, L. & W. R. Co.*, 74 N. Y. 116. FOLLOWED IN *Grafjam v. Boston & M. R. Co.*, 67 Me. 234.

**15. Exception to the rule**—Where it is the settled law that passengers are only entitled to have their baggage carried where it goes on the same train with them, a hus-

band may recover for loss of baggage belonging to himself and family, where they are all passengers, and the baggage goes on the train with his family, but he goes on another train. *Curtis v. Delaware, L. & W. R. Co.*, 74 N. Y. 116.—APPLYING *Wilson v. Grand Trunk R. Co.*, 56 Me. 60; *Becher v. Great Eastern R. Co.*, L. R. 5 Q. B. 241; *Stimson v. Connecticut River R. Co.*, 98 Mass. 83; *Belfast & B. Co. v. Keys*, 9 H. of L. Cas. 556. DISTINGUISHING *Magnin v. Dinsmore*, 62 N. Y. 35.

**16. Company liable whether passenger travels on same train or not.**—A carrier is liable for lost baggage whether it goes on the same train with the passenger or not. *Wilson v. Chesapeake & O. R. Co.*, 21 Gratt. (Va.) 654.

If a passenger on a railroad pays his fare, and his baggage is sent forward pursuant to an agreement and as a part of the consideration moving from the company for the fare prepaid by the passenger, the same rules of care and diligence on the part of the company apply whether the baggage is forwarded on the same, the preceding, or a subsequent train. *Warner v. Burlington & M. R. R. Co.*, 22 Iowa 166.

Upon applying to a baggage-room to have his trunk checked, a passenger was told by an agent that it was locked up then, but would be sent on by the next train. The passenger inquired for his trunk on the day after his arrival at destination and on the following day, but did not find it. On the third day it was found in the passenger waiting-room, but broken open and the contents stolen, it appearing that the room had been broken open at night. *Held*, that there was such negligence on the part of the company in failing to forward promptly, and in not placing it in the proper place for storage, as to make it liable for the loss of the contents. *Warner v. Burlington & M. R. R. Co.*, 22 Iowa 166.

#### 4. Connecting Lines.

**17. Their liability, generally.\***—Baggage checked over connecting lines is subject to the contract made by the passenger with the first company, and this is not affected by a charge at the starting-point for overweight. *Gulf, C. & S. F. R. Co.*

\* Liability of connecting lines for loss of baggage: when companies jointly liable, see 44 AM. & ENG. R. CAS. 436, *abstr.*

*v. Jons*, 3 *Tex. Civ. App.* 619, 22 *S. W. Rep.* 1011.

Where three separate railroad companies owning distinct portions of a continuous railroad between two termini run their cars over the whole road, employing the same agents to sell passage-tickets and receive luggage to be carried over the entire road, an action may be maintained against one of them for the loss of luggage received at one terminus to be carried over the whole road. *Hart v. Rensselaer & S. R. Co.*, 8 *N. Y.* 37.—**DISTINGUISHED** in *Atchison, T. & S. F. R. Co. v. Roach*, 27 *Am. & Eng. R. Cas.* 257, 35 *Kan.* 740; *Milnor v. New York & N. H. R. Co.*, 53 *N. Y.* 363. **FOLLOWED** in *Quimby v. Vanderbilt*, 17 *N. Y.* 306; *Buffett v. Troy & B. R. Co.*, 40 *N. Y.* 168; *Cary v. Cleveland & T. R. Co.*, 29 *Barb. (N. Y.)* 35; *Schroeder v. Hudson River R. Co.*, 5 *Duer (N. Y.)* 55; *Louisville & N. R. Co. v. Weaver*, 16 *Am. & Eng. R. Cas.* 218, 9 *Lea (Tenn.)* 38. **REVIEWED** in *Peterson v. Chicago, R. I. & P. R. Co.*, 80 *Iowa* 92, 45 *N. W. Rep.* 573; *Barter v. Wheeler*, 49 *N. H.* 9; *Gray v. Jackson*, 51 *N. H.* 9; *Dillion v. New York & E. R. Co.*, 1 *Hilt. (N. Y.)* 231, 12 *Abb. U. S.* 479; *Check v. Little Miami R. Co.*, 2 *Disn. (Ohio)* 237.

Plaintiff bought a through ticket, by rail to a certain point and thence by boat, and had his baggage checked accordingly. At the point where he took the boat, the railroad agent, instead of delivering the baggage to the boat delivered it to another road, which carried it to the place of destination, where it was lost. *Held*, that such agent was in no sense the agent of the passenger so as to bind him by his act. *Fairfax v. New York C. & H. R. Co.*, 73 *N. Y.* 167; *affirming* 11 *J. & S.* 18; *referring to* 67 *N. Y.* 11, *which reversed* 5 *J. & S.* 516.

**18. Liability of initial carrier, generally.**—In the absence of a special contract a carrier is only bound to transport baggage to the end of its own line and safely deliver it to the next connecting carrier; but any one of the companies forming a link in the through route may agree that its liability shall extend over the whole. *Maurits v. New York, L. E. & W. R. Co.*, 21 *Am. & Eng. R. Cas.* 286, 23 *Fed. Rep.* 765.

A passenger who was to travel over two roads had her trunk checked to the end of the first, and left it overnight in a union depot used by both companies. Before

leaving on the second road she gave her check to an agent of the first company, who agreed to put her trunk out in position for transportation on the second road; but it appeared that it had never been put on the train, and it was lost. *Held*, that the first company was liable for the loss. *Rome R. Co. v. Wimberly*, 75 *Ga.* 316, 58 *Am. Rep.* 468.

The company could not relieve itself of responsibility without in some manner accounting for the loss of the trunk and showing how it left its custody. Its failure to do this would warrant the inference that the trunk was stolen by its servants or was lost in consequence of their gross neglect. *Rome R. Co. v. Wimberly*, 75 *Ga.* 316, 58 *Am. Rep.* 468.

Nor is the charge of negligence fully met by evidence produced to show that the building used for the storage of baggage was safe and secure, in charge of trusty agents and servants, and properly guarded by day and night. *Rome R. Co. v. Wimberly*, 75 *Ga.* 316, 58 *Am. Rep.* 468.

**19. Contract with initial carrier for through carriage.**—The sale of a ticket for a through carriage, without limitations, makes the initial carrier liable for the safe transportation of the passenger and his baggage to his place of destination, and it will be liable for the loss of baggage occurring on the connecting lines. *Talcott v. Wabash R. Co.*, 50 *N. Y. S. R.* 423, 66 *Hun* 456, 21 *N. Y. Supp.* 318.—**APPLYING** *Burnell v. New York C. R. Co.*, 45 *N. Y.* 188; *Cary v. Cleveland & T. R. Co.*, 29 *Barb. (N. Y.)* 35; *Burtis v. Buffalo & S. L. R. Co.*, 24 *N. Y.* 275; *Condict v. Grand Trunk R. Co.*, 54 *N. Y.* 505; *Sloman v. Great Western R. Co.*, 67 *N. Y.* 211. **RECONCILING** *Isaacson v. New York C. & H. R. Co.*, 94 *N. Y.* 278.—*Hawley v. Screven*, 62 *Ga.* 347.—**DISTINGUISHING** *Baugh v. McDaniel*, 42 *Ga.* 641; *East Tenn. & G. R. Co. v. Montgomery*, 44 *Ga.* 278.—**FOLLOWED** in *Savannah, F. & W. R. Co. v. McIntosh*, 27 *Am. & Eng. R. Cas.* 269, 73 *Ga.* 532.—*Cary v. Cleveland & T. R. Co.*, 29 *Barb. (N. Y.)* 35.—**FOLLOWING** *Hart v. Rensselaer & S. R. Co.*, 8 *N. Y.* 37. **QUOTING** *Weed v. Saratoga & S. R. Co.*, 19 *Wend. (N. Y.)* 534. **REVIEWING** *Muschamp v. Lancaster & P. J. R. Co.*, 8 *M. & W.* 421.—**APPLIED** in *Talcott v. Wabash R. Co.*, 50 *N. Y. S. R.* 423. **DISTINGUISHED** in *Milnor v. New York & N. H. R. Co.*, 53 *N. Y.* 363. **FOLLOWED** in *Brown v. Canadian Pac. R. Co.*, 3 *Man.* 496.

REVIEWED IN *Gray v. Jackson*, 51 N. H. 9. —*Atchison, T. & S. F. R. Co. v. Roach*, 27 Am. & Eng. R. Cas. 257, 35 Kan. 740, 12 Pac. Rep. 93. *Croft v. Baltimore and O. R. Co.*, 1 MacArth. (D. C.) 492. *Baltimore & O. R. Co. v. Campbell*, 3 Am. & Eng. R. Cas. 246, 36 Ohio St. 647, 38 Am. Rep. 617.—QUOTED IN *Frank v. Ingalls*, 21 Am. & Eng. R. Cas. 277, 41 Ohio St. 560.

And this liability is not affected by the fact that the passenger is travelling upon a through ticket with a coupon for each road. *Louisville & N. R. Co. v. Weaver*, 16 Am. & Eng. R. Cas. 218, 9 Lea (Tenn.) 38.—APPLYING *Mytton v. Midland R. Co.*, 4 H. & N. 615. DISTINGUISHING *Nashville & C. R. Co. v. Sprayberry*, 9 Heisk. (Tenn.) 857. QUOTING *Furstenheim v. Memphis & O. R. Co.*, 9 Heisk. (Tenn.) 238.—QUOTED IN *Coward v. East Tenn., V. & G. R. Co.*, 16 Lea (Tenn.) 225, 57 Am. Rep. 226.

Nor by the fact that the lines beyond the point to which it was checked sold the passenger return tickets at reduced rates, in consideration that she would release them from liability. *Louisville & N. R. Co. v. Weaver*, 16 Am. & Eng. R. Cas. 218, 9 Lea (Tenn.) 38.—FOLLOWING *Hart v. Rensselaer & S. R. Co.*, 8 N. Y. 37.

Where a carrier sells tickets over its own and connecting lines, and receives baggage to be sent through without a change of cars, the initial carrier is liable for baggage received and lost anywhere on the route, but which was not checked, the agent informing the passenger that it "would be perfectly safe" without being checked. *Najac v. Boston & L. R. Co.*, 7 Allen (Mass.) 329.—REFERRED TO IN *Darling v. Boston & W. R. Co.*, 11 Allen (Mass.) 295. REVIEWED IN *Gray v. Jackson*, 51 N. H. 9.

The fact of the sale of a through ticket may be considered in determining whether the initial carrier intended to be liable for through baggage; but evidence sufficient in amount ought to be introduced as to make it evident that the initial carrier in selling the ticket intended to be so liable. *Mauritz v. New York, L. E. & W. R. Co.*, 21 Am. & Eng. R. Cas. 286, 23 Fed. Rep. 765.

A railroad company that checks baggage over its own line and a connecting stage-coach line is liable for loss of the baggage by the stage line; and this is so even where the ticket specifies on its face that the company will only be responsible for loss of baggage on its own line. *Wilson v. Ches-*

*apeake & O. R. Co.*, 21 Gratt. (Va.) 654.—APPLIED IN *Louisville & N. R. Co. v. Weaver*, 16 Am. & Eng. R. Cas. 218, 9 Lea (Tenn.) 38.

A railroad checking baggage over its own line and that of a connecting steamboat line is not liable for a loss while on the steamboat, unless the railroad company has some interest in or control over the carriage of passengers by boat, or the railroad company received fare for passage by the boat. *Green v. New York C. R. Co.*, 12 Abb. Pr. N. S. (N. Y.) 473, 4 Daly 553.

It seems that a railroad company has not the implied power of contracting for through carriage of a passenger and baggage over its own line and a connecting steamboat line. *Green v. New York C. R. Co.*, 12 Abb. Pr. N. S. (N. Y.) 473, 4 Daly 553.

Plaintiff purchased a ticket from defendant at D. for a first-class passage from D. to W., paying a fare for the whole distance. It had five coupons attached, perforated so that they could be detached and given up, each one being for the distance to be traversed over a different railway or omnibus route on the way. The plaintiff's trunk was checked to Buffalo, and, when near that place, a person took his check for it, with the coupon for the omnibus route to the station of the Erie railway, by which the plaintiff was to proceed, and gave him an omnibus check across the city of B. in return. The conductor of the defendant's train, being asked by the plaintiff, told him it was right to give his check to this person. The omnibus line was paid by the Erie R. W. Co. The trunk having been lost owing to the neglect of the omnibus agent—held, that the defendants were liable, for the contract was with them to carry the plaintiff and his luggage the entire distance. *Smith v. Grand Trunk R. Co.*, 35 U. C. Q. B. 547.—QUOTING *Great Western R. Co. v. Blake*, 7 H. & N. 987; *Thomas v. Rhymney R. Co.*, L. R. 6 Q. B. 266; *Wright v. Midland R. Co.*, L. R. 8 Ex. 137. REVIEWING *Zunz v. Southeastern R. Co.*, L. R. 4 Q. B. 539; *Peninsula & S. Co. v. Shand*, 12 L. T. 808; *Bristol & E. R. Co. v. Collins*, 7 H. L. Cas. 194.

**20. Delivery to second carrier, and proof thereof.\***—Where three carriers unite in selling through tickets and checking through baggage, the initial car-

\* See also *post*, 58.

rier is liable for a loss of baggage in the absence of proof showing that it carried the baggage safely over its line and delivered it to the next carrier, and the burden of proof in such case is on the carrier. *Philadelphia, W. & B. R. Co. v. Harper*, 29 Md. 330.

Where baggage has been checked over connecting lines, to relieve the initial carrier from liability for loss it must show that it delivered it to the next connecting line by evidence that would be sufficient to charge such line if the suit was against it. *Hyman v. Central Vt. R. Co.*, 49 N. Y. S. R. 313, 66 Hun (N. Y.) 202, 21 N. Y. Supp. 119.

Where a through ticket was sold, and through baggage checked, and the contract of the initial carrier was only to safely carry to the terminus of its line and deliver to the next carrier, a total loss or non-delivery at the point of destination makes the initial carrier *prima facie* liable and casts on it the burden of showing delivery to the next connecting line; but this presumption does not arise where the baggage is delivered by the first line, but in a damaged condition. *Montgomery & E. R. Co. v. Culver*, 22 Am. & Eng. R. Cas. 411, 75 Ala. 587.—EXPLAINING AND MODIFYING *South & N. Ala. R. Co. v. Wood*, 71 Ala. 215.

Where it is the custom of a railroad at the end of its route, and where it connects with another carrier, to keep baggage in its room to be delivered to the agents of the next carrier, baggage arriving in the night and left for a few hours, to be reshipped, remains in the company's hands as carrier and not as warehouseman. *Quinit v. Henshaw*, 35 Vt. 605.—REVIEWED AND DISTINGUISHED IN *Blumenthal v. Brainerd*, 38 Vt. 402.

The initial carrier is not liable for baggage lost after it is delivered to the second carrier simply because it sells a through ticket and checks baggage through, and the two carriers divide the money received, where the ticket was in two parts easily detached from each other, and where there was nothing in common between the two roads except the mere arrangement to sell through tickets. *Milnor v. New York & N. H. R. Co.*, 53 N. Y. 363, 5 Am. Ry. Rep. 381; *affirming 4 Daly* 355.—DISTINGUISHING *Quimby v. Vanderbilt*, 17 N. Y. 306; *Hart v. Rensselaer & S. R. Co.*, 8 N. Y. 37; *Weed v. Saratoga & S. R. Co.*, 19 Wend.

1 D. R. D.—34.

534; *Cary v. Cleveland & T. R. Co.*, 29 Barb. 35; *Burnell v. New York C. R. Co.*, 45 N. Y. 184.

Where baggage arriving at a union depot is placed where the baggage for the next connecting line is usually put, and there destroyed by fire, there is no such delivery to the next carrier as to relieve the initial carrier from liability. *Hyman v. Central Vt. R. Co.*, 49 N. Y. S. R. 313, 66 Hun (N. Y.) 202, 21 N. Y. Supp. 119.—REVIEWING *Isaacson v. New York C. & H. R. R. Co.*, 94 N. Y. 278.

A delivery of baggage at the end of the passenger's journey, either to him or to his authorized agent, terminates the liability of the company as a common carrier; but a delivery at the terminus of the defendant's road to the baggage-master of an independent steamboat company, who, by agreement between the railroad and steamboat companies, always entered the defendant's cars and took the baggage-checks of through passengers, giving in exchange for them the checks of the steamboat company, would not discharge the defendant from liability for a loss caused by the larceny of its servants after the delivery of the baggage to the baggage-master of the boat, unless the baggage-master was the plaintiff's authorized agent to receive the baggage; which, being a controverted question, is for the jury. *Mobile & O. R. Co. v. Hopkins*, 41 Ala. 486.

**21. Right of initial carrier to limit liability to its own route.\***—Where a railroad company sells a ticket for the carriage of a passenger over its line and other connecting lines, it may, by a stipulation printed on the ticket and agreed to by the passenger, limit its liability for injury to his baggage to such injury as may occur on its own line. *Peterson v. Chicago, R. I. & P. R. Co.*, 80 Iowa 92, 45 N. W. Rep. 573.

A condition printed on a through ticket that the initial carrier only acts as the agent of the next carrier in selling the ticket, and will not be liable beyond its own line, is sufficient to advise a passenger that such is the fact; and in such case the duty of the initial carrier as to the passenger's baggage is fully discharged when it is safely carried over its line and delivered to the next carrier. *Nealon v. Grand Trunk R. Co.*, 5 N. Y. S. R. 256, 42 Hun 651. *Pennsylvania*

\* See also *post*, 95-103.

*C. R. Co. v. Schwarzenberger*, 45 Pa. St. 208. —DISTINGUISHING *Camden & A. R. Co. v. Baldauf*, 16 Pa. St. 67.—APPROVED IN *Harris v. Howe*, 39 Am. & Eng. R. Cas. 498, 74 Tex. 534. REVIEWED IN *Mullarkey v. Philadelphia, W. & B. R. Co.*, 9 Phila. (Pa.) 114.

Railroad companies have a right to contract, in the sale of through tickets, that they will only be liable for loss of baggage upon their own lines; and a passenger buying a ticket with such conditions printed on its face is bound by it, though he may not have read it, as the initial carrier would not be bound anyhow in the absence of an express contract, or something like a partnership arrangement between the roads. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 31 Am. & Eng. R. Cas. 103, 31 Fed. Rep. 247.

**22. Liability of intermediate carrier.**—Each carrier is liable for the result of its own negligence, and, although the first carrier may have assumed the responsibility for the transportation to a point beyond its own route, any of the subsequent or connecting lines to whose negligence the loss or injury can be traced will also be liable to the owner. *Atchison, T. & S. F. R. Co. v. Roach*, 27 Am. & Eng. R. Cas. 257, 35 Kan. 740, 12 Pac. Rep. 93. *Louisville & N. R. Co. v. Weaver*, 16 Am. & Eng. R. Cas. 218, 9 Lea (Tenn.) 38.

An intermediate carrier may be liable for loss of baggage of a through passenger, where the proof shows clearly that it came into its possession, and the proof tending to show that it delivered it to the next connecting line is not legally sufficient for that purpose. *Baltimore Steam Packet Co. v. Smith*, 23 Md. 402.

Where baggage has been checked over more than one road, if it is not found at the end of the first line by the agents of the second they should at once give notice to the owner or the initial carrier, and failing to do so, the second carrier will be liable. *Davis v. Michigan S. & N. I. R. Co.*, 22 Ill. 278.—DISTINGUISHED IN *Chicago, R. I. & P. R. Co. v. Clayton*, 78 Ill. 616.

Where baggage is carried over three lines and delivered in a damaged condition, and it appears that it was in good condition when delivered by the first company to the second and by that to the third or delivering company, mere proof of its bad condition when delivered will not cast on the inter-

mediate company the burden of showing that it was in good condition when delivered by it to the delivering company. *Montgomery & E. R. Co. v. Culver*, 22 Am. & Eng. R. Cas. 411, 75 Ala. 587.

An arrangement between three companies, whose roads are connected, to sell through tickets, and to check through baggage, each being entitled only to the fare for transportation over its own line, does not render one company liable for a loss occurring on another's line; and the intermediate company is only bound to receive from the initial company, and safely carry over its own road, and deliver to the terminal company. *Montgomery & E. R. Co. v. Culver*, 22 Am. & Eng. R. Cas. 411, 75 Ala. 587. —QUOTING *Michigan C. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 318; *Mobile & G. R. Co. v. Copeland*, 63 Ala. 219. REVIEWING *Lindley v. Richmond & D. R. Co.*, 88 N. Car. 547.

Where a connecting line over which another company issues through tickets receives baggage of a through passenger to forward it, it commits a breach of duty in neglecting to do so, for which it is responsible apart from any question of contract. *Hooper v. London & N. W. R. Co.*, 50 L. J. Q. B. D. 103, 43 L. T. N. S. 570, 29 W. R. 241.

**23. Last carrier, when liable.\***—Where a passenger purchased a through ticket over a line of railroads, having a coupon attached for each road, and checked his baggage through to his destination, if, upon his arrival, it was found to be lost, he could hold the last road of the line responsible therefor. *Savannah, F. & W. R. Co. v. McIntosh*, 27 Am. & Eng. R. Cas. 269, 73 Ga. 532.—FOLLOWING *Hawley v. Screven*, 62 Ga. 347; *Wolff v. Central R. Co.*, 68 Ga. 653.—APPLIED IN *International & G. N. R. Co. v. Foltz*, 3 Tex. Civ. App. 644. REVIEWED IN *Peterson v. Chicago, R. I. & P. R. Co.*, 80 Iowa 92, 45 N. W. Rep. 573.

Where a railroad company sells a through ticket and checks baggage over its own and connecting roads, and, in pursuance of the contract thus made, the passenger is transported to his destination, and his baggage is delivered to him by the last carrier, with the lock broken, and a portion of the contents

\* Liability of last carrier of connecting lines for baggage lost or injured, see note, 27 Am. & Eng. R. Cas. 271.

stolen, he is entitled to recover damages from the last carrier, unless it shows that the baggage was delivered in the same condition as received. *Lin v. Terre Haute & I. R. Co.*, 10 Mo. App. 125.—DISTINGUISHING *Wyman v. Chicago & A. R. Co.*, 4 Mo. App. 35; *Watkins v. Terre Haute & I. R. Co.*, 8 Mo. App. 570.—FOLLOWED IN *Jacobs v. Tutt*, 33 Fed. Rep. 412.

Where the last of connecting carriers delivers baggage in a damaged condition, the presumption prevails that the baggage continued in the same condition as when delivered to the first carrier, and casts on the last carrier the burden of showing its condition when received. *Montgomery & E. R. Co. v. Culver*, 22 Am. & Eng. R. Cas. 411, 75 Ala. 587. *Lin v. Terre Haute & I. R. Co.*, 10 Mo. App. 125.

Where a passenger buys a through ticket with coupons for each road, where the last carrier receives the coupon for its road, and carries the passenger, and delivers to him a check for his baggage, and delivers a part of it, it will be liable for the portion not delivered or lost. *McCormick v. Hudson River R. Co.*, 4 E. D. Smith (N. Y.) 181.—APPLIED IN *Louisville & N. R. Co. v. Weaver*, 16 Am. & Eng. R. Cas. 218, 9 Lea (Tenn.) 38.

**24. Last carrier, when not liable.**—Ga. Code § 2084, providing that the last of a connecting line of railroads over which goods are shipped which receives them as in good order is liable to the consignee, does not apply to baggage of a passenger checked and accompanying him on his passage. *Wolff v. Central R. Co.*, 6 Am. & Eng. R. Cas. 441, 68 Ga. 653, 45 Am. Rep. 501.—FOLLOWED IN *Savannah, F. & W. R. Co. v. McIntosh*, 27 Am. & Eng. R. Cas. 269, 73 Ga. 532.

Mere failure on the part of the last connecting carrier to deliver baggage is not of itself proof of negligence, so as to make it liable. *Stimson v. Connecticut River R. Co.*, 98 Mass. 83.

Where plaintiff travels over several connecting lines on a coupon ticket, and has baggage checked through, the last carrier is not liable for its loss without some evidence to show that it came into its hands. *Kessler v. New York C. & H. R. R. Co.*, 61 N. Y. 538, 12 Am. Ry. Rep. 134; *affirming 7 Lans. 62.*—FOLLOWING *Milnor v. New York & N. H. R. Co.*, 53 N. Y. 363.—REVIEWED IN *Pooler v. Delaware, L. & W. R. Co.*, 35 Hun (N. Y.) 29; *Ward v. New York C. &*

*H. R. R. Co.*, 56 Hun (N. Y.) 268, 30 N. Y. S. R. 604, 9 N. Y. Supp. 377.

In the absence of evidence to show a joint contract between connecting roads, one road is not liable for loss of baggage before it reaches its line. *Felder v. Columbia & G. R. Co.*, 27 Am. & Eng. R. Cas. 264, 21 So. Car. 35, 53 Am. Rep. 656.—DISTINGUISHING *Bradford v. South Carolina R. Co.*, 7 Rich. (So. Car.) 201.

Where, by traffic arrangements between two companies, passengers are ticketed through, over both lines, there is one entire contract between the passenger and the company issuing the ticket. Accordingly the passenger has no cause of action against the second company for the loss of luggage on its line. *Mytton v. Midland R. Co.*, 4 H. & N. 615, 28 L. J. Exch. 385, 33 L. T. 587, 7 W. R. 737.—HELD OVERRULED IN *Hooper v. London & N. W. R. Co.*, 50 L. J. Q. B. 103, 43 L. T. 570, 29 W. R. 241, 45 J. P. 223.

The Pennsylvania Central R. Co. sold and delivered in New York "a through ticket" and "a through check" to F., and undertook to transport him and his baggage over its own road and others designated, making a continuous line from New York to Memphis. F. sued the Memphis & O. R. Co., the last road along the route, for the loss of his baggage on the first. In the absence of proof that the first company was the agent of the last or that there was a contract or arrangement, either expressed or implied, or a custom from which such contract or arrangement could be inferred, between the several companies, as to the transportation of passengers and baggage—*held*, that the first company acted for itself, and that, as no privity was shown between the plaintiff and defendant, the latter was not responsible for the loss. *Furstenheim v. Memphis & O. R. Co.*, 9 Heisk. (Tenn.) 238, 19 Am. Ry. Rep. 409.—QUOTED IN *Louisville & N. R. Co. v. Weaver*, 16 Am. & Eng. R. Cas. 218, 9 Lea (Tenn.) 38.

Plaintiff bought a through ticket with the privilege of changing the route at an intermediate point and go from there over defendant's road. Her baggage was checked over the regular route, but on reaching such intermediate point she had it rechecked over defendant's road, and on arrival at its destination some of the articles were found to be stolen. *Held*: (1) that the rechecking of the baggage was not a new contract, but



was done in pursuance of the original agreement; (2) that, without deciding the liability of defendant for loss while in its hands, no recovery can be had where the complaint does not allege that the loss occurred through defendant's negligence. *Candee v. Pennsylvania R. Co.*, 21 Wis. 582.—FOLLOWING Illinois C. R. Co. v. Copeland, 24 Ill. 332; Peet v. Chicago & N. W. R. Co., 19 Wis. 118.—DISTINGUISHED IN *Tolman v. Abbot*, 78 Wis. 192. REVIEWED IN *Gray v. Jackson*, 51 N. H. 9.

### 25. When either road may be sued.

—Where different railways forming a continuous line run their cars over the whole line and sell tickets over the whole route and take baggage through, an action lies against either company for the loss of the baggage, *Texas & P. R. Co. v. Ferguson*, 9 Am. & Eng. R. Cas. 395, 1 Tex. App. (Civ. Cas.) 724.

Where a through passenger upon arriving at his place of destination finds that his baggage is damaged or has been broken open and the contents stolen, he may sue the road which issued the check, or he may sue the road delivering the baggage in bad condition. *Wolff v. Central R. Co.*, 6 Am. & Eng. R. Cas. 441, 68 Ga. 653, 45 Am. Rep. 501.

Under the American authorities each of the roads composing a continuous line over which a passenger travels on a through ticket, and baggage is sent on a through check, is a principal contractor, adopting the contract of the first road, and is therefore liable for spoliation of baggage, irrespective of the point at which it actually occurred. *Wolff v. Central R. Co.*, 6 Am. & Eng. R. Cas. 441, 68 Ga. 653, 45 Am. Rep. 501.—REVIEWED IN *Peterson v. Chicago, R. I. & P. R. Co.*, 80 Iowa 92, 45 N. W. Rep. 573.

26. Each road agent of all the others.—Where several carriers unite to complete a line of transportation and receive passengers for transportation over their entire lines, and give tickets for baggage to be transported, each carrier is the agent of all the others to accomplish the carriage of the passenger and the delivery of his baggage, and is liable for any damage to them on whatever part of their line the damage is received. *Texas & P. R. Co. v. Fort*, 9 Am. & Eng. R. Cas. 392, 1 Tex. App. (Civ. Cas.) 722. *Texas & P. R. Co. v. Ferguson*, 9 Am. & Eng. R. Cas. 395, 1 Tex. App. (Civ. Cas.) 724.

—DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Roach*, 27 Am. & Eng. R. Cas. 257, 35 Kan. 740. REVIEWED IN *Peterson v. Chicago, R. I. & P. R. Co.*, 80 Iowa 92, 45 N. W. Rep. 573.—*Missouri Pac. R. Co. v. Slater*, 3 Tex. App. (Civ. Cas.) 25.

As to through baggage, it is the duty of the company receiving it, and selling a through ticket, to see that the baggage is delivered at the end of the route, and its duty does not cease until this is done. If it delivers to a connecting line, the latter acts as its agent in the further carrying and delivering. *Lin v. Terre Haute & I. R. Co.*, 10 Mo. App. 125.

Plaintiff purchased a through ticket and had his baggage checked through, but arrived at his place of destination over a connecting line. Two days afterward he demanded his baggage, but it could not be found. It appeared that the company selling the ticket had delivered the baggage to the connecting carrier, who had carried it to its place of destination, but that it was lost about the baggage-room. Held, that the second company was but the agent of the first, and that the first was liable either as carrier or warehouseman. *Burnell v. New York C. R. Co.*, 45 N. Y. 184, 6 Am. Rep. 61.—LIMITING *Roth v. Buffalo & S. L. R. Co.*, 34 N. Y. 548.—APPLIED IN *Talcott v. Washash R. Co.*, 50 N. Y. S. R. 423. DISTINGUISHED IN *Price v. Oswego & S. R. Co.*, 50 N. Y. 213; *Milnor v. New York & N. H. R. Co.*, 53 N. Y. 363. FOLLOWED IN *Grossman v. Fargo*, 6 Hun (N. Y.) 310; *Burgevin v. New York C. & H. R. R. Co.*, 23 N. Y. Supp. 415; *Brown v. Canadian Pac. R. Co.*, 3 Man. 496.

Suit was instituted against the Texas & Pacific Railway for baggage lost at some unknown point between Memphis and Dallas, through checks for said baggage being delivered to plaintiff at Memphis by an agent of the Memphis and Little Rock Railroad, over three uniting lines, including the Texas and Pacific Railway. Held, that the check delivered at Memphis was the check of appellant railroad, as well as of the other companies, and that the contract was appellant's contract, and it was bound by it. *Texas & P. R. Co. v. Fort*, 9 Am. & Eng. R. Cas. 392, 1 Tex. App. (Civ. Cas.) 722.—REVIEWING *McCormick v. Hudson River R. Co.*, 4 E. D. Smith (N. Y.) 181.—DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Roach*, 27 Am. & Eng. R. Cas. 257, 35 Kan. 740.

REVIEWED IN *Peterson v. Chicago, R. I. & P. R. Co.*, 80 Iowa 92, 45 N. W. Rep. 573.

**27. Effect of custom or course of business.**—The course of business and the practice of a railroad company in respect to the custody of baggage passing over its line, and to be transferred to a connecting road, is of great importance in determining the nature of its liability therefor. *Quimit v. Henshaw*, 35 Vt. 605.

Where a passenger buys a ticket by a particular route over connecting lines, and has his baggage so checked and marked, and it is carried a part of the way by a road not forming part of the through route, no contract can be inferred from the fact that such road had frequently carried other baggage similarly checked and marked. *Fairfax v. New York C. & H. R. R. Co.*, 8 J. & S. (N. Y.) 128.—FOLLOWING *Coleman v. Livingston*, 4 J. & S. 32.

**28. Effect of recognition of ticket sold by another road.**—Where two railroads connect, and sell through tickets which are recognized by each road, they are jointly liable for through baggage that may be lost. *St. Louis, I. M. & S. R. Co. v. Hindsman*, 1 Tex. App. (Civ. Cas.) 82.

Where a passenger ticket entitles the holder to travel over different lines of road to his place of destination, to which his baggage is checked, all of them recognizing the validity of the ticket, each company into whose possession the baggage may come will be liable for its loss while in the possession of such company. *Chicago & R. I. R. Co. v. Fahey*, 52 Ill. 81.

Where a passenger seeks to hold one of several roads in his line of transit liable for the loss of his baggage, the recognition of his ticket, purchased at the beginning of his trip, by the conductor of such road is, in effect, an admission that it was issued by some person having competent authority to bind the company; and in such case it is immaterial whether the ticket was issued by a special agent of the company sought to be held liable or by the ticket agent of some other company. *Chicago & R. I. R. Co. v. Fahey*, 52 Ill. 81.

## II. WHAT WILL BE DEEMED TO BE BAGGAGE.

**29. What is included within the term "baggage," generally.\***—A car-

\* What constitutes baggage, see notes, 16 AM. & ENG. R. CAS. 121; 23 *Id.* 486; 31 *Id.* 97; 34

rier of passengers for hire is, at common law, only bound to carry their personal luggage. *Great Northern R. Co. v. Shepherd*, 8 Exch. 30, 7 Railw. Cas. 310, 21 L. J. Exch. 286.

Under the California Civil Code the term "luggage" means the same as the term "baggage." *Pfister v. Central Pac. R. Co.*, 70 Cal. 169, 11 Pac. Rep. 686.

A carrier of passengers is liable only for a loss of wearing apparel or personal effects of the passenger, and for money enough to defray his travelling expenses. *Dunlap v. International Steamboat Co.*, 98 Mass. 371. *Whitmore v. Steamboat Caroline*, 20 Mo. 513.

The baggage which a passenger is entitled to have carried is limited to a reasonable amount, which may include such articles as are necessary and convenient for the personal use of the passenger, and such as passengers usually carry. *New Orleans, J. & G. N. R. Co. v. Moore*, 40 Miss. 39. *Metz v. California Southern R. Co.*, 44 Am. & Eng. R. Cas. 433, 85 Cal. 329, 24 Pac. Rep. 610.—FOLLOWING *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. 272.—*Hutchings v. Western & A. R. Co.*, 25 Ga. 61.

As a rule any article which is carried by a passenger for personal use and convenience and according to the want of a particular class of travellers to which he belongs, and carried with reference to immediate wants, is properly a part of his baggage. *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85.—QUOTING *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 622; *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64. REVIEWING *Phelps v. London & N. W. R. Co.*, 19 C. B. N. S. (115 E. C. L.) 321.—*Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612, 40 L. J. Q. B. 300, 24 L. T. 618, 19 W. R. 8, 3 Ry. & C. T. Cas. xix.

A carrier is liable for the loss of such articles of baggage as passengers usually carry for their personal use, comfort, instruction, amusement, or protection, considering the object and length of the journey. *Farmlee v. Fischer*, 22 Ill. 212.—FOLLOWING *Davis v. Michigan S. & N. I. R. Co.*, 22 Ill. 278.

The term baggage may also include travelling articles, a reasonable amount, which may be purchased while abroad for the use of the traveller's family at home, such as or-

*Id.* 249; 47 *Id.* 444; 71 Am. Dec. 158; 8 Am. Rep. 302; 3 L. R. A. 346, 11 *Id.* 759.

dinarily men are in the habit of bringing to their families in that way. *Jones v. Priester*, 1 *Tex. App. (Civ. Cas.)* 326.

But it does not extend to articles purchased for strangers. *Dexter v. Syracuse, B. & N. Y. R. Co.*, 42 *N. Y.* 326.—DISTINGUISHING *Pardee v. Drew*, 25 *Wend.* 460. FOLLOWING *Merrill v. Grinnell*, 30 *N. Y.* 594.

**30. What is or is not baggage a question for the jury.**—What articles of property, as to quantity and value, contained in a trunk may be deemed baggage within the rule is to be determined by the jury according to the circumstances of the case, subject to the power of the court to correct any abuse. *Oakes v. Northern Pac. R. Co.*, 47 *Am. & Eng. R. Cas.* 437, 20 *Oreg.* 392, 25 *Pac. Rep.* 230. *Mauritz v. New York, L. E. & W. R. Co.*, 21 *Am. & Eng. R. Cas.* 286, 23 *Fed. Rep.* 765.

What articles are usually carried by passengers is a question to be left to the jury, under the direction of the court, upon a consideration of the time of life of the traveller, his habits, vocation, and tastes, the length of his journey, and whether he travels alone or with his family, and of the usage of the time and place, and all the circumstances of each case. *Dibble v. Brown*, 12 *Ga.* 217.—QUOTING *Orange County Bank v. Brown*, 9 *Wend. (N. Y.)* 115; *Hawkins v. Hoffman*, 6 *Hill (N. Y.)* 589.

The question as to what is embraced in the term baggage is one made up of both law and fact; whether certain classes of articles usually transported by the different modes of public conveyance should be included within the term or not is a question of law; but when the question is as to the quantity of the articles generally coming under that denomination, then it becomes a question of fact to be found by the jury. *Jones v. Priester*, 1 *Tex. App. (Civ. Cas.)* 326.

Where there is a dispute as to whether articles lost fall within the meaning of passenger's personal baggage or not, it is a mixed question of law and fact to be determined by the jury upon the proper instructions of the court. *Texas & P. R. Co. v. Ferguson*, 9 *Am. & Eng. R. Cas.* 395, 1 *Tex. App. (Civ. Cas.)* 724.

To the extent that articles carried by a passenger for his personal use when travelling exceed in quantity and value such as

are ordinarily or usually carried by passengers of like station and pursuing like journeys, they are not baggage for which the carrier, by common law, is responsible as insurer. But whether a passenger has carried such an excess of baggage is not a pure question of law for the sole or final determination of the court, but a question of fact for the jury, under proper guidance as to the law of the case; and their determination of the facts, no error of law appearing, is not subject to re-examination in this court. *New York C. & H. R. R. Co. v. Fraloff*, 100 *U. S.* 24, 21 *Am. Ry. Rep.* 428.—DISAPPROVED IN *Humphreys v. Perry*, 148 *U. S.* 627. DISTINGUISHED IN *Carlson v. Oceanic Steam Nav. Co.*, 34 *Am. & Eng. R. Cas.* 215, 109 *N. Y.* 359, 16 *N. E. Rep.* 546, 15 *N. Y. S. R.* 519. FOLLOWED IN *Jacobs v. Tutt*, 33 *Fed. Rep.* 412; *Wabash R. Co. v. McDaniels*, 11 *Am. & Eng. R. Cas.* 158, 107 *U. S.* 454, 2 *Sup. Ct. Rep.* 932.

**31. Beds and Bedding.**—Wearing apparel and bedding valued at \$285 is a reasonable amount of baggage for a woman and two children who are travelling to this country by vessel as immigrants, and a provision in the ticket that the carrier's liability for loss of baggage should be limited to \$50 was held invalid. *Glovinsky v. Cunard Steamship Co.*, 53 *N. Y. S. R.* 528.

A bed, pillows, bolster, and bed-quilts belonging to a poor man, who is moving with his wife and family, may properly be called baggage, and under such circumstances it is not error to submit to the jury whether such articles are baggage. *Ouimit v. Henshaw*, 35 *Vt.* 605.

An ordinary ocean steamship transportation contract does not include a feather-bed as baggage, which is not necessary for the use of the passenger on the voyage. *Connelly v. Warren*, 106 *Mass.* 146.

A silk bed-quilt valued at \$10, carried by a lady in her trunk, which is not necessary for her convenience or comfort, is not baggage, and the carrier is not liable for its loss. *St. Louis & C. R. Co. v. Hardway*, 17 *Ill. App.* 321.

Sheets, blankets, and quilts, intended for a passenger's household when permanently settled, are not to be considered as personal luggage. *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612, 40 *L. J. Q. B.* 300, 24 *L. T. N. S.* 618, 19 *W. R.* 873.

**32. Dogs.\***—A carrier that does not take regular possession of dogs, but permits them to be placed in the car of the baggage-master, is not liable as a common carrier for loss or injury to the same, though the baggage-master may have been paid a fee. *Honeyman v. Oregon & C. R. Co.*, 25 *Am. & Eng. R. Cas.* 380, 13 *Oreg.* 352, 10 *Pac. Rep.* 628, 57 *Am. Rep.* 20.—QUOTING *New York C. R. Co. v. Lockwood*, 17 *Wall*, (U. S.) 357.

Where a company posts notice that live animals are "allowed as baggage-men's perquisites," and a dog is placed in the baggage-master's care, who charges therefor, the company is not liable for its loss. *Cantling v. Hannibal & St. J. R. Co.*, 54 *Mo.* 385, 12 *Am. Ry. Rep.* 387.

**33. Fire-arms.**—Guns for sporting purposes may be included as baggage of a traveller coming into the United States from a foreign country. *Van Horn v. Kermit*, 4 *E. D. Smith* (N. Y.) 453.

A rifle packed in a trunk and valued at \$35—held to be baggage. *Davis v. Cayuga & S. R. Co.*, 10 *How. Pr.* (N. Y.) 330.

A revolver may be included as baggage. *Davis v. Michigan S. & N. I. R. Co.*, 22 *Ill.* 278.—FOLLOWED IN *Parmelee v. Fischer*, 22 *Ill.* 212.

A Chicago grocer, who went into the country in quest of butter, sought to recover of a railroad the value of two revolvers, among other things, which he claimed were in his trunk as part of his baggage, which was lost by the company. *Held*, with due regard to the habits and condition in life of the passenger, more than one revolver was not reasonably necessary for his personal use and protection. *Chicago, R. I. & P. R. Co. v. Collins*, 56 *Ill.* 212, 4 *Am. Ry. Rep.* 453.

**34. Fragile articles, lace, etc.**—A carrier may be liable for valuable laces belonging to a lady which were packed in her trunk and shipped as baggage, such articles appearing proper, considering the object of her journey, and her social position and wealth. *Fraloff v. New York C. & H. R. R. Co.*, 10 *Blatchf.* (U. S.) 16.

Construing § 4281 of the Rev. St. of the United States (requiring shippers of certain articles to give to carriers by vessel written

notice of the true character and value thereof) in the light of judicial decisions upon the English statute, of which that section is in most respects a substantial copy, fans and parasols made of delicate and expensive materials, ornamented with carving, fragile in construction and intended more for ornament than for use, although possessing to some extent the quality of utility, are "trinkets," in the sense in which this word is used in that section. Though constituting a part of a lady's paraphernalia, such articles are not clothing; and when shipped by vessel written notice of their character and value must be given. *Ocean Steamship Co. v. Way*, 90 *Ga.* 747.

The word "lace" in the section cited includes a lady's shawl made exclusively of Chantilly lace. *Ocean Steamship Co. v. Way*, 90 *Ga.* 747.

**35. Household goods.**—Articles not intended to be used on the passenger's trip, but being transported merely for future or prospective household use, are not considered baggage in that sense, whereby the railway company would be liable for their loss; and a refusal of a charge asking such instruction to the jury was error. *Texas & P. R. Co. v. Ferguson*, 9 *Am. & Eng. R. Cas.* 395, 1 *Tex. App. (Civ. Cas.)* 724.

A railway company may be liable for such articles as blankets, window-curtains, books, cutlery, and ornaments when packed with other baggage for which the company is liable; but the company is not liable as warehouseman for goods left at a station after the journey has terminated, where the company is not entitled to charge for storage. *McCaffrey v. Canadian Pac. R. Co.*, 1 *Man.* 350.—APPROVING *Great Northern R. Co. v. Shepherd*, 8 *Exch.* 30; *Hudston v. Midland R. Co.*, L. R. 4 Q. B. 366; *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612; *Cahill v. London & N. W. R. Co.*, 13 C. B. N. S. 819. FOLLOWING *Shaw v. Grand Trunk R. Co.*, 7 U. C. C. P. 493; *Bruty v. Grand Trunk R. Co.*, 32 U. C. Q. B. 66; *Lee v. Grand Trunk R. Co.*, 36 U. C. Q. B. 350.

Where an emigrant carries trunks and other ordinary baggage with her, and also turns over to the carrier a number of boxes of goods for transportation, and pays freight for their weight in excess of her baggage allowance, and the general character of the shipment is known to such carrier, it cannot be conclusively presumed that the entire shipment was as baggage. *Hamburg-Ameri-*

\* Carrier not liable at common law for refusing to carry dogs, see note, 57 *AM. REP.* 24.

Responsibility of company for dog left with baggage-master, see note, 25 *AM. & ENG. R. CAS.* 383.

*can Packet Co. v. Gattman*, 127 Ill. 598, 20 N. E. Rep. 662; *affirming* 27 Ill. App. 182.

**36. Jewelry.\***—(1) *Company liable*.—Finger rings and a gold watch and chain may be carried as baggage, for which the carrier will be liable. *McCormick v. Hudson River R. Co.*, 4 E. D. Smith (N. Y.) 181.

A diamond pin and a watch-chain valued at \$1400 held to be baggage, and the carrier liable for the loss of them, though the carrier had attempted to limit its liability to wearing apparel, not to exceed in value \$100. *Coward v. East Tenn., V. & G. R. Co.*, 16 Lea (Tenn.) 225, 37 Am. Rep. 226.—**QUOTING** *Louisville & N. R. Co. v. Weaver*, 9 Lea 51; *Dillard v. Louisville & N. R. Co.*, 2 Lea 293; *New York C. R. Co. v. Lockwood*, 17 Wall. (U. S.) 358; *Davidson v. Graham*, 2 Ohio St. 131.—**APPROVED** IN *Louisville & N. R. Co. v. Wynn*, 45 Am. & Eng. R. Cas. 312, 88 Tenn. 320, 14 S. W. Rep. 311. **DISTINGUISHED** IN *Louisville & N. R. Co. v. Sowell*, 90 Tenn. 17.

If a station agent checks as personal baggage a trunk known to him to belong to a jeweller and to contain a stock of jewelry, the railroad company is liable as a common carrier for its loss to the same extent as if the trunk had contained nothing but wearing apparel, or as if it had undertaken to carry it as freight. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 40 Am. & Eng. R. Cas. 636, 39 Fed. Rep. 417.

(2) *Company not liable*.—A carrier is not liable for the loss of such articles, shipped in a trunk as baggage, as jewelry which the traveller had purchased and intended as presents to friends, engravings, or regalia of a secret order. *Ne vins v. Bay State Steamboat Co.*, 4 Bosw. (N. Y.) 225.—**QUOTING** *Hawkins v. Hoffman*, 6 Hill (N. Y.) 589.

Where a passenger sues to recover for loss of baggage, the jury will not be justified in allowing a certain sum which he claims for loss of jewelry, but which he can neither identify nor describe other than as "several articles of jewelry, being presents received, valued at \$100." *Ne vins v. Bay State Steamboat Co.*, 4 Bosw. (N. Y.) 225.

A man travelling alone cannot recover as baggage for loss of a lady's jewelry which he had in his trunk. *Metz v. California Southern R. Co.*, 44 Am. & Eng. R. Cas. 433, 85 Cal. 329, 24 Pac. Rep. 610.—**DISTINGUISH-**

**ING** *McGill v. Rowand*, 3 Pa. St. 451, 45 Am. Dec. 654.—*Cadwallader v. Grand Trunk R. Co.*, 9 Low. Can. 169.

**37. Merchandise—Carrier not liable.\***—The term "baggage," for which passenger carriers are responsible, does not include articles of merchandise not intended for personal use. *Collins v. Boston & M. R. Co.*, 10 Cush. (Mass.) 506.—**FOLLOWING** *Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69.—*Oakes v. Northern Pac. R. Co.*, 20 Oreg. 392, 26 Pac. Rep. 230.

A railroad company is not bound by the sale of a ticket to a passenger to carry merchandise offered as baggage, and is not liable as common carrier for the loss of merchandise so offered and received by it without any intimation of its true nature. *Blumenthal v. Maine C. R. Co.*, 34 Am. & Eng. R. Cas. 247, 79 Me. 550, 5 N. Eng. Rep. 355, 11 Atl. Rep. 605. *Dibble v. Brown*, 12 Ga. 217. *Michigan Southern & N. T. R. Co. v. Oehm*, 56 Ill. 293, 4 Am. Ry. Rep. 451.—**FOLLOWING** *Cincinnati & C. A. L. R. Co. v. Marcus*, 38 Ill. 223.—*Hamburg-American Packet Co. v. Gattman*, 127 Ill. 598, 20 N. E. Rep. 662; *affirming* 27 Ill. App. 182. *Mississippi C. R. Co. v. Kennedy*, 41 Miss. 671. *Pardee v. Drew*, 25 Wend. (N. Y.) 459.—**FOLLOWING** *Orange County Bank v. Brown*, 9 Wend. 85.—**DISTINGUISHED** IN *Dexter v. Syracuse, B. & N. Y. R. Co.*, 42 N. Y. 326. **FOLLOWED** IN *Richards v. Wescott*, 7 Bosw. (N. Y.) 6.—*Belfast & B. R. Co. v. Keys*, 9 H. L. Cas. 556, 9 W. R. 793, 4 L. T. 841, 8 Jur. N. S. 367. *Cahill v. London & N. W. R. Co.*, 10 C. B. N. S. 154, 7 Jur. N. S. 1164, 30 L. J. C. P. 289, 9 W. R. 653, 4 L. T. N. S. 246; *affirmed on appeal* in 13 C. B. N. S. 818, 8 Jur. N. S. 1063, 31 L. J. C. P. 271, 10 W. R. 321. *Great Northern R. Co. v. Shepherd*, 8 Exch. 30, 7 Railw. Cas. 310, 21 L. J. Exch. 286.

And the carrier is not bound to inquire as to the nature of the property, but may assume that it contains only such things as are properly baggage. *Haines v. Chicago, St. P., M. & O. R. Co.*, 29 Minn. 160, 43 Am. Rep. 199, 12 N. W. Rep. 447.

Articles carried for sale are not baggage without regard as to what the articles may be. *Spooner v. Hannibal & St. J. R. Co.*, 23 Mo. App. 403.

A common carrier of passengers is not an

\* Jewelry and precious stones as baggage, see note, 16 AM. & ENG. R. CAS. 400.

\* Liability of company for merchandise shipped as baggage, see note, 34 AM. REP. 379.

insurer of merchandise taken along by the passenger, unless a reward be given for its transportation, or it be of a character which, by usage or contract, is to be regarded as part of the baggage. *Smith v. Boston & M. R. Co.*, 44 N. H. 325. *Shaw v. Grand Trunk R. Co.*, 7 U. C. C. P. 493.—FOLLOWED IN *McCaffey v. Canadian Pac. R. Co.*, 1 Man. 350.—*Doyle v. Kiser*, 6 Ind. 242.—DISTINGUISHING *Walker v. Jackson*, 10 M. & W. 161; *Cole v. Goodwin*, 19 Wend. (N. Y.) 234.—EXPLAINED IN *Indiana C. R. Co. v. Gulick*, 19 Ind. 83.

Although the carrier in such case is not liable as an insurer, he is liable as a bailee without reward for loss or injury caused by his gross negligence; but such negligence must be proved, and is not to be presumed from the mere fact of the loss. *Smith v. Boston & M. R. Co.*, 44 N. H. 325.

The fact that other agents had at other times and places received and checked the merchandise as baggage with knowledge of its true nature, will not operate as notice to the company of its nature, with respect to the trip during which it was lost. *Blumenthal v. Maine C. R. Co.*, 34 Am. & Eng. R. Cas. 247, 79 Me. 550, 5 N. Eng. Rep. 355, 11 Atl. Rep. 605. *Smith v. Boston & M. R. Co.*, 44 N. H. 325.—FOLLOWING *Elkins v. Boston & M. R. Co.*, 23 N. H. 286; *Murch v. Concord R. Co.*, 29 N. H. 41.

The plaintiff, an emigrant for Toronto, brought with him from England a box as personal luggage which contained only rare plants and roses intended for sale. He delivered it to the defendant's baggage-master at Quebec, saying that he would pay for it, but not stating its contents, on which the latter asked for his ticket, and on seeing that it was a third-class government emigrant ticket he said there was nothing to pay, and that it might go with plaintiff in the train. The plaintiff said the box was marked somewhere "Plants, perishable," but he could not say that defendant's officer saw it, and it was sworn that if defendant had been notified that it was freight or merchandise it would not have been taken. *Held*, that the defendant was not liable for its loss. *Lee v. Grand Trunk R. Co.*, 36 U. C. Q. B. 350.—REVIEWING *Cahill v. London & N. W. R. Co.*, 13 C. B. N. S. 818, 10 C. B. N. S. 154.—FOLLOWED IN *McCaffey v. Canadian Pac. R. Co.*, 1 Man. 350.

### 38. Merchandise—Carrier liable.—

If a carrier receives goods as baggage,

knowing them to be articles of merchandise, and undertakes to transport them, it is liable for their loss. *Stoneman v. Erie R. Co.*, 52 N. Y. 429; *affirming 1 Sheld.* 286.—DISTINGUISHED IN *Pfister v. Central Pac. R. Co.*, 70 Cal. 169. REVIEWED IN *Talcott v. Wabash R. Co.*, 50 N. Y. S. R. 423.—*Ross v. Missouri, K. & P. R. Co.*, 4 Mo. App. 582.

Where the duly authorized agent of a railroad company receives personal property to be transported as baggage, the railroad company must account for such property as baggage, although in strict language it might not be baggage. *Chicago, R. I. & P. R. Co. v. Conklin*, 16 Am. & Eng. R. Cas. 116, 32 Kan. 35, 3 Pac. Rep. 762.

Where property is offered by a passenger, but not so packed as to assume the outward appearance of ordinary baggage, or as to deceive or to conceal its true character, it is within the scope of the agent's business and duty to decide whether the company will receive and carry it as baggage, and if so received, to be forwarded, the company is liable. *Waldron v. Chicago & N. W. R. Co.*, 1 Dak. 351, 46 N. W. Rep. 456, 1 Dak. T. 336.—QUOTING *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. (U. S.) 274; *Great Northern R. Co. v. Shepherd*, 7 Railw. Cas. 310.

Proof that a passenger had a package of merchandise checked as baggage, the baggage master knowing that it was merchandise, and that other passengers had similar packages checked, does not warrant a finding that the carrier had agreed to carry it as merchandise, or to become liable for it as a common carrier, where there is no evidence that the baggage-master had authority to receive freight to be carried on passenger trains, or to bind the carrier to carry merchandise as personal baggage. *Blumantle v. Fitchburg R. Co.*, 127 Mass. 322.—DISTINGUISHING *Great Northern R. Co. v. Shepherd*, 8 Exch. 30. EXPLAINING *Sloman v. Great Western R. Co.*, 67 N. Y. 208; *Graffam v. Boston & M. R. Co.*, 67 Me. 234. REVIEWING *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. (U. S.) 262.

If a passenger openly offers merchandise as personal luggage, or if the merchandise is so packed that its nature is obvious, and the company does not object to it, it will be liable. *Great Northern R. Co. v. Shepherd*, 8 Exch. 30, 7 Railw. Cas. 310, 21 L. J. Exch. 286.



Where a passenger pays his passage and an extra sum for having articles of merchandise transported with his baggage, in the absence of fraud or concealment on his part as to the contents of the packages of merchandise, the carrier is liable for the loss of the merchandise the same as for baggage. *Stoneman v. Erie R. Co.*, 52 N. Y. 429; *affirming 1 Sheid.* 286.—DISAPPROVED IN *Humphreys v. Perry*, 148 U. S. 627.—*Perley v. New York C. & H. R. R. Co.*, 65 N. Y. 374. *Stoman v. Great Western R. Co.*, 67 N. Y. 208, 15 Am. Ry. Rep. 113; *reversing 6 Hun* 546.—APPLIED AND REVIEWED IN *Talcott v. Wabash R. Co.*, 50 N. Y. S. R. 423. DISAPPROVED IN *Humphreys v. Perry*, 148 U. S. 627. DISTINGUISHED IN *Pfister v. Central Pac. R. Co.*, 70 Cal. 169. REVIEWED IN *Talcott v. Wabash R. Co.*, 50 N. Y. S. R. 423, 66 Hun 456, 21 N. Y. Supp. 318.

While the obligation of a carrier of passengers is limited to ordinary baggage, yet if the carrier knowingly permits a passenger, either on payment or without payment of an extra charge, to take articles as personal baggage which are not properly such, it will be liable for their loss or destruction though without fault. *Oakes v. Northern Pac. R. Co.*, 47 Am. & Eng. R. Cas. 437, 20 Oreg. 392, 26 Pac. Rep. 230.

Where in such case the property is not that of the passenger, but is in his hands as agent of the owner, and he makes the contract and pays the compensation for its carriage, for account of and in the conduct of the business of his principal, an action is properly brought in the name of the latter to recover for the loss. *Stoman v. Great Western R. Co.*, 67 N. Y. 208, 15 Am. Ry. Rep. 113; *reversing 6 Hun* 546.

**39. Military stores, etc.**—Public baggage, stores, arms, etc., sent by railway, in charge of troops, specified in 7 & 8 Vic. ch. 85, § 12, is their baggage, no matter what may be the disproportion between the amount of baggage and the number of the force, and it must be carried at the rates imposed by that section. *Attorney-General v. Great Southern & W. R. Co.*, 14 Ir. Com. Law Rep. 447.

#### 40. Money.\*—(1) Carrier liable.—A

\* See also *post*, 84.

Liability of company for money transported as baggage, see note, 18 AM. & ENG. R. CAS. 627.

Passenger carrying money as baggage may

passenger has a right to carry money in his trunk as baggage in a sum proper for travelling expenses, and if lost the carrier will be liable therefor. *Merrill v. Grinnell*, 30 N. Y. 594.—FOLLOWED IN *Dexter v. Syracuse, B. & N. Y. R. Co.*, 42 N. Y. 326.—*Torpey v. Williams*, 3 Daly (N. Y.) 162. *Taylor v. Monnot*, 4 Duer (N. Y.) 116, 1 Abb. Pr. 325.—FOLLOWING *Weed v. Saratoga & S. R. Co.*, 19 Wend. (N. Y.) 534; *Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69. NOT FOLLOWING *Hawkins v. Hoffman*, 6 Hill (N. Y.) 589.—REVIEWED IN *Merrill v. Grinnell*, 30 N. Y. 594.—*Missouri Pac. R. Co. v. York*, 2 Tex. App. (Civ. Cas.) 557. *International & G. N. R. Co. v. McCown*, 2 Tex. App. (Civ. Cas.) 624. *Cadwallader v. Grand Trunk R. Co.*, 9 Low. Can. 169.

In determining the amount of money which a passenger may have carried as baggage his expenses for his entire trip must be considered, and not his expenses merely over the line of the defendant company. In addition to necessary travelling expenses he is entitled to a proper allowance for accidents, sickness, and sojourning by the way, such as a prudent man would consider necessary to make. *Merrill v. Grinnell*, 30 N. Y. 594.

Bank bills amounting to \$300 are a reasonable sum for a passenger to carry as baggage in his trunk without informing the company. *Illinois C. R. Co. v. Copeland*, 24 Ill. 332.

A person making an ocean steamship voyage may retain in his trunk money for small personal expenses, and the owner of the vessel will be liable therefor if lost; and the amount may differ from that allowed where a person is travelling by railroad or stage coach, where the journey is much briefer as to time. *Duffy v. Thompson*, 4 E. D. Smith (N. Y.) 178.

(2) Carrier not liable.—Common carriers of passengers are not responsible for money included in the baggage of a passenger to an amount exceeding what a prudent person would deem proper and necessary, or intended for purposes other than for the expenses of the journey, unless the loss is occasioned by the gross negligence of the carriers or their servants. *Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69.—APPLIED IN *Merrill v. Grinnell*, 30 N. Y. 594. FOL-

be compelled to pay freight, see note, 27 AM. & ENG. R. CAS. 256.

LOWED IN *Collins v. Boston & M. R. Co.*, 10 Cush. (Mass.) 506; *Taylor v. Monnot*, 4 Duer (N. Y.) 116. REVIEWED IN *Davis v. Cayuga & S. R. Co.*, 10 How. Pr. (N. Y.) 330.

A traveller cannot recover from a carrier for the loss of money contained in his trunk checked as baggage, which he expected to expend in buying merchandise at the end of his journey. *Hickox v. Naugatuck R. Co.*, 31 Conn. 281.

When the baggage consists of an ordinary travelling trunk, in which there is a large sum of money, such money is not considered as included under the term baggage, so as to render the carrier responsible for it. It seems, however, that the carrier would be liable for money in the trunk not exceeding an amount ordinarily carried for travelling expenses. *Orange County Bank v. Brown*, 9 Wend. (N. Y.) 85.—APPLIED IN *Merrill v. Grinnell*, 30 N. Y. 594. FOLLOWED IN *Pardee v. Drew*, 25 Wend. (N. Y.) 459. QUOTED IN *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64; *Dibble v. Brown*, 12 Ga. 217; *Oppenheimer v. United States Exp. Co.*, 69 Ill. 62. REVIEWED IN *Pacific Exp. Co. v. Foley*, 46 Kan. 457.

It seems that money to pay travelling expenses, carried in the passenger's trunk, is not included in the term baggage. *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586.—NOT FOLLOWED IN *Merrill v. Grinnell*, 30 N. Y. 594.

Gold, silver, notes, etc., contained in a travelling-bag are not baggage, and a person carrying a bag containing such on a train and keeping entire possession and control of it near his own person is liable to pay freight therefor. *Hutchings v. Western & A. R. Co.*, 25 Ga. 61.

Where money amounting to \$90,000 is presented by a passenger, the company may refuse to carry it as luggage and insist that it shall go by express. *Pfister v. Central Pac. R. Co.*, 27 Am. & Eng. R. Cas. 246, 70 Cal. 169, 11 Pac. Rep. 686.

A county treasurer who is travelling to the place of deposit of his funds is not entitled to carry with him, as baggage, a large sum of money, and the carrier may refuse to carry it, though for years it had allowed him to travel on the train with large sums of money. *Pfister v. Central Pac. R. Co.*, 27 Am. & Eng. R. Cas. 246, 70 Cal. 169, 11 Pac. Rep. 686.—DISTINGUISHING *Minter v. Pacific R. Co.*, 41 Mo. 504; *Butler v. Hudson*

*River R. Co.*, 3 E. D. Smith 571; *Stoneman v. Erie R. Co.*, 52 N. Y. 429; *Sloman v. Great Western R. Co.*, 67 N. Y. 208; *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. (U. S.) 262.

(3) *Question of liability for jury.*—Whether a sum of money carried in a trunk is more than would ordinarily be required to meet the expenses of a journey is a question for the jury. *Jones v. Priester*, 1 Tex. App. (Civ. Cas.) 326.

As to what is a reasonable amount of money to be carried by a passenger as baggage must depend upon the character of the journey and the special circumstances of each case. *Merrill v. Grinnell*, 30 N. Y. 594.—APPLYING *Weed v. Saratoga & S. R. Co.*, 19 Wend. 534; *Orange County Bank v. Brown*, 9 Wend. 85; *Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69.

As to what is a reasonable amount of money to be carried by a passenger as baggage is a question to be determined by the jury or a referee; and where the referee has passed upon the fact and determined what is a reasonable sum, his finding should not be disturbed on appeal. *Merrill v. Grinnell*, 30 N. Y. 594.—REVIEWING *Orange County Bank v. Brown*, 9 Wend. 85; *Weed v. Saratoga & S. R. Co.*, 19 Wend. 534; *Taylor v. Monnot*, 4 Duer 116.

Plaintiff was moving a long distance with himself and family, and with other things shipped \$400 in money in a trunk, which was lost, and he claimed that such amount was necessary under the circumstances, and that there was less danger of pickpockets. *Held*, that the question as to whether the money was necessary under the circumstances for their personal comfort and convenience, and was therefore baggage, was a question of fact. *Missouri Pac. R. Co. v. York*, 2 Tex. App. (Civ. Cas.) 557.

**41. Price-lists, catalogues, etc.**—A "price-book" carried by a travelling salesman, containing lists and prices which he used in his business and could not remember, is properly personal baggage. *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85, 14 Am. Rep. 716.—FOLLOWED IN *Staub v. Kendrick*, 40 Am. & Eng. R. Cas. 632, 121 Ind. 226, 23 N. E. Rep. 79, 6 L. R. A. 619.

A catalogue prepared by a travelling salesman at his own expense, and which was his own individual property, and was carried with him as an article convenient and necessary for use in his business while travelling,

is an article of personal baggage for which he may recover when lost, with other articles in a valise, by a baggage-transfer carrier. *Staub v. Kendrick*, 40 *Am. & Eng. R. Cas.* 632, 121 *Ind.* 226, 23 *N. E. Rep.* 79, 6 *L. R. A.* 619.—FOLLOWING *Gleason v. Goodrich Transp. Co.*, 32 *Wis.* 85, 14 *Am. Rep.* 716.

**42. Samples carried by travelling salesmen.**—The term baggage does not embrace samples of merchandise carried by the passenger in a trunk, with a view to enabling him to make bargains for the sale of goods. *Hawkins v. Hoffman*, 6 *Hill. (N. Y.)* 586.—QUOTED IN *Dibble v. Brown*, 12 *Ga.* 217.—*Texas & P. R. Co. v. Capps*, 2 *Tex. App. (Civ. Cas.)* 35.

A railroad company is not liable on its implied contract for the loss of samples used by a travelling salesman in his business, which are shipped as baggage, at the suit of either the owner or the salesman, and it is only liable in tort for the loss where there is gross negligence. *Stimson v. Connecticut River R. Co.*, 98 *Mass.* 83.—APPLIED IN *Curtis v. Delaware, L. & W. R. Co.*, 74 *N. Y.* 116. FOLLOWED IN *Alling v. Boston & A. R. Co.*, 126 *Mass.* 121.

A carrier, in the absence of gross negligence, is not liable for the loss of samples of merchandise shipped in a trunk as personal baggage, and its liability is not affected by proof that the carrier was in the habit of carrying trunks known to contain samples used by travelling salesmen. *Alling v. Boston & A. R. Co.*, 126 *Mass.* 121.—FOLLOWING *Stimson v. Connecticut River R. Co.*, 98 *Mass.* 83.

Where a trunk is checked containing samples of jewelry used by a travelling salesman, the contents being made known to the agent who checks it, the carrier is liable for its loss as for ordinary baggage. *Jacobs v. Tutt*, 33 *Fed. Rep.* 412.—FOLLOWING *New York C. & H. R. Co. v. Fraloff*, 100 *U. S.* 27.—*Texas & P. R. Co. v. Capps*, 16 *Am. & Eng. R. Cas.* 118, 2 *Tex. App. (Civ. Cas.)* 35. *Hogger v. Chicago, M. & St. P. R. Co.*, 21 *Am. & Eng. R. Cas.* 308, 63 *Wis.* 100, 23 *N. W. Rep.* 435, 53 *Am. Rep.* 271.

A railroad company which, with knowledge of its contents, takes upon a freight car as passenger's baggage a sample trunk containing valuable merchandise, is liable

\* Commercial travellers' trunks and sample-cases as baggage. Liability of carrier, see 39 *Am & Eng. R. Cas.* 439 *abstr.*

for its loss while in transit. *Rider v. Wabash, St. L. & P. R. Co.*, 14 *Mo. App.* 529.

**43. Surgical instruments, tools of mechanics, etc.**—Surgical instruments, in the case of a surgeon in the army travelling with troops, constitute part of his baggage. *Hannibal & St. J. R. Co. v. Swift*, 12 *Wall. (U. S.)* 262, 1 *Am. Ry. Rep.* 434.

A reasonable quantity of his tools is proper baggage for a mechanic working as a watchmaker and jeweller. What constitutes a reasonable quantity is for the jury. *Kansas City, Ft. S. & G. R. Co. v. Morrison*, 34 *Kan.* 502, 55 *Am. Rep.* 252, 9 *Pac. Rep.* 225.—QUOTING *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612. REVIEWING *Davis v. Cayuga & S. R. Co.*, 10 *How. Pr. (N. Y.)* 330; *Porter v. Hildebrand*, 14 *Pa. St.* 129.

The tools of a harness-maker, valued at \$10, packed in his trunk with clothing and shipped as baggage—held to be such, under proof that it was customary for a harness-maker when quitting one place to pack and transport his tools in that way. *Davis v. Cayuga & S. R. Co.*, 10 *How. Pr. (N. Y.)* 330.—REVIEWING *Brooke v. Peckwith*, 4 *Bing.* 218; *Bomar v. Maxwell*, 9 *Humph. (Tenn.)* 623; *Jordan v. Fall River R. Co.*, 5 *Cush. (Mass.)* 69.—REVIEWED IN *Kansas City, Ft. S. & G. R. Co. v. Morrison*, 34 *Kan.* 502, 55 *Am. Rep.* 252.

**44. Watches.**—A watch is part of a traveller's baggage, and is properly deposited in his trunk. *Jones v. Voorhees*, 10 *Ohio* 145. *American Contract Co. v. Cross*, 8 *Bush (Ky.)* 472.

A railroad company is responsible as a common carrier for the value of a gold watch which was lost from the trunk of a passenger by the negligence of the company. *American Contract Co. v. Cross*, 8 *Bush (Ky.)* 472.

**45. Miscellaneous articles.**—While such articles as a group of photographs framed, family portraits, a meerschaum pipe, chandeliers, and mirrors are not strictly baggage, yet where a railroad company receives such things with other articles, and receives extra compensation for the same, as baggage, and agrees to transport them at baggage rates without inquiry as to what the packages contain, and without any misrepresentation by the owner, the railroad company will be liable for any loss or damage thereto. *Missouri Pac. R. Co. v. Slater*, 3 *Tex. App. (Civ. Cas.)* 25.—APPROVING *Stoneman v. Erie R. Co.*, 52 *N. Y.* 429;

*Hannibal & St. J. R. Co. v. Swift*, 12 Wall. (U. S.) 262.

Where a traveller is a shipmaster, common carriers will be held responsible for a dressing-case, and for night-glasses or telescopes, upon the presumption that he may reasonably have thought they would be useful to him in the course of his intended voyage across the Atlantic. *Cadwalader v. Grand Trunk R. Co.*, 9 Low. Can. 169.

*The following articles have been held to be within the meaning of the term "baggage," so as to render the carrier liable for their loss.*

A limited quantity of goods cut into shirt patterns. *Duffy v. Thompson*, 4 E. D. Smith (N. Y.) 178.

An opera-glass. *Toledo, W. & W. R. Co. v. Hammond*, 33 Ind. 379.

A rifle, a revolver, two gold chains, a locket, two gold rings, a silver pencil-case. *Brady v. Grand Trunk R. Co.*, 31 U. C. Q. B. 66.

Articles for the personal use, convenience, instruction, or amusement of the passenger on the way, and usually carried as baggage; e.g., wearing apparel, brushes, writing materials, books, fishing tackle, etc. *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586.

Clothing, money for travelling expenses, a few books for reading, a watch, a lady's jewelry for dressing, etc. *Doyle v. Kiser*, 6 Ind. 242.

Manuscript of a student, author, or professional man. *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64.—QUOTED IN *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85.

Sixteen yards of silk, two goblets, a half a bushel of canary-seed, 100 dollars in coin and 200 dollars in bills. *Jones v. Priester*, 1 Tex. App. (Civ. Cas.) 326.

*The following articles are held not "baggage" for the loss of which the carrier is liable:*

An artist's pencil sketches. *Mytton v. Midland R. Co.*, 4 H. & N. 615, 28 L. J. Exch. 385, 33 L. T. 587, 7 W. R. 737.—HELD OVERRULED IN *Hooper v. London & N. W. R. Co.*, 50 L. J. Q. B. 103, 43 L. T. 570, 29 W. R. 241, 45 J. P. 223.

A child's spring-horse, although it weighs less than the limit which passengers are entitled to take. *Hudson v. Midland R. Co.*, L. R. 4 Q. B. 366, 10 B. & S. 504, 38 L. J. Q. B. 213, 17 W. R. 705, 20 L. T. N. S. 526.

A concertina, a sewing-machine, and the tools of trade of a carpenter. *Brady v. Grand*

*Trunk R. Co.*, 32 U. C. Q. B. 66.—FOLLOWED IN *McCaffey v. Canadian Pac. R. Co.*, 1 Man. 350.

Articles usually carried about the person and not as baggage. *Hawkins v. Hoffman*, 6 Hill (N. Y.) 586.—NOT FOLLOWED IN *Taylor v. Monnot*, 4 Duer (N. Y.) 116. QUOTED IN *Nevins v. Bay State Steamboat Co.*, 4 Bosw. (N. Y.) 225.

A sacque and muff and silver napkin-rings, when carried by a man. *Chicago, R. I. & P. R. Co. v. Boyce*, 73 Ill. 510.

Title deeds and bank notes to a considerable amount, carried by an attorney for use in court. *Phelps v. London & N. W. R. Co.*, 19 C. B. N. S. 321, 11 Jur. N. S. 652, 34 L. J. C. P. 259, 13 W. R. 782, 12 L. T. 496.

**46. Extra baggage—Limit of weight.**—An agreement to carry immigrants across the ocean into this country only binds the carrier to transport the ordinary personal baggage. *Nordmeyer v. Loescher*, 1 Hill. (N. Y.) 499.

Under the laws of Texas a railway company has a right to exact pay for extra weight of baggage above 100 pounds, and—all tickets being bought with knowledge of this law—demanding and receiving pay for such extra weight is neither a violation, change, nor substitute of the contract between the carrier and the passenger made in buying the ticket. *Gulf, C. & S. F. R. Co. v. Ions*, 3 Tex. Civ. App. 619, 22 S. W. Rep. 1011.

The mere payment of extra compensation on account of overweight of baggage does not convert it into freight. *Hamburg-American Packet Co. v. Gattman*, 127 Ill. 598, 20 N. E. Rep. 662; affirming 27 Ill. App. 182.

A rule that the passenger may carry with him a certain weight of luggage, permits a husband and wife travelling together to take double that weight. *Great Northern R. Co. v. Shepherd*, 21 L. J. Exch. 114.

### III. COMMENCEMENT AND TERMINATION OF THE LIABILITY.

#### 1. Delivery to Company—Checks for Baggage.

**47. Necessity of delivery to company.**—A common carrier is not liable for loss of baggage unless it appears that there was some contract on its part to carry the baggage, or that it came into the carrier's hands. *Michigan, S. & N. I. R. Co. v. Meyres*, 21 Ill. 627.—DISTINGUISHED IN *Chi-*

cago, R. I. & P. R. Co. v. Clayton, 78 Ill. 616.

**48. Sufficiency of the delivery, generally.**—It is immaterial when baggage comes to the possession of the carrier, whether at the time the check is issued or at a subsequent time. In either case, the carrier's liability as an insurer becomes fixed in case of a loss. *Chicago, R. I. & P. R. Co. v. Clayton*, 78 Ill. 616.

Receiving baggage, in the evening, from passengers intending to take a morning train, where that is the custom of the company, makes the company liable as carrier of the baggage from the time of its receipt. *Green v. Milwaukee & St. P. R. Co.*, 41 Iowa 410. —REVIEWED IN *Lake Shore & M. S. R. Co. v. Foster*, 104 Ind. 293, 54 Am. Rep. 319.

Mere depositing of baggage on the vehicle of a carrier, without notifying the carrier or his agent of an intention to take passage, is not such constructive notice as will sustain an action for its loss. *Wright v. Caldwell*, 3 Mich. 51.—DISTINGUISHED IN *Lake Shore & M. S. R. Co. v. Foster*, 104 Ind. 293, 54 Am. Rep. 319.

A common carrier may assent to the delivery of baggage at its station without notice to its agents, and this assent may be implied from the course of business and custom of the carrier in allowing baggage to be deposited in its rooms; but whether such delivery is to be regarded by the company as binding upon it is a question of fact, which should be left to the jury. *Green v. Milwaukee & St. P. R. Co.*, 38 Iowa 100.

The company is not liable as a carrier if the passenger, finding that his trunk is too large to be put in the caboose, on his own account and responsibility, and not as a delivery to a common carrier, places it in a box-car, the company having no knowledge as to the character of its contents. *Rider v. Wabash, St. L. & P. R. Co.*, 14 Mo. App. 529.

Plaintiff, an intending passenger by defendant's railway, a quarter of an hour before the train started entered a passenger car standing at the station at the original starting-point, left his valise on a vacant seat, and went out; on his return shortly afterward his valise was gone. It was not shown that at the time he left the valise any one was in charge of the train, or that there was any other passenger in the car. Held, no sufficient delivery of the valise to defendants to render them liable.

*Kerr v. Grand Trunk R. Co.*, 24 U. C. C. P. 209. —DISTINGUISHING *Talley v. Great Western R. Co.*, L. R. 6 C. P. 44; *Gamble v. Great Western R. Co.*, 24 U. C. Q. B. 407.

**49. Delivery to baggage-master.**—The proprietors of a railroad, who receive passengers and commence their carriage at the station of another road, are bound to have a servant there to take charge of the baggage until it is placed in their cars; and if it is the custom of the baggage-master of the station, in the absence of such servant, to receive and take charge of baggage in his stead, the proprietors will be responsible for baggage so delivered to him. *Jordan v. Fall River R. Co.*, 5 Cush. (Mass.) 69. —DISTINGUISHED IN *Michigan C. R. Co. v. Carrow*, 73 Ill. 348.

The delivery of a trunk to a baggage-master at his railroad station, and his acceptance of such trunk for transportation, impose upon the railroad company the obligation of common carriers. *Wilson v. Grand Trunk R. Co.*, 57 Me. 138.—RECONCILING *Elkins v. Boston & M. R. Co.*, 23 N. H. 287; *Collins v. Boston & M. R. Co.*, 10 Cush. (Mass.) 507. REVIEWING *Mayall v. Boston & M. R. Co.*, 19 N. H. 122.

Where a baggageman is the agent of a railway company, with general authority to receive the baggage of persons intending to go upon the company's train, and does receive baggage in violation of the rules and regulations of the company, the latter will be liable for the loss of such baggage to the owner who has delivered the same in good faith within a reasonable time before the departure of the train, unless the existence of such rules is brought to the knowledge of such owner. *Lake Shore & M. S. R. Co. v. Foster*, 104 Ind. 293, 54 Am. Rep. 319, 4 N. E. Rep. 20.

If a baggage-master receives and checks a trunk, and it is lost before the passenger purchases a ticket, the company is liable, though the baggage-master may have violated a rule of the company in so checking it. *Lake Shore & M. S. R. Co. v. Foster*, 104 Ind. 293, 54 Am. Rep. 319, 4 N. E. Rep. 20.—DISTINGUISHING *Ford v. Mitchell*, 21 Ind. 54; *Grosvenor v. New York C. R. Co.*, 39 N. Y. 34; *Mattison v. New York C. R. Co.*, 57 N. Y. 552; *Wright v. Caldwell*, 3 Mich. 51. REVIEWING *Green v. Milwaukee & St. P. R. Co.*, 41 Iowa 410; *Hiccox v. Naugatuck R. Co.*, 31 Conn. 281; *Camden & A. R. Co. v. Belknap*, 21 Wend. (N. Y.)

354; *Rogers v. Long Island R. Co.*, 1 T. & C. (N. Y.) 396.

It is within the apparent authority of a baggage-master to check baggage, and where he receives it and agrees to check it through by a particular route, the company is bound, although in fact he had no authority to check it by that route; at least it is a question of fact for a jury. *Isaacson v. New York C. & H. R. R. Co.*, 16 Am. & Eng. R. Cas. 188, 94 N. Y. 278, 46 Am. Rep. 142; reversing 25 Hun 350.

It seems that a baggage-master, in the absence of special authority, cannot bind his company by a contract to carry baggage beyond the terminus of its road, or by fixing a special or unusual mode of delivery, as at a place other than the depot of the company. *Isaacson v. New York C. & H. R. R. Co.*, 16 Am. & Eng. R. Cas. 188, 94 N. Y. 278, 46 Am. Rep. 142; reversing 25 Hun 350.

The general duty of a carrier to transport baggage of passengers cannot be extended to imply a special contract to carry baggage which has been receipted for by a train baggage-master, where the owner has paid no fare to the carrier, but takes passage by another route to the same place of destination; and the carrier receiving the baggage will not be liable for its loss. *Fairfax v. New York C. & H. R. R. Co.*, 5 J. & S. (N. Y.) 516.

Where a package of goods was delivered to a baggage-master along with the passenger's trunk, and the latter was checked, and the baggage-master told the passenger that the goods would go safely without being checked, the company was liable for their loss, though the baggage-master was instructed by his company not to receive articles of merchandise as baggage. *Minter v. Pacific R. Co.*, 41 Mo. 503.—DISAPPROVED IN *Humphreys v. Perry*, 148 U. S. 627. DISTINGUISHED IN *Fisher v. Central Pac. R. Co.*, 70 Cal. 169. REVIEWED IN *Cantling v. Hannibal & St. J. R. Co.*, 54 Mo. 385.

Plaintiff presented his baggage to be checked, but was told by the baggage-master that he must first buy tickets. While gone to purchase tickets the baggage-master placed the baggage in the car, and on plaintiff's return with his tickets he was told that he would have to pay for extra weight on the baggage, which he declined to do, and demanded his baggage, but the baggage-master said it was already loaded and he could not get it off the train before time

for its departure. Plaintiff declined to take passage, but the baggage was carried to its place of destination and there destroyed by fire. *Held*, in an action for conversion of the baggage, that the company did not occupy the position of common carrier of plaintiff, and therefore could not avail itself of any of the rules governing common carriers, and that it was liable for the act of its baggage-master, even if the act was wrongful. *McCormick v. Pennsylvania C. R. Co.*, 49 N. Y. 303, 4 Am. Ry. Rep. 429.—FOLLOWING *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23.—DISTINGUISHED IN *McCormick v. Pennsylvania C. R. Co.*, 80 N. Y. 353.

**50. Delivery to porter.\***—The liability of a railway company as insurers of luggage commences from the moment when luggage is placed under the control of one of their porters for the purpose of putting it in transit. *Lovell v. London, C. & D. R. Co.*, 45 L. J. Q. B. 476, 34 L. T. 127, 24 W. R. 394, 6 Ry. & C. T. Cas. lxix.

When a porter receives luggage at the entrance of a station for the purpose of labelling it and putting it in a train, he receives it as agent of the company, and the company is liable for its safety, although the passenger has not yet taken a ticket. *Lovell v. London, C. & D. R. Co.*, 45 L. J. Q. B. 476, 34 L. T. 127, 24 W. R. 394, 6 Ry. & C. T. Cas. lxix, 3 Ry. & C. T. Cas. xx.

In such a case the company is not relieved from liability by a notice that it would not be responsible for luggage left in the custody of porters. *Lovell v. London, C. & D. R. Co.*, 24 W. R. 394, 45 L. J. Q. B. D. 476, 34 L. T. 127.

If a passenger intrusts luggage to a porter for deposit and custody, as distinguished from the physical handing over for the purpose of transit, the railway company are not liable for the loss of such luggage. *Great Western R. Co. v. Bunch*, 13 App. Cas. 31 57 L. J. Q. B. 361. *Welch v. London & N. W. R. Co.*, 34 W. R. 166, 6 Ry. & C. T. Cas. lxix.

The wife of the plaintiff arrived at a station on the defendants' railway forty minutes before the time at which the train by which she intended to travel was to start. She had a bag and two other articles of luggage, which a porter took into the sta-

\* Liability of carrier for baggage delivered to porter or agent, see note, 26 Am. & Eng. R. Cas. 148.



tion. She saw the two labelled, and told the porter she wished the bag to be put in the train with her, and asked if it would be safe to leave it with him. He replied that it would be quite safe, and she then went to meet her husband and get a ticket. They returned together in ten minutes and found that the two labelled articles had been put into the van, but that the bag was not forthcoming. At the trial in the county court the judge found that the porter had been negligent in not being in readiness to put the bag into the carriage on the return of the female plaintiff, and that the defendants were liable for its loss. *Held* (LOPES, L.J., dissenting), that there was evidence to warrant the judge in finding that the bag was intrusted to the porter for the purpose of the transit, and not to be taken charge of while the journey was suspended, and that he was acting within the scope of his authority in taking charge of it. *Bunch v. Great Western R. Co.*, 17 Q. B. D. 215, 55 L. J. Q. B. 525, 5 Ry. & C. T. Cas. viii.

Where a passenger on arriving at a station hands his bag to a porter, telling him his destination, and the porter takes the bag and is about to have it labelled, when the passenger tells him he will take it with him in the carriage, and the porter then suddenly departs, leaving the bag on the platform, and the passenger goes to get his ticket and the bag is missing on his return, there is evidence to go to the jury that the bag was intrusted to the porter to go to the passenger's destination as his luggage, and there is no evidence of the bailment having been terminated. *Leach v. South Eastern R. Co.*, 34 L. T. 134.

**51. Delivery to captain of steamboat.**—The receipt of baggage is within the apparent scope of the employment of a captain of a steamboat, and such delivery will bind the transportation company, though the captain was not in fact the proper agent to receive such things. *Wittebeck v. Schuyler*, 31 How. Pr. (N. Y.) 97.

**52. Delivery to ticket agent.**—Where a company sanctions the employment of a ticket agent and holds him out to the world as its agent, it is estopped from repudiating his act in accepting baggage for transportation. *Rogers v. Long Island R. Co.*, 38 How. Pr. (N. Y.) 289, 2 Lans. 269.

**53. — or other agent of company.**—Common carriers of passengers and bag-

gage, as well as of merchandise, are answerable, under their common-law liability, for baggage left at their offices for transportation in charge of their agents, with the intention of proceeding with the same on the next conveyance. *Camden & A. R. & Tr. Co. v. Belknap*, 21 Wend. (N. Y.) 354. —REVIEWED IN *Waldron v. Chicago & N. W. R. Co.*, 1 Dak. 351; *Lake Shore & M. S. R. Co. v. Foster*, 104 Ind. 293, 54 Am. Rep. 319.

Proof that baggage was delivered to a person acting as the agent of the company, who received and accepted it, establishes a *prima-facie* delivery to the company, though it appears that such person was not the actual agent having charge of the receipt of baggage and freight. *Rogers v. Long Island R. Co.*, 38 How. Pr. (N. Y.) 289, 2 Lans. 269. —DISTINGUISHING *Grosvenor v. New York C. R. Co.*, 39 N. Y. 34.

Where baggage is sent to a railroad station in care of an expressman, who delivers it to the company's agent and calls his attention to it, who replies "All right," it is a sufficient delivery to make the company liable for its loss. *Rogers v. Long Island R. Co.*, 1 T. & C. (N. Y.) 396; *affirmed*, 56 N. Y. 620, *mem.* —REVIEWED IN *Lake Shore & M. S. R. Co. v. Foster*, 104 Ind. 293, 54 Am. Rep. 319.

When a passenger notifies the servants of a railroad company of his wish that his baggage go with him, it is the duty of the company to take charge of it. The company is liable as for a breach of that duty if the passenger, having been directed by a servant of the company where to deposit his baggage, delivered it at the place designated, but, by mistake, to another than an employé of the company. *International & G. N. R. Co. v. Folliard*, 66 Tex. 603, 1 S. W. Rep. 624.

**54. Delivery some time in advance of departure of train.\***—The question of the intent of the party in leaving baggage at a station some time in advance of the departure of a train determines whether the company is liable for it as a common carrier. So where baggage is left in good faith, the owner intending to take passage, the company is liable, though the owner subsequently changes his mind and does not become a

\* See also *post*, 73.

Liability for baggage lost before train time. Agent's authority, see 26 Am. & Eng. R. Cas. 153 *abstr.*

passenger. *Green v. Milwaukee & St. P. R. Co.*, 41 Iowa 410.

If a person leaves his baggage with a railroad agent as a matter of accommodation, without any direction as to shipment, knowing that a regulation of the company prevents the receipt of baggage except for immediate shipment, the company will not be liable for its loss. *Illinois C. R. Co. v. Tronstine*, 31 Am. & Eng. R. Cas. 99, 64 Miss. 834, 2 So. Rep. 255.

Where trunks are left overnight in the care of a freight agent, the passenger intending to have them transported to the passenger depot the next day, and where they are destroyed before being taken away, the freight agent is to be regarded as a gratuitous bailee, and the company will not be liable as common carrier or as warehouseman, in the absence of gross negligence leading to the loss. *Van Gilder v. Chicago & N. W. R. Co.*, 44 Iowa 548.

A person expecting to become a passenger left his baggage in the care of the company's agent to be shipped the next evening, unless other directions were given. *Held*, that, in the absence of further directions, after the lapse of such time the baggage was held for immediate shipment, and the company became liable as carriers. *Illinois C. R. Co. v. Tronstine*, 31 Am. & Eng. R. Cas. 99, 64 Miss. 834, 2 So. Rep. 255.

A passenger took his trunk to a station and requested it to be checked for a train that left in about four hours, but was told by the agent that the company only checked baggage fifteen minutes before the departure of trains. He left his baggage and returned at the proper time, got his check, and took passage, but on receiving his trunk at the place of destination found that it had been opened and some of its contents stolen, but there was no evidence as to whether it was opened while at the station or *en route*. *Held*, that the company must be regarded as having received the trunk when it was first taken to the station, that their liability attached at that time, and that it was therefore immaterial where the articles were stolen. *Hickox v. Naugatuck R. Co.*, 31 Conn. 281.—REVIEWED IN *Lake Shore & M. S. R. Co. v. Foster*, 104 Ind. 293, 54 Am. Rep. 319.

**55. Nature and use of checks for baggage.**—The purpose of delivering a check for baggage is to relieve the passenger of its burden and care, which devolve upon

the carrier. *Check v. Little Miami R. Co.*, 2 Disn. (Ohio) 237.

The usual baggage check delivered to a passenger is not regarded as embodying the contract of carriage, but only as a voucher or token to enable him to identify and claim his baggage at the end of the route. *Isaacson v. New York C. & H. R. R. Co.*, 16 Am. & Eng. R. Cas. 188, 94 N. Y. 278, 46 Am. Rep. 142; reversing 25 Hun. 350.

The check is a mere receipt and is only intended as evidence of ownership and to identify the baggage. *Hickox v. Naugatuck R. Co.*, 31 Conn. 281.

A check for baggage may be issued with a ticket for only part of the way. In such case the check may be considered as standing in the place of a bill of lading for the distance called for, and it imposes the duty to carry and deliver accordingly. *Louisville & N. R. Co. v. Weaver*, 16 Am. & Eng. R. Cas. 218, 9 Lea (Tenn.) 38.—APPLYING *Dill v. South Carolina R. Co.*, 7 Rich. (So. Car.) 158; *Wilson v. Chesapeake & O. R. Co.*, 21 Gratt. (Va.) 654.

A check for baggage may be given by one company for part of the line when the passenger has a through ticket from another company, in which case the former will be liable for the loss. *Louisville & N. R. Co. v. Weaver*, 16 Am. & Eng. R. Cas. 218, 9 Lea (Tenn.) 38.—APPLYING *McCormick v. Hudson River R. Co.*, 4 E. D. Smith (N. Y.) 181; *Straiton v. New York & N. H. R. Co.*, 2 E. D. Smith 184.

**56. Checks as evidence, generally.**—Baggage checks are admissible in evidence to show the nature and undertaking of the carrier's contract. *Wilson v. Chesapeake & O. R. Co.*, 21 Gratt. (Va.) 654.

Possession of a baggage check and proof that it was presented at the place of destination at a proper time, and the baggage demanded but not delivered, raises a presumption of negligence on the part of the carrier. *Atchison, T. & S. F. R. Co. v. Brewer*, 20 Kan. 669.

**57. Checks as evidence of receipt of baggage by carrier.**—The delivery of a baggage check by a railroad company to a passenger is *prima-facie* evidence that the carrier has received the baggage it represents. *Chicago, R. I. & P. R. Co. v. Clayton*, 78 Ill. 616; *Davis v. Michigan, S. & N. I. R. Co.*, 22 Ill. 278; *Denver, S. P. & P. R. Co. v. Roberts*, 18 Am. & Eng. R. Cas. 627, 6 Colo. 333.

Possession of a baggage check and proof that baggage-masters only give checks upon the owner of the baggage taking passage and delivering the baggage to the company is sufficient to establish the receipt of the baggage by the company and make it liable for its loss. *Davis v. Cayuga & S. R. Co.*, 10 *How. Pr. (N. Y.)* 330.

A check in the possession of a passenger is evidence that his baggage was delivered to the carrier, and as a trunk is the usual means by which a passenger conveys his baggage, it is evidence that a trunk, with its contents, was delivered. *Dill v. South Carolina R. Co.*, 7 *Rich. (So. Car.)* 158.—APPLIED IN *Louisville & N. R. Co. v. Weaver*, 16 *Am. & Eng. R. Cas.* 218, 9 *Lea (Tenn.)* 38.

**58. Delivery of check to connecting carrier.**—The possession of a baggage check by a railway passenger is *prima-facie* evidence that the carrier has received and is in possession of his personal baggage, and where he delivers such check to the agent of a connecting railroad company, and receives its check in exchange therefor, the presumption is, in the absence of proof to the contrary, that the baggage is received in due course by the latter company, and it is responsible therefor. *Ahlbeck v. St. Paul. M. & M. R. Co.*, 39 *Minn.* 424, 40 *N. W. Rep.* 364.

Delivery of a baggage check by a carrier and taking up one of a former carrier is *prima-facie* evidence of receipt of the baggage in good order, but this presumption or evidence may be overcome. *St. Louis, A. & T. H. R. Co. v. Hawkins*, 39 *Ill. App.* 406.

Where the company takes up a baggage check of a former carrier and issues a new check, to release it from liability for damage to baggage, it must show that it received the baggage in the same condition that it was delivered to the owner. *St. Louis, A. & T. H. R. Co. v. Hawkins*, 39 *Ill. App.* 406.

Where a passenger has travelled over one road, holding a check for baggage, the fact that he delivers such check to the next connecting carrier is some evidence that such connecting carrier received the baggage, and it may go to the jury with other evidence tending to establish the same fact. *Kansas Pac. R. Co. v. Montelle*, 10 *Kan.* 119.

Where a railway company received a passenger's check for baggage, which had not

then arrived by another road, and gave its own check for the same, and it appeared that it surrendered the passenger's first check to the other railway company—*held*, that this was sufficient, in the absence of proof to the contrary, to show that the baggage was received by the company so surrendering the first check. *Chicago, R. I. & P. R. Co. v. Clayton*, 78 *Ill.* 616.—DISTINGUISHING *Davis v. Michigan, S. & N. I. R. Co.*, 22 *Ill.* 278; *Michigan, S. & N. I. R. Co. v. Meyres*, 21 *Ill.* 627.

**59. Penalty for refusal to check baggage.\***—Receiving baggage upon a train and refusing to check it renders the company liable for the penalty provided by Mass. act of 1854, ch. 23. *Commonwealth v. Connecticut River R. Co.*, 15 *Gray (Mass.)* 447.

Plaintiff, injured by a railroad company's refusal to carry his baggage, is not limited to a recovery of the penalty prescribed for such refusal by Va. Code 1873, ch. 61, § 17, but may recover the amount of the actual damage. *Norfolk & W. R. Co. v. Irvine*, 84 *Va.* 553, 1 *L. R. A.* 110, 5 *S. E. Rep.* 532.

## 2. Delivery by Company.

**60. Duty to have baggage in readiness for delivery to owner.**—When a passenger's baggage has reached its destination, it is the duty of the company to have it ready for delivery upon the platform at the usual place, until the owner, in the exercise of due diligence, can receive it. *Patscheider v. Great Western R. Co.*, L. R. 3 *Exch. D.* 153, 38 *L. T.* 149, 26 *W. R.* 268.—DISTINGUISHED IN *Hodkinson v. London & N. W. R. Co.*, L. R. 14 *Q. B. D.* 228, 32 *W. E.* 662.

The liability of a carrier of passengers for the passenger's baggage does not cease until a delivery of the same to the passenger. *Lin v. Terre Haute & I. R. Co.*, 10 *Mo. App.* 125. *Cary v. Cleveland & T. R. Co.*, 29 *Barb. (N. Y.)* 35.

A carrier who retains the custody of baggage after it has reached the place of destination, and deposits it in a room assigned to unclaimed baggage, is responsible for its safe keeping, and is bound to deliver the thing or pay its value, unless delivery has become impossible without his act or fault. *Pelland v. Canadian Pac. R. Co.*, 7 *Mont. L. R. (Sup. Ct.)* 131.

If baggage belonging to a passenger,

\* See also *ante*, 20.

\* See also *post*, 86.

after reaching its place of destination, and while still in the possession of the carrier, is destroyed by fire, without any fault of the owner, the carrier is liable for its value. *Cary v. Cleveland & T. R. Co.*, 29 Barb. (N. Y.) 35.

Common carriers are bound to deliver to each passenger, at the end of his journey, his trunk or baggage. The whole duty in this respect rests upon the carrier. The exercise of ordinary care in marking the baggage, entering it upon a way-bill, and delivering a check ticket to the owner, renders its discharge easy. The passenger is not required to expose his person in a crowd or endanger his safety in the attempt to designate or claim his property. *Cole v. Goodwin*, 19 Wend. (N. Y.) 251.

Where a passenger, on his arrival at his destination, sees a person handling and taking charge of baggage he has a right to assume that he is the authorized agent of the company, and directions to such person as to the destination of baggage will be deemed as given to the company. *Ouimit v. Henshaw*, 35 Vt. 605.

**61. What is a sufficient delivery.**—Common carriers of passengers and their baggage are liable for the latter until its safe delivery to the owner; its delivery upon a forged order will not discharge them. *Powell v. Myers*, 26 Wend. (N. Y.) 591. —DISTINGUISHED IN *Roth v. Buffalo & S. L. R. Co.*, 34 N. Y. 548. FOLLOWED IN *Brown v. Canadian Pac. R. Co.*, 3 Man. 496. QUOTED IN *Ouimit v. Henshaw*, 35 Vt. 605.

A railway company is bound, on the arrival of a train at the terminus of the journey, to deliver a passenger's luggage into a carriage, to be conveyed from the station, if required so to do, and if such is the usual practice. *Butcher v. London & S. W. R. Co.*, 16 C. B. 13, 3 C. L. R. 805, 1 Jur. N. S. 427, 24 L. J. C. P. 137, 3 W. R. 409.—EXPLAINED IN *Bergheim v. Great Eastern R. Co.*, 26 W. R. 301, L. R. 3 C. P. D. 221, 47 L. J. C. P. 318, 38 L. T. 160; *Bunch v. Great Western R. Co.*, L. R. 17 Q. B. D. 215, 34 W. R. 574, 55 L. J. Q. B. 525, 55 L. T. 9.

If a porter takes charge of a passenger's luggage at the terminus of the journey, and places part of it in a cab and returns for the remainder, when the cab disappears, the company is liable for the loss. *Butcher v. London & S. W. R. Co.*, 16 C. B. 13, 3 C. L. R. 805, 1 Jur. N. S. 427, 24 L. J. C. P. 137, 3 W. R. 409.

A passenger by the M. R. from G. to B., on arriving at B., told a porter there that he wished to proceed by the B. & E. R., whose station closely adjoined that of the M. R. The porter thereupon placed the portmanteau on a truck with other luggage, and entered the B. & E. station with the truck. There was no evidence that the portmanteau was ever afterward seen. In an action against the M. R. Co.—held, that there was no evidence of a breach of its contract. *Midland R. Co. v. Bromley*, 17 C. B. 372, 2 Jur. N. S. 140, 25 L. J. C. P. 94.

If a passenger has notice of reasonable regulations of the company, touching the manner of delivering baggage, he is bound thereby without directly assenting thereto. *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85.

**62. Place of delivery.**—A railroad company is liable where it carries baggage beyond the proper station and puts it in its baggage-room at another station, from which it is stolen. *Toledo W. & W. R. Co. v. Hammond*, 33 Ind. 379.

A steamship passenger bound for the port of New York, being sick, left the vessel at the quarantine station, some distance from the city, but left his baggage on the vessel. Held, that in the absence of any offer of the vessel to deliver the baggage at the quarantine station, it was bound to carry it to the end of the journey and deliver it when called for. *Gilkooly v. New York & S. S. N. Co.*, 1 Daly (N. Y.) 197.

"The port of New York" does not necessarily mean New York City; so where an immigrant sailed with his baggage for the port of New York—held, that the carrier's obligation was ended by discharging him in New Jersey, opposite New York City, and that the vessel was not liable for the loss of his baggage between there and the city. *Klein v. Hamburg-American Packet Co.*, 3 Daly (N. Y.) 390.

**63. Leaving baggage in agent's custody after delivery by company.\***—Where a passenger tells a station porter that he will leave his luggage at the station for a short time and then send for it, and the porter replies that he will take care of it, this amounts to a delivery of the luggage by the company and a redelivery by the passenger to the porter as his agent; accordingly the company is not liable for the loss of such luggage. *Hodkinson v. London & N.*

\*See also *post*, 71, 128-131.

*W. R. Co., L. R. 15 Q. B. D. 228, 32 W. R. 662, 5 Ry. & C. T. Cas. ix.*

The liability of a common carrier is terminated after a reasonable time after the arrival of baggage at its place of destination; and although, if the station-master at such place consents to hold such baggage for the owner after such time, the carrier's liability continues, yet, if the station-master is ignorant of the fact that the articles carried are not personal baggage, the company is not responsible, notwithstanding that the receipt of the articles as baggage had previously estopped it from denying that the articles were baggage. *Texas & P. R. Co. v. Capps, 16 Am. & Eng. R. Cas. 118, 2 Tex. App. (Civ. Cas.) 35.*

A lady was prevented from taking her baggage with her at the end of her journey by the baggage-master placing it in the baggage-room and immediately leaving. Some three hours afterward she sent her son for the baggage, who, not finding the baggage-master in, hunted him up, delivered the checks, and the baggage was drawn to the front door; but meanwhile the hack retained to remove the baggage had gone away and no other could be procured that day, and the baggage was left in charge of the baggage-master. During the night it was broken open and the contents were stolen. *Held*, that the company's liability as common carrier had not terminated, and that it was liable. *Dinenny v. New York & N. H. R. Co., 49 N. Y. 546, 4 Am. Ry. Rep. 457.*

Plaintiff was a passenger upon defendant's road from R. to P., having the usual check for her baggage. On arriving at P. she informed the baggage-master at the station that she desired to leave her trunk for a few days. The baggage-master replied that he was not allowed to and could not keep baggage with the checks on, but that if she gave up her check the baggage would be perfectly safe. This she did, and the trunk was left. It was subsequently delivered to one falsely claiming authority to receive it. In an action to recover the value of the trunk and contents—*held*, that the declaration of defendant's agent was, in substance, a notification to plaintiff that he was without power to continue in force the obligation of the company in respect to the baggage indicated by the check; that the surrender of the check was, in effect, an admission of the performance of that obligation,

i.e., the safe arrival and delivery of the baggage; that in the absence of evidence tending to show that the agent had power thereafter to bind the company by a new agreement, or that it had acquiesced in the exercise by him of such power, and it appearing that it was in clear violation of the regulations of the company, defendant could not be held liable; and that the submission to the jury of the question as to the authority of the agent was error. *Mattison v. New York C. R. Co., 57 N. Y. 552.*—DISTINGUISHING *Dinenny v. New York & N. H. R. Co., 49 N. Y. 546.*—DISTINGUISHED IN *Lake Shore & M. S. R. Co. v. Foster, 104 Ind. 293, 54 Am. Rep. 319; Matteson v. New York C. & H. R. R. Co., 76 N. Y. 381.*

A lady on arriving at the end of her journey delivered her baggage checks to the company's agent, with his assurance that her trunks would be just as safe without the checks as with them. A few days later, when the trunks were called for, they could not be found, and it appeared that the baggage-master was prohibited from thus keeping baggage. *Held*, in an action to recover for their loss, that the question as to whether there was a delivery to the owner was for the jury. *Matteson v. New York C. & H. R. R. Co., 76 N. Y. 381.*—DISTINGUISHING *Mattison v. New York C. R. Co., 57 N. Y. 552.*

### 3. Duty of Owner to Call for Baggage.

**64. The general rule.**—It is the duty of the owner of baggage to call for and take it away within a reasonable time after the journey is complete, and during this time it is the duty of the company to keep the baggage ready for delivery on its platform. *Vineberg v. Grand Trunk R. Co., 27 Am. & Eng. R. Cas. 271, 13 Ont. App. 93.*—QUOTING *Shepherd v. Bristol & E. R. Co. L. R., 3 Exch. 189.* REVIEWING *Penton v. Grand Trunk R. Co., 28 U. C. Q. B. 367; Hodgkinson v. London & N. W. R. Co., 14 Q. B. D. 228.*

Where a passenger on arriving at his destination fails to look after his baggage, or to make any arrangement that the company should retain it for him, if it is lost without the carrier's fault, the carrier is not liable. *Curtis v. Avon, G. & Mt. M. R. Co., 49 Barb. (N. Y.) 148.*—FOLLOWING *Roth v. Buffalo & S. L. R. Co., 34 N. Y. 548.*—*Powell v. Myers, 26 Wend. (N. Y.) 591.*

Only the act of God or a public enemy

will relieve a common carrier from its liability for the safe carriage and delivery of baggage. This liability does not necessarily terminate at the end of the route, but continues until the baggage is delivered to the owner; but if the owner fails to call for it within a reasonable time the liability of the carrier is that of bailee only, and it is liable only for a loss which is the result of its own neglect. *Roth v. Buffalo & S. L. R. Co.*, 34 N. Y. 548.—DISTINGUISHING *Powell v. Myers*, 26 Wend. 591; *Garside v. Trent & M. Nav. Co.*, 4 Term Rep. 581.—FOLLOWED IN *Hedges v. Hudson River R. Co.*, 49 N. Y. 223; *Curtis v. Avon, G. & Mt. M. R. Co.*, 49 Barb. (N. Y.) 148; *Holdridge v. Utica & B. R. R. Co.*, 56 Barb. (N. Y.) 191; *Burgevin v. New York C. & H. R. R. Co.*, 23 N. Y. Supp. 415. LIMITED IN *Burnell v. New York C. R. Co.*, 45 N. Y. 184. QUALIFIED IN *Lamb v. Camden & A. R. & T. Co.*, 2 Daly (N. Y.) 454. REVIEWED IN *Burgevin v. New York C. & H. R. R. Co.*, 52 N. Y. S. R. 617.

**65. What is a compliance with the rule on the part of the passenger.**

—Where it is usual to deliver baggage immediately after its arrival the owner should apply for it as soon as it is possible for him with due diligence to do so, and this rule applies even where the baggage arrives at a late hour of the night, if the company is ready to deliver it. *Onimit v. Henshaw*, 35 Vt. 605.

A traveller should call for his baggage within a reasonable time, and where both come on the same train this should be immediately after his arrival, and the transfer of the baggage to the platform, making due allowance for the delay and confusion caused by the arrival and departure of trains and the crowd that usually is about the platform. *Chicago & A. R. Co. v. Addisoat*, 17 Ill. App. 632.—DISTINGUISHING *Stevens v. Boston & M. R. Co.*, 1 Gray (Mass.) 277.

Where a party is informed that the baggage has not arrived on the train with him, and he fails to give any directions concerning it or notice where he may be found, he should call and make inquiry as soon as convenient after the arrival of the next train. *Chicago & A. R. Co. v. Addisoat*, 17 Ill. App. 632.

Where the agents of a railroad company agree that baggage arriving in the evening may remain in the baggage-room until the following morning, it remains during that time at the risk of the company. *Burgevin*

*v. New York C. & H. R. R. Co.*, 23 N. Y. Supp. 415.

Where a passenger is lame and cannot carry his baggage, but arranges with the baggage-master to leave it until sent for, the liability of the company continues as common carrier until he sends for it. *Curtis v. Avon, G. & Mt. M. R. Co.*, 49 Barb. (N. Y.) 148.

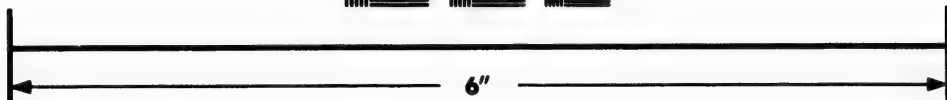
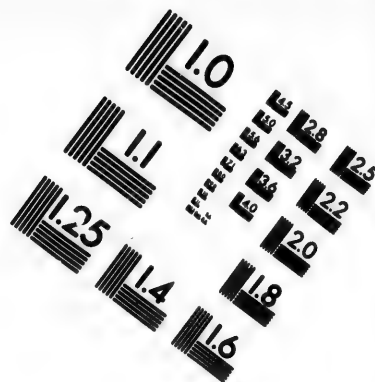
A delay of several days in calling for baggage arriving by steamer does not release the company from its obligation to deliver it on demand. *Gilhooley v. New York & S. S. N. Co.*, 1 Daly (N. Y.) 197.

Where a passenger, a lady travelling alone, in consequence of the detention of the train, did not arrive at her destination until late at night, and—a number of trains arriving at the same time—there was an unusual crowd of passengers and much delay in delivering baggage—held, that she was not required to demand her baggage that night, and that it having been destroyed by fire during the night, the company was liable. *Cary v. Cleveland & T. R. Co.*, 29 Barb. (N. Y.) 35.—DISTINGUISHING *Thomas v. Boston & P. R. Co.*, 10 Met. (Mass.) 472; *Norway Plains Co. v. Boston & M. R. Co.*, 1 Gray (Mass.) 263.

Where a railroad company is sued for loss of baggage, the defense that the owner never presented the check for the baggage to any agent of the company, and never demanded the delivery of the same, is unavailing where the owner's evidence shows that immediately on arrival at the place of destination she gave the check to a gentleman with whom she was stopping, and directed him to get the baggage, but that he returned from the baggage-room saying that he could not get the baggage until the next morning, and that the next morning he went and returned with a trunk which was not hers; whereupon she went with the gentleman and told the baggage-master that the trunk was not hers, and that she had returned it, when he told her to look through the baggage-room to see if she could find her trunk, which she did, but failed. *Texas & P. R. Co. v. Cook*, 2 Tex. App. (Civ. Cas.) 576.

**66. Owner must have a reasonable time.**—Railroad companies are liable as common carriers for the baggage of passengers until the baggage is ready to be delivered to the owner at his place of destination, and until he has had a reasonable opportunity of receiving and removing it. *Louisville, C. & L. R. Co. v. Mahan*, 8 Bush





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(Ky.) 184. *Mote v. Chicago & N. W. R. Co.*, 27 Iowa 22.—DISTINGUISHED IN *Richmond v. Dubuque & S. C. R. Co.*, 33 Iowa 422.—*Patscheider v. Great W. R. Co.*, L. R. 3 Exch. D. 153, 38 L. T. N. S. 149, 26 W. R. 268.—DISTINGUISHED IN *Hodkinson v. London & N. W. R. Co.*, L. R. 14 Q. B. D. 228, 32 W. R. 662.

Hence it is not negligence for a passenger to go to his hotel, which is only a short distance away, and send back for his baggage. *Nevins v. Bay State Steamship Co.*, 4 Bosw. (N. Y.) 225.

In order to remove the responsibility of a common carrier, for baggage, it is its duty to have a baggage-master at the depot to deliver baggage for a reasonable time after the arrival of a train, and at reasonable hours thereafter. *Dinny v. New York & N. H. R. Co.*, 49 N. Y. 546, 4 Am. Ry. Rep. 457.—DISTINGUISHED IN *Mattison v. New York C. R. Co.*, 57 N. Y. 552.

But in determining what is a reasonable time, the custom of the company, the manner of taking the baggage away from the station, and all the circumstances of the case are to be considered. *Mote v. Chicago & N. W. R. Co.*, 27 Iowa 22.

Where baggage arrives after six o'clock in the evening, until seven o'clock of the following morning is a reasonable time in which to call for it, and during that time the company is liable as common carrier. *Burgevin v. New York C. & H. R. R. Co.*, 23 N. Y. Supp. 415.

Where baggage arrives in the evening, until the next morning is a reasonable time for the passenger to call for and take it away; and where the carrier is sued for the loss of baggage which is thus left overnight, an instruction that the company was not liable as a common carrier, but only as a warehouseman, and leaving it to the jury to determine whether there was such negligence as to make it liable as warehouseman, was more favorable than the company had a right to ask for, as it was in fact liable as carrier. *Burgevin v. New York C. & H. R. R. Co.*, 52 N. Y. S. R. 617.—REVIEWING *Roth v. Buffalo & S. L. R. Co.*, 34 N. Y. 548.

The morning of the second day after baggage arrived—held, to be a reasonable time to call for it, and the company is held liable for a loss in the meantime, with interest on the value of the articles lost from date of loss. *Mote v. Chicago & N. W. R. Co.*, 27 Iowa 22.—DISTINGUISHED IN *Atch-*

*ison, T. & S. F. R. Co. v. Gabbert*, 22 Am. & Eng. R. Cas. 621, 34 Kan. 132; *Cobb v. Illinois C. R. Co.*, 38 Iowa 601. FOLLOWED IN *Arthur v. Chicago, R. I. & P. R. Co.*, 16 Am. & Eng. R. Cas. 283, 61 Iowa 648.

**67. What delay is unreasonable.\***—(1) *General rules.*—Where a passenger leaves his baggage at the station until the following morning, for no other reason than that his cabman could not conveniently carry it, it is not taking it away within the reasonable time required by law; and in the meantime the liability of the company will be only that of a bailee. *Vineberg v. Grand Trunk R. Co.*, 27 Am. & Eng. R. Cas. 271, 13 Ont. App. 93.

From afternoon until between nine and ten o'clock of the next day is not a reasonable time for a passenger to delay demanding his baggage at the place of destination. *Jacobs v. Tutt*, 33 Fed. Rep. 412.

From Friday night until the following Monday morning is not a reasonable time to leave baggage in the company's depot, and if it is destroyed in the meantime the company is not liable. *Watkins v. New York C. & H. R. R. Co.*, 16 N. Y. S. R. 592, 3 N. Y. Supp. 946.

(2) *Illustrations.*—The owner of a valise which had been transported as baggage allowed it to remain in the company's open depot, where baggage was usually kept, without making any arrangement for it, for some twenty-four hours before calling for it, and in the meantime it was stolen. Held, that the liability of the company as carrier ceased upon the arrival of the baggage, and that therefore it was only liable as bailee. *Holdridge v. Utica & B. R. R. Co.*, 56 Barb. (N. Y.) 191.—FOLLOWING *Roth v. Buffalo & St. L. R. Co.*, 34 N. Y. 548.

The plaintiff was a passenger on defendant's railway from P. to S., with two trunks for which he had checks. At S. the trunks were put on the platform, and he assisted defendants' servant to carry them into the baggage-room, and went up in an omnibus to the hotel; this was about 3 P.M. In the evening about 8 he sent his checks for his trunks, but one or them had disappeared, and the evidence went to show that it had been stolen. Held, that defendants were not responsible, that their duty as common carriers ended when the trunk had been placed on the platform, and that the plaintiff

\* See also *post*, 69.

had had a reasonable time to remove it. A nonsuit was therefore ordered. *Penton v. Grand Trunk R. Co.*, 28 U. C. Q. B. 367.—FOLLOWING *Inman v. Buffalo & L. H. R. Co.*, 7 U. C. C. P. 325; *Shepherd v. Bristol & E. R. Co.*, L. R. 3 Exch. 189.—FOLLOWED IN *Brown v. Canadian Pac. R. Co.*, 3 Man. 496. REVIEWED IN *Vineberg v. Grand Trunk R. Co.*, 13 Ont. App. 93.

Plaintiff sued for baggage burned in a baggage-room. The railroad set up the defense that the baggage was safely carried to its destination, and not being called for was stored, and was there destroyed by fire without fault on their part. Plaintiff replied that his passage had been over several lines; that while on an intermediate line he was informed that his baggage was not on the same train as himself; that on reaching his destination at defendant's station he looked in defendant's baggage-car, and not seeing his baggage went away without calling for it; and that he called the next day but was told that it had been destroyed. *Held*, that the replication was bad on demurrer. *Brown v. Canadian Pac. R. Co.*, 3 Man. 496.

#### 4. Company When Liable as Warehouseman Only.

**68. When liability as carrier ceases, generally.\***—The liability of a railroad company as a common carrier ceases upon the expiration of a reasonable time after putting baggage off at a station, and after the expiration of such reasonable time the company's liability for baggage in its custody is that of a warehouseman for hire; and in case of the destruction of the baggage by the burning of the station there is no presumption of negligence against the company. *Wald v. Louisville, E. & St. L. R. Co. (Ky.)*, 58 Am. & Eng. R. Cas. 123.

Where a passenger with baggage arrives at a railroad station, and for his own convenience leaves his baggage at the station overnight, the railroad company is no longer liable as a common carrier, and if the baggage is destroyed by accidental fire, without the company's fault, the company is not liable therefor. *Ross v. Missouri, K. & T. R. Co.*, 4 Mo. App. 582.

Leaving baggage with a carrier either for temporary convenience, or from necessity, sickness, or accident, is not such an unusual

or exceptional circumstance as to create a presumption that it was not within the contemplation of the carrier at the time the contract to carry was made. *Burnell v. New York C. R. Co.*, 45 N. Y. 184, 6 Am. Rep. 61.

Where a passenger on board a steamboat checks his baggage through to his destination, and, having taken advantage of his stop-over, the baggage is warehoused subject to delivery on call and presentation of check, the carrier is not liable for its loss by fire while in the warehouse. *Laffrey v. Grummond*, 37 Am. & Eng. R. Cas. 235, 74 Mich. 186, 41 N. W. Rep. 894.—REVIEWING *McKee v. Owen*, 15 Mich. 115.

**69. Expiration of reasonable time to call for baggage.\***—Where baggage is not called for within a reasonable time it is the duty of the carrier to properly store it, and when this is done its liability as carrier ceases and that of warehouseman attaches. *Mote v. Chicago & N. W. R. Co.*, 27 Iowa 22. *St. Louis & C. R. Co. v. Hardway*, 17 Ill. App. 321.—FOLLOWING *Bartholomew v. St. Louis, J. & C. R. Co.*, 53 Ill. 227.—*Chicago & A. R. Co. v. Addisat*, 17 Ill. App. 632. *Louisville, C. & L. R. Co. v. Mahan*, 8 Bush (Ky.) 184. *Wald v. Louisville, E. & St. L. R. Co.*, 92 Ky. 645. *Burnell v. New York C. R. Co.*, 45 N. Y. 184, 6 Am. Rep. 61. *Galveston, H. & S. A. R. Co. v. Smith*, 81 Tex. 479, 17 S. W. Rep. 133.—QUOTING *Ouimit v. Henshaw*, 35 Vt. 605.—*Texas & P. R. Co. v. Capps*, 16 Am. & Eng. R. Cas. 118, 2 Tex. App. (Civ. Cas.) 35. *Ouimit v. Henshaw*, 35 Vt. 605.—CRITICISING *Norway Plains Co. v. Boston & M. R. Co.*, 1 Gray (Mass.) 263. QUOTING *Farmers' & M. Bank v. Champlain T. Co.*, 23 Vt. 211; *Powell v. Myers*, 26 Wend. (N. Y.) 591.—QUOTED IN *Galveston, H. & S. A. R. Co. v. Smith*, 81 Tex. 479.—*Brown v. Canadian Pac. R. Co.*, 3 Man. 496.—FOLLOWING *Patscheider v. Great Western R. Co.*, 3 Ex. D. 154; *Jones v. Norwich & N. Y. T. Co.*, 50 Barb. (N. Y.) 194; *Powell v. Myers*, 26 Wend. (N. Y.) 591; *Cary v. Cleveland T. R. Co.*, 29 Barb. (N. Y.) 35; *Burnell v. New York C. R. Co.*, 45 N. Y. 184; *Penton v. Grand Trunk R. Co.*, 28 U. C. Q. B. 367.

If the passenger does not call for his baggage on arrival the carrier cannot leave it uncared for, or abandon it; but his strict responsibility as carrier ceases after a reasonable time has elapsed to enable the

\* When company's liability as carrier ceases, see note, 21 AM. & ENG. R. CAS. 312.

\* See also *ante*, 67.

owner to claim it, and a modified liability, like that of a warehouseman, supervenes. *Matteson v. New York C. & H. R. R. Co.*, 76 N. Y. 381.—REVIEWED IN *Oderkirk v. Fargo*, 34 N. Y. S. R. 166, 58 Hun 347, 11 N. Y. Supp. 871.

Where a travelling salesman leaves his sample-trunk in the baggage-room at his place of destination from Saturday evening until Monday morning, the company is liable for its loss as warehouseman. *Hoeger v. Chicago, M. & St. P. R. Co.*, 21 Am. & Eng. R. Cas. 308, 63 Wis. 100, 23 N. W. Rep. 435, 53 Am. Rep. 271.

A passenger by vessel has a reasonable time after the arrival of the vessel in port for the removal of his baggage. During that time the liability of the owners of the vessel as insurers continues, but beyond such reasonable time the owners of the vessel are bound to preserve it with ordinary care, and they will only be charged thereafter as bailees where such loss occurs through their negligence. *Van Horn v. Kermit*, 4 E. D. Smith (N. Y.) 453.

A passenger on a railway train got off the train about nine o'clock at night, and his baggage was also put off and placed at his disposal. Failing to call for his trunks, they were put in the depot for safe keeping. During the night the depot, with its contents, was burned. *Held*, that in the absence of any negligence on the part of the railroad company it was not liable to the owner of the baggage. *Wald v. Louisville, E. & St. L. R. Co.*, 92 Ky. 645.

The fact that the depot in which plaintiff's baggage was stored was constructed of pine timber is not evidence of negligence, the depot being in a small town, and not exposed to any unusual danger from fire. *Wald v. Louisville, E. & St. L. R. Co.*, 92 Ky. 645.

**70. Question of reasonable time is for jury.**—The liability of the carrier for baggage continues for a reasonable time after its arrival at place of destination, and what is a reasonable time, where the facts are undisputed, is a question for the court. *Burgevin v. New York C. & H. R. R. Co.*, 23 N. Y. Supp. 415.—FOLLOWING *Roth v. Buffalo & S. L. R. Co.*, 34 N. Y. 548; *Burnell v. New York C. R. Co.*, 45 N. Y. 184.

Whether a passenger has called for his baggage at the place of destination within a reasonable time after its arrival, is a question for the jury, to be determined from all

of the facts and circumstances of the case. *Brown v. Canadian Pac. R. Co.*, 3 Man. 496.

What constitutes such reasonable opportunity for removing the baggage is a mixed question of law and fact, necessarily dependent upon the peculiar surroundings of each particular case. *Louisville, C. & L. R. Co. v. Mahan*, 8 Bush (Ky.) 184.

**71. Voluntary bailment by passenger.**—A passenger's baggage was delivered to him at the end of his journey, but afterward he asked the baggage-master, as a matter of convenience, to keep it until he sent for it. *Held*, that the bailment being gratuitous, the company was not liable for the subsequent loss, as a common carrier, and would only be liable at all for gross negligence. *Minor v. Chicago & N. W. R. Co.*, 19 Wis. 40.

Arriving at his destination at half-past eight P.M., the passenger left his baggage in the custody of the agent of the company, and during the same night the depot and contents, including the baggage, were destroyed by fire. *Held*, that in order to make the company liable for the baggage so destroyed, it was incumbent on the owner to show that the fire was the result of such negligence on the part of the employes of the company as would render liable a bailee for hire. *Louisville, C. & L. R. Co. v. Mahan*, 8 Bush (Ky.) 184.

A lady left a trunk at a depot till she was ready to proceed on her journey, or until she called for it, if she should decide not to go. *Held*, that the liability of the company, at most, was not more than that of a gratuitous bailee. *Little Rock & Ft. S. R. Co. v. Hunter*, 18 Am. & Eng. R. Cas. 527, 42 Ark. 200.

Where the baggage of a passenger is placed in charge of the carrier, and upon arriving at his place of destination the passenger leaves it in charge of the carrier, the liability of the carrier, as such, will not be changed to that of warehouseman, until the baggage is stored in a safe and secure warehouse. If the baggage be placed in an insecure room, and is stolen, the carrier will be responsible in that capacity, not as warehouseman. In this regard, the same rule applies to the carrying of baggage as to the carrying of ordinary freight. *Bartholomew v. St. Louis, J. & C. R. Co.*, 53 Ill. 227.

**72. Baggage reaching destination ahead of passenger.**—Where a passen-

\* See also *ante*, 63; *post*, 128-131.

ger is detained *en route* by sickness, causing his baggage to reach its destination ahead of him, and the baggage is placed in the baggage-room, the carrier will be liable thereafter only as warehouseman. *Chicago, R. I. & P. R. Co. v. Boyce*, 73 Ill. 510.

**73. — or held over for later train.**\*—A carrier is only liable as carrier for a passenger's baggage which is left with it for immediate transportation, and where such baggage is voluntarily deposited for safe keeping, as when it is brought to the depot for one train, and on learning that it could not go till a later train is left for such later train, the liability for loss is merely that of warehouseman. *Goodbar v. Wabash R. Co.*, 53 Mo. App. 434.—QUOTING *O'Neil v. New York C. & H. R. R. Co.*, 60 N. Y. 138; *Watts v. Boston & L. R. Corp.*, 106 Mass. 466. REVIEWING *Hunt v. Little Rock & Ft. S. R. Co.*, 42 Ark. 200; *Gregory v. Wabash R. Co.*, 46 Mo. App. 574.

**74. Extent of the liability as warehouseman.**—On the trial of an action for the loss of a passenger's trunk, it was not error to charge that if the company failed to deliver it and undertook to deposit it in its warehouse, its liability would be that of a warehouseman, and it would be bound to use ordinary diligence in taking care of it, and if it failed, the plaintiff would be entitled to recover. *Georgia R. & B. Co. v. Thompson*, 86 Ga. 327, 12 S. E. Rep. 640.

When a passenger checks baggage to his destination, and such baggage arrives, but is not, from any cause, delivered to such passenger, it is the duty of the company to deposit such baggage in their baggage-room, in which event the responsibility becomes that of warehouseman. It is not necessary that such place of deposit should be absolutely fire-proof or burglar-proof, but it should be such a place as a man of ordinary prudence would use for the storage of his own goods. *Chicago, R. I. & P. R. Co. v. Fairclough*, 52 Ill. 106.

Where a lady's trunk arrives in the evening and is placed overnight, in the ladies' waiting-room, where it is broken open and the contents are stolen, the company is liable for the loss. *St. Louis & C. R. Co. v. Hardway*, 17 Ill. App. 321.

Baggage left in a station at its place of destination from evening until the next morning is held by the company as a gratu-

itous bailee, and it will only be liable for its loss where there is gross negligence; and a failure on its part to provide a storeroom safe from fire, and to provide proper means for extinguishing fire, is not of itself sufficient proof of gross negligence to make the company liable. *Clark v. Eastern R. Co.*, 21 Am. & Eng. R. Cas. 307, 139 Mass. 423, 1 N. E. Rep. 128.

Where a company holds baggage as warehouseman only, proof that baggage was delivered to the company requires it to redeliver it on demand or to account for its loss, and failing to do so will warrant a verdict against the company for its value. *Fairfax v. New York C. & H. R. R. Co.*, 67 N. Y. 11, 15 Am. Ry. Rep. 141; reversing 8 J. & S. 128.

A road that receives baggage which is checked over another route, and carries it to its place of destination, where it is lost, is subject, at least, to the liability of a warehouseman, and to relieve itself from liability for the loss, it must show that such loss was without its fault; and this is so regardless of the nature of the baggage. *Fairfax v. New York C. & H. R. R. Co.*, 73 N. Y. 167; affirming 11 J. & S. 18.

Baggage arrived safely in New York and was there lost through defendant's negligence. Held, that, without regard to the question of defendant's liability as common carrier, it incurred the responsibility of warehouseman, and was liable for negligence. *Curtis v. Delaware, L. & W. R. Co.*, 74 N. Y. 116.—DISTINGUISHED IN *Faulkner v. Hart*, 82 N. Y. 413, 37 Am. Rep. 574.

The implied undertaking of a carrier to insure the safety of baggage does not extend to the contents of a trunk, consisting of samples of merchandise, which the passenger, a travelling salesman, carried, to facilitate his business in making sales. But the carrier, by taking the property into his charge, and putting it in his warehouse for safe keeping, assumes the relation to it of an ordinary bailee, and he is bound to take such care of the property as a man of ordinary prudence would of his own, under like circumstances. *Pennsylvania Co. v. Miller*, 35 Ohio St. 541.

As to goods in the hands of a carrier shipped as baggage, but held by the carrier as warehousemen, it is bound only to ordinary care, or such care as a man of ordinary prudence would use in the management of

\* See also ante, 54.



his own property under like circumstances; and such care does not require the carrier to keep a night-watch about a warehouse, or to have some one sleep therein, where the average amount of goods stored therein does not exceed \$500. *Pike v. Chicago, M. & St. P. R. Co.*, 40 Wis. 583, 13 Am. Ry. Rep. 447.

Where a vessel arrives in port on Monday evening and baggage is called for on Wednesday morning, but is lost, the burden is on the owners of the vessel to show that it was lost without their fault, or the fault of their servants. *Van Horn v. Kermit*, 4 E. D. Smith (N. Y.) 453.

#### 5. Transfer Companies.

**75. Right to solicit business.**—Going on an incoming passenger train, at out stations, and soliciting the transfer of baggage from passengers, is not a violation of a city ordinance prohibiting soliciting any passenger at any of the "stands, railroad stations, steamboat landings, or elsewhere in said city," where no baggage was taken at the time, and only checks were given therefor. *Reg. v. Verral*, 18 Ont. 117.

**76. Sufficiency of delivery to.**—In an action against the W. Express Co. to recover a trunk and contents, it appeared that plaintiffs' agent took passage by railroad and checked the trunk at Detroit for New York City; that he stopped over *en route*; that the trunk arrived at the Grand Central depot twenty-four hours before him; and that it was taken out of the car on its arrival by defendant's employés, but was left in the baggage-room of the railroad company and in its possession and control, to be delivered, in accordance with custom, to any one presenting the check. H. gave the check to defendant's agent on the train, who, upon reaching New York, searched for the trunk, but it could not be found. *Held*, that plaintiffs failed to show a delivery of the trunk to defendant, and that therefore it was not liable. *Aikin v. Westcott*, 123 N. Y. 363, 25 N. E. Rep. 503, 33 N. Y. S. R. 623.

**77. Liability for loss of trunk.**—A passenger on a railway train, having arrived at the point of destination, entered into a contract with a transfer company, for an agreed compensation, to procure his baggage from the railroad company's depot and haul it to his residence, and for that purpose surrendered his baggage checks. *Held*, that the transfer company was respon-

sible to the passenger for the safe keeping and delivery of the baggage. *DaPonte v. New Orleans Transfer Co.*, 42 La. Ann. 696, 7 So. Rep. 608.

Under this state of facts, contractual relations existed between the passenger and the transfer company, which the former could enforce by suit and sequestration. *DaPonte v. New Orleans Transfer Co.*, 42 La. Ann. 696, 7 So. Rep. 608.

Defendant was engaged in transferring baggage arriving at a city depot. An incoming passenger surrendered his checks to one of defendant's agents on the train, and another employé of defendant testified that plaintiff's two trunks came to the station and were taken charge of by him for defendant, as was their custom under an arrangement with railroad company. One of the trunks was delivered to plaintiff. *Held*, that there was sufficient evidence to call on defendant to answer why the other was not delivered, and it was error to dismiss the complaint. *Aikin v. Westcott*, 14 Daly (N. Y.), 504, 9 N. Y. Supp. 481, 16 N. Y. S. R. 600.

**78. Limitation of liability.**—Where a transfer company receives the baggage of a person to be transferred from a railroad station to her home, merely putting in her hand a card of the company with a condition printed on it, limiting the company's liability, will not bind her, where there is nothing to show that she assented thereto. Such a contract applies only to steamboats and railroads. *Prentice v. Decker*, 49 Barb. (N. Y.) 21.

#### IV. CUSTODY OF BAGGAGE BY PASSENGER.

**79. General rule exempting carrier from liability.**\*—A railway company is liable for the loss of baggage only when it is placed in its charge, not when it is retained in the possession of the passenger. *Cohen v. Frost*, 2 Duer (N. Y.) 335.—FOLLOWING *Burgess v. Clements*, 4 M. & S. 306. *REVIEWING Hawkins v. Hoffman*, 6 Hill (N. Y.) 586.

Where the counsel for the plaintiff disclaims any taking charge by the defendants as common carriers of articles lost, and it appears that the plaintiff, during her whole travel, kept them in her possession,

\*Liability of company for baggage in passenger's custody, see notes 16 AM. & ENG. R. CAS. 399; 42 AM. DEC. 27.

under her charge, no question of liability as common carriers can arise. *Tolano v. National Steam Nav. Co.*, 5 Robt. (N. Y.) 318, 4 Abb. Pr. 316, 35 How. Pr. 496.

If a passenger retains the exclusive control of his baggage, the carrier is not responsible for its loss, unless such loss results from the latter's negligence. *Pullman Palace Car Co. v. Pollock*, 34 Am. & Eng. R. Cas. 217, 69 Tex. 120, 5 Am. St. Rep. 31, 5 S. W. Rep. 814.

A railway company is not liable for the loss or theft, without any negligence on its part, of luggage placed in the same compartment with a passenger at his request. *Bergheim v. Great E. R. Co.*, L. R. 3 C. P. D. 221, 47 L. J. C. P. Div. 318, 38 L. T. N. S. 160, 26 W. R. 301, 3 Ry. & C. T. Cas. xx.

If a passenger's luggage be intrusted to a porter of the carrier, the latter will be liable as common carrier; but where the passenger takes it into the carriage and under his own control, a railway company is not liable as common carrier, if it is lost, and will be liable in any way only for negligence. *Bunch v. Great Western R. Co.*, 26 Am. & Eng. R. Cas. 137, 17 Q. B. D. 215, 55 L. J. Q. B. 525, 5 Ry. & C. T. Cas. viii.—EXPLAINING *Bergheim v. Great Eastern R. Co.*, 3 C. P. D. 221; *Cohen v. South Eastern R. Co.*, 2 Exch. D. 253. REVIEWING *Butcher v. London and South Western R. Co.*, 16 C. B. 13, 24 L. J. (C. P.) 137; *Richards v. London, B. & S. C. R. Co.*, 7 C. B. 839, 18 L. J. (C. P.) 251.

A railway company accepting passenger's luggage to be carried in a carriage with the passenger, enter into a contract as common carriers, subject to this modification, that in respect of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory. *Great Western R. Co. v. Bunch*, 13 App. Cas. 31, 57 L. J. Q. B. 361, 3 Ry. & C. T. Cas. lxi.

If the negligence of a passenger who has his luggage with him in the carriage causes its loss, the company is not liable. *Talley v. Great Western R. Co.*, L. R. 6 C. P. 44, 40 L. J. C. P. 9, 19 W. R. 154, 23 L. T. N. S. 413, 3 Ry. & C. T. Cas., xx.—APPROVED IN *Bergheim v. Great Eastern R. Co.*, 26 W. R. 301, L. R. 3 C. P. D. 221, 47 L. J. C. P. 318, 38 L. T. 160.

If a passenger having his luggage in the

carriage with him gets out at an intermediate station and negligently fails to find the same carriage again, finishing his journey in a different one, and his portmanteau is stolen, the company is not liable. *Talley v. Great Western R. Co.*, L. R. 6 C. P. 44, 40 L. J. C. P. 9, 19 W. R. 154, 23 L. T. N. S. 413, 3 Ry. & C. T. Cas. xx.

Steamboat owners are regarded as common carriers and are subject to the law regulating such carriers, but there is no law making a common carrier responsible for the wearing apparel of a passenger or for money which he carries upon his person and which is under his own immediate care and control; but it is otherwise when such things are made baggage and delivered to the steamboat owners or their agents. *Steamboat Crystal Palace v. Vanderpool*, 16 B. Mon. (Ky.) 302.

Jewels of \$6000 value retained by a passenger in his own care are not baggage for the loss of which a carrier is chargeable. In order to render the carrier liable for losses of baggage, or of goods shipped as freight, they must be delivered and entrusted to the carrier. *Del Valle v. Steamboat Richmond*, 27 La. Ann. 90.

**80. Limits and exceptions to the rule.**—Where no interference with a common carrier's control of property carried is attempted, it is not a ground for limiting its responsibility that the owner of such property accompanies it and keeps a watchful lookout for its safety. *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. (U. S.) 262, 1 Am. Ry. Rep. 434.

A carrier is not to be regarded as the insurer of money or other baggage which is lost while being carried in the control of the passenger; but such carrier is liable if its negligence is the proximate cause of the loss. *Bonner v. Grumbach*, 2 Tex. Civ. App. 482, 21 S. W. Rep. 1010.

A carrier is bound to deliver the passenger's luggage to him at the end of the journey, although it may have been in the same carriage with him and under his personal care; and if the usual course of delivery is at a particular spot, that is the place of delivery. *Richards v. London & S. C. R. Co.*, 7 C. B. 839, 6 Railw. Cas. 49, 13 Jur. 986, 18 L. J. C. P. 251.

A railway company is liable for the loss of a passenger's luggage, though carried in the carriage in which he himself is travelling. *LeConteur v. London & S. W. R.*

*Co.*, 6 B. & S. 961, 35 L. J. Q. B. 40, 12 Jur. N. S. 266, L. R. 1 Q. B. 54, 14 W. R. 80, 13 L. T. 325.—COMMENTED ON IN *Bergheim v. Great Eastern R. Co.*, 26 W. R. 301, L. R. 3, C. P. D. 221, 47 L. J. C. P. 318, 38 L. T. 160.

If a passenger keeps his luggage with him during the journey, it is in the custody of the company, which is responsible for its loss. *Great Northern R. Co. v. Shepherd*, 8 Exch. 30, 7 Railw. Cas. 310, 21 L. J. Exch. 286.

The mere fact of a passenger travelling in a railway carriage retaining possession of a bag or other small article of luggage does not, without some evidence of contract express or implied to that effect, relieve the company from their liability as common carriers in case of loss. *Gamble v. Great Western R. Co.*, 3 Up. Can. Error & App. 163.

Where a passenger directs a porter to place his luggage on the carriage seat, which is done, this alone is not a sufficient taking of such luggage from under the control of the company so as to relieve it from liability for its loss. *LeConteur v. London & S. W. R. Co.*, 6 B. & S. 961, 35 L. J. Q. B. 40, 12 Jur. N. S. 266, L. R. 1 Q. B. 54, 14 W. R. 80, 13 L. T. 325.

The company receiving a passenger's luggage, to be carried in the carriage with the passenger, contracts as a common carrier, except that it will not be liable for any loss or injury to which the passenger's own act contributed. *Great Western R. Co. v. Bunch*, 34 Am. & Eng. R. Cas. 224, 13 App. Cas. 31; affirming 17 Q. B. D. 215.—APPROVING *Richards v. London, B. & S. C. R. Co.*, 7 C. B. 839; *Talley v. Great Western R. Co.*, L. R. 6 C. P. 44. DISAPPROVING *Bergheim v. Great Eastern R. Co.*, 3 C. P. D. 221. QUOTING *Butcher v. London & S. W. R. Co.*, 16 C. B. 13.

#### 81. Placing articles in state-room.\*

—Where a passenger by boat is given a state-room (and the key to it), in which he places his baggage, and from which it is stolen in his absence while the door is locked, the owners of the boat are liable. *Mudgett v. Bay State Steamboat Co.*, 1 Daly (N. Y.) 151.—FOLLOWED IN *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85.—*Gleason v. Goodrich Transp. Co.*, 32 Wis. 85.

It seems that carriers by water may re-

quire passengers to deposit baggage not necessary for daily use in some designated place in their care; but to hold the ship-owners liable it is not necessary for the passenger, of his own motion, to place it in charge of the officers of the vessel. *Van Horn v. Kermit*, 4 E. D. Smith (N. Y.) 453.

Where a passenger pays extra for a state-room on a vessel, a rule requiring him to place his baggage in the care of an officer of the vessel and forbidding him to take it into his state-room is an unreasonable rule, so far as it applies to articles required for present use, and will not relieve the company from liability in case of loss. *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr. N. S. (N. Y.) 229.

Where a passenger by vessel places his baggage in a state-room and it is stolen at night, without negligence on his part, the owners of the vessel are liable, though the articles lost are such things as a pocket-book and money, and a watch and chain. And a notice posted up requiring such baggage to be put in the custody of an officer of the boat does not apply where the passenger is furnished with a state-room. *Crozier v. Boston, N. Y. & N. Steamboat Co.*, 43 How. Pr. (N. Y.) 466.—QUOTED IN *Woodruff, S. & P. Coach Co. v. Diehl*, 9 Am. & Eng. R. Cas. 294, 84 Ind. 474, 43 Am. Rep. 102.

If a passenger by steamboat deposits his wearing apparel in his state-room, the owners of the vessel are liable if it is stolen therefrom without fault on the part of the owner. *Gore v. Norwich & N. Y. Transp. Co.*, 2 Daly (N. Y.) 254.

The fact that a passenger by steamboat wears an overcoat and deposits it in his state-room cannot be regarded as such exclusive possession as to relieve the carrier from liability if it be stolen without the owner's fault. *Gore v. Norwich & N. Y. Transp. Co.*, 2 Daly (N. Y.) 254.—FOLLOWED IN *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85.

The *animus custodiendi* of a passenger by boat as to wearing apparel ceases when such articles are placed in his state-room, unless he has notice to the contrary. *Gore v. Norwich & N. Y. Transp. Co.*, 2 Daly (N. Y.) 254.

The liability of a carrier of passengers for the safe transportation of baggage does not extend to such articles as the passenger has in his charge. Where a lady passenger by boat left jewelry in her state-room, and

\* See also *ante*, 4.

it was stolen, the owners of the boat were held not liable. *The R. E. Lee*, 2 Abb. (U. S.) 49.—REVIEWING *Tower v. Utica & S. R. Co.*, 7 Hill (N. Y.) 47.

The owners of a steamboat are not liable for the loss of a passenger's baggage, which without the consent of the owners he deposits in his state-room, which he knows cannot be locked, where there is a baggage-porter known to the passenger, whose duty it is to take charge of and check baggage, and where the loss occurs while the passenger is away from his room. *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85.

#### 82. Leaving articles on the cars.—

A railroad company is liable for the contents of a valise which is left by a passenger on a train, he being informed that he must get off quick, that the train will soon start, it appearing that the valise was discovered by the officers of the train and that it remained in their possession for several hours. The negligence of the passenger under the circumstances in leaving the valise in the car after he had reached his destination will not relieve the company from liability. *Bonner v. De Mendoza*, 4 Tex. App. (Civ. Cas. 392, 16 S. W. Rep. 976.

Where a carrier provides a place for the safe keeping of articles that may be inadvertently left by passengers on its cars, and make it the duty of its employes to take charge of such articles, it will be deemed a part of the business of the carrier to take charge of and safely keep such articles until called for. *Morris v. Third Ave. R. Co.*, 1 Daly (N. Y.) 202, 23 How. Pr. 345.

A passenger by rail left a car to get a meal, on being told by an employé that it was perfectly safe to leave his baggage in the car. On returning the car was detached, but he was told that he would find his baggage and a seat in another car, but in going into such car he found only part of his baggage. The first car was a sleeper and was not owned by the railroad company hauling it, but there was nothing to show that plaintiff had any knowledge of such fact. *Held*, that there was evidence to warrant a finding that the missing baggage was lost through the negligence of the company, and that its liability was not affected by the fact that it did not own the car. *Kinsley v. Lake Shore & M. S. R. Co.*, 125 Mass. 54.

Plaintiff, travelling on a first-class passenger ticket on defendant's railway, from C. to

T., had a travelling-bag which he took with him into the car, not having offered it to be checked, nor having been asked to do so, or to give it in charge to any of defendant's servants. At L., where the train stopped for refreshments, he left it on his seat in the car in order to retain the place, and on his return from the refreshment-room it was gone. *Held*, that the defendants were liable for the loss. *Gamble v. Great Western R. Co.*, 24 U. C. Q. B. 407.—QUOTING *Stewart v. London & N. W. R. Co.*, 10 L. T. N. S. 302. REVIEWING *Butcher v. London & S. W. R. Co.*, 16 C. B. 13.—DISTINGUISHED IN *Kerr v. Grand Trunk R. Co.*, 24 U. C. C. P. 209.

In an action brought to charge a railroad company, as a common carrier, for the loss of an overcoat belonging to a passenger, it appeared that the coat was not delivered to the defendants, but that the passenger, having placed it on the seat of the car in which he sat, forgot to take it with him when he left, and that it was afterward stolen. *Held*, that the defendant was not liable. *Tower v. Utica & S. R. Co.*, 7 Hill (N. Y.) 47.—ADHERED TO IN *Welch v. Pullman Palace Car Co.*, 16 Abb. Pr. N. S. (N. Y.) 352. DISTINGUISHED IN *Weeks v. New York, N. H. & H. R. Co.*, 72 N. Y. 50. FOLLOWED IN *Grosvenor v. New York C. R. Co.*, 39 N. Y. 34, 5 Abb. Pr. N. S. 345. QUOTED IN *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85. REVIEWED IN *The R. E. Lee*, 2 Abb. (U. S.) 49.

83. Articles dropped from car window.—A railroad company is not responsible for the loss of a bag containing money and jewelry, carried in the hand of a passenger and by him accidentally dropped through an open window in the car, although, upon notice of the loss, it refused to stop the train, short of a usual station, to enable him to recover it. *Henderson v. Louisville & N. R. Co.*, 31 Am. & Eng. R. Cas. 95, 123 U. S. 61, 8 Sup. Ct. Rep. 60; affirming 16 Am. & Eng. R. Cas. 397, 20 Fed. Rep. 430.

#### 84. Money on person of passenger.\*

—A company is not liable as common carriers for the loss of money in the possession of a passenger, which is carried without notice to the company, and for purposes not connected with the journey, though the loss be caused by the negligence of the company's servants. *First Nat. Bank v. Mari-*

\* See also *ante*, 40.

*Atta & C. R. Co.*, 20 *Ohio St.* 259. — APPROVED IN *Illinois C. R. Co. v. Handy*, 63 *Miss.* 609.

It seems that a railroad corporation does not undertake to carry and safely deliver the effects of travellers not delivered into its custody, and that, while money necessary for the expense of a journey undertaken, which is carried in the trunk of a passenger, is part of his baggage, for the loss of which while in the custody of the corporation for transportation it is liable, money in the clothing worn by the passenger is not in its custody, and it is not chargeable for its loss unless negligence on its part is shown. *Carpenter v. New York, N. H. & H. R. Co.*, 47 *Am. & Eng. R. Cas.* 421, 124 *N. Y.* 53, 26 *N. E. Rep.* 277, 34 *N. Y. S. R.* 854; *affirming* 15 *N. Y. S. R.* 345, 14 *Daly* 457.

**85. Company's liability where passenger is robbed.**—Under the ordinary contract of carriage, a carrier of passengers makes no contract and enters into no duty as to articles of property of great value forming no part of the passenger's ordinary baggage or personal equipment; and where a passenger carries such articles upon his person, without notice to or knowledge of the carrier, and they are violently taken from him by robbers, in the absence of gross negligence or fraud the carrier is not liable, although negligent in the exercise of its duty of protecting its passengers from violence. *Weeks v. New York, N. H. & H. R. Co.*, 72 *N. Y.* 50, 28 *Am. Rep.* 104; *affirming* 9 *Hun* 669. — DISTINGUISHING *Tower v. Utica & S. R. Co.*, 7 *Hill* (N. Y.) 47.

Whether, where a passenger is robbed of articles of clothing or usual and reasonable articles of personal adornment, under circumstances charging the carrier with a neglect to perform its duty of protecting the passenger from violence, the carrier is liable for the loss, *quare*. *Weeks v. New York, N. H. & H. R. Co.*, 72 *N. Y.* 50, 28 *Am. Rep.* 104; *affirming* 9 *Hun* 669.

**86. Refusal to receive parcel as baggage.**\*—A railway company cannot refuse to carry as luggage a package brought by a passenger and made up in a railway wrapper or a horse-rug, on the ground that it consists of articles of clothing; nor can they oblige the passenger to take it along with him in the carriage, so as to throw on him the responsibility for its safety. *Munster*

*v. South Eastern R. Co.*, 4 *Jur. N. S.* 738, 27 *L. J. C. P.* 308, 4 *C. B. N. S.* 676.

**87. Rights of passenger stopping over.**—Where a passenger buys through-tickets over a railroad and a connecting stage line, on arriving at the end of the railroad he has a right to have his baggage taken to a hotel where he waits until the next morning for the stage, without breaking the continuity of through transportation of his baggage. *Wilson v. Chesapeake & O. R. Co.*, 21 *Gratt. (Va.)* 654.

#### V. DISCLOSURE OR CONCEALMENT OF VALUE OR CONTENTS.

**88. Duty of passenger to disclose value and nature of contents.**—It is the duty of a passenger having valuables in his trunk, and desiring its transportation, to disclose to the carrier the nature and value of the contents; and if the latter then chooses to treat it as baggage, without extra compensation, the liability of common carrier will attach, but not otherwise. *Michigan C. R. Co. v. Carrow*, 73 *Ill.* 348.

In order to charge a railroad company for loss of articles which it receives in a trunk and transports as baggage, but which are not properly baggage, it must appear that the company at the time of shipment had notice of the contents of the trunk. *Texas & P. R. Co. v. Capps*, 2 *Tex. App. (Civ. Cas.)* 35.

If a passenger practises a fraud on the carrier by inducing it to accept jewelry, merchandise, and other valuables for transportation as baggage, such fraud releases the carrier from liability as a common carrier. *Cincinnati & C. A. L. R. Co. v. Marcus*, 38 *Ill.* 219. — DISTINGUISHED IN *Michigan C. R. Co. v. Carrow*, 73 *Ill.* 348. FOLLOWED IN *Michigan S. & N. I. R. Co. v. Oehm*, 56 *Ill.* 293.

Where a valise is accepted by a carrier as baggage, without notice that it contains in addition to baggage proper a large amount of gold, the carrier is not liable for the loss of the gold, though stolen by one of its agents. *Doyle v. Kiser*, 6 *Ind.* 242.

Where a passenger knows that a carrier has a fixed rate of charges for transporting gold, surreptitiously obtaining the carrier to take charge of gold as baggage is such fraud as will release the company from liability in case of a loss; but if the carrier knows that the baggage contains gold, and

\* See also *ante*, 59.

charges as for extra baggage, there is no fraud, and the company is liable for a loss. *Hellman v. Holladay*, 1 *Woolw.* (U. S.) 365.

If a passenger on a railway brings a trunk to the depot which contains jewelry of the value of \$30,000, and gives no notice of its contents, and has the same checked as ordinary baggage, and there is nothing about the trunk indicating its contents, and the same is consumed by fire while being carried, the company not being guilty of gross negligence, it cannot be held liable. *Michigan C. R. Co. v. Carrow*, 73 *Ill.* 348.

Where a person, under the pretence of having baggage transported, places in the hands of the agents of a railroad jewelry and other valuables, without notifying them of its character and value, he practises a fraud upon the company which will prevent his recovery in case of a loss, unless it occurs through gross negligence. *Michigan C. R. Co. v. Carrow*, 73 *Ill.* 348.

Where goods are shipped as freight, if the shipper use fraud or artifice to deceive the carrier, whereby his risk is increased or his care and vigilance are lessened, the carrier is relieved from liability. There is a distinction with regard to money carried as part of freight and money carried as part of baggage. *Missouri Pac. R. Co. v. York*, (Tex.) 18 *Am. & Eng. R. Cas.* 623.

As a condition precedent to any contract for the transportation of baggage, the carrier may require information from the passenger as to its value, and may demand extra compensation for any excess beyond that which the passenger may reasonably demand to have transported as baggage under the contract to carry the person. *New York C. & H. R. Co. v. Fraloff*, 100 *U. S.* 24, 21 *Am. Ry. Rep.* 428.

The carrier may be discharged from liability for the full value of the passenger's baggage if the latter by any device or artifice puts off inquiry as to such value, whereby is imposed upon the carrier a responsibility beyond what it is bound to assume in consideration of the ordinary fare charged for the transportation of the person. *New York C. & H. R. Co. v. Fraloff*, 100 *U. S.* 24, 21 *Am. Ry. Rep.* 428.

A rule of a railroad company that it will carry as baggage only the passenger's wearing-apparel on passenger trains is reasonable; and where plaintiff, who had been in the habit of carrying his peddler's ware as baggage, declined to certify that his

trunk contained nothing except wearing apparel, the company had a right to decline to carry the trunk, and he is not entitled to damages therefor. *Norfolk & W. R. Co. v. Irvine*, 84 *Va.* 553, 1 *L. R. A.* 110, 5 *S. E. Rep.* 532.—QUOTING *Phelps v. London & N. W. R. Co.*, 19 *C. B. N. S.* 321.

**80. Necessity of inquiry on part of carrier.**—(1) *Such inquiry necessary.*—In the absence of legislation, or of special regulations by the carrier, or of conduct by the passenger misleading the carrier as to the value of baggage, the failure of the passenger unasked to disclose the value of his baggage is not in itself a fraud upon the carrier. *New York C. & H. R. Co. v. Fraloff*, 100 *U. S.* 24, 21 *Am. Ry. Rep.* 428.

A person who sends baggage by a common carrier is not bound to declare its value unless required to do so, and in the absence of proof to the contrary this will be presumed, in an action in the courts of New Jersey, to be the rule of law in that state. *Brown v. Camden & A. R. Co.*, 83 *Pa. St.* 316, 15 *Am. Ry. Rep.* 421.—REVIEWED IN *Ryan v. Missouri, K. & T. R. Co.*, 23 *Am. & Eng. R. Cas.* 703, 65 *Tex.* 13.

A passenger, whose trunk contained a quantity of coin, paid the charge for extra baggage demanded by the baggage-master, but did not inform him that the trunk contained coin, in addition to clothing. *Held*, in an action against the carrier for the loss of the trunk, that the carrier was liable for the value of the coin. *Baldruff v. Camden & A. R. Co.*, 2 *Fed. Cas.* 507.

Where a trunk of a passenger contains specie it is not incumbent on him to inform the carrier of its contents, unless inquired of, notwithstanding the advertisement of the carrier, that passengers are "prohibited from taking anything as baggage but their wearing-apparel, which will be at the risk of the owner;" and where the extra weight of the passenger's baggage, including the trunk, was paid for, and the agents of the carrier took charge of it—*held*, that it was immaterial whether the trunk was to be viewed as baggage or freight, and that the carrier was responsible for its loss through the negligence or fraud of its agent. *Camden & A. R. Co. v. Baldauf*, 16 *Pa. St.* 67.—DISTINGUISHED IN *Pennsylvania C. R. Co. v. Schwarzenberger*, 45 *Pa. St.* 208.

An emigrant shipped a quantity of gold coin packed in the centre of a box of clothing and household goods. *Held*, that the car-



riers were not liable for a loss if there were no circumstances to lead them to infer that the box contained coin; but if the carriers knew that emigrants were in the habit of transporting gold put up in a similar way, and might reasonably have inferred that plaintiff's box contained money, then it was their duty to inquire as to its contents, and failing to do so they would be liable as carriers. *Kuter v. Michigan C. R. Co.*, 1 Biss. (U. S.) 35.—DISAPPROVED IN *Humphreys v. Perry*, 148 U. S. 627. DISTINGUISHED IN *Michigan C. R. Co. v. Carrow*, 73 Ill. 348.

(2) *Such inquiry unnecessary*.—A carrier of passengers is not bound to inquire as to the contents of a trunk delivered to it as ordinary baggage, such as travellers usually carry, even if the same is of considerable weight, but may rely upon the representation, arising by implication, that it contains nothing more than baggage. *Michigan C. R. Co. v. Carrow*, 73 Ill. 348.

After buying a railroad ticket a travelling salesman for a jewelry firm asked the agent to check his trunk, but without informing him that it contained jewelry, and without any inquiry on the part of the agent as to what it contained. The trunk was found to be overweight as baggage, and an extra charge was paid and the trunk checked. The trunk was so constructed as to show that it was a jeweller's sample-trunk. The carrier had been in the habit of checking similar trunks, but there was no evidence to show that it knew when doing so what the trunks contained. *Held*, that the agent was not bound to inquire what the trunk contained, that the evidence was not sufficient to show that he had knowledge of its contents, or had reason to believe it contained jewelry, and that the company therefore was not liable for a loss. *Humphreys v. Perry*, 54 Am. & Eng. R. Cas. 29, 148 U. S. 627, 13 Sup. Ct. Rep. 711; reversing 40 Am. & Eng. R. Cas. 636.—DISAPPROVING *Kuter v. Michigan C. R. Co.*, 1 Biss. (U. S.) 35; *Minter v. Pacific R. Co.*, 41 Mo. 503; *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. (U. S.) 262; *Stoneman v. Erie R. Co.*, 52 N. Y. 429; *Sloman v. Great Western R. Co.*, 67 N. Y. 208; *Millard v. Missouri, K. & T. R. Co.*, 86 N. Y. 441; *Texas & P. R. Co. v. Capps*, 2 Tex. App. (Civ. Cas.) 35; *Butler v. Hudson River R. Co.*, 3 E. D. Smith (N. Y.) 571; *New York C. & H. R. R. Co. v. Fraloff*, 100 U. S. 24; *Talcott v. Wabash R. Co.*, 21 N. Y. Supp. 318.

**90. Requiring affidavit as to contents.**—A passenger in the habit of carrying merchandise in his trunk against the carrier's rules may be required to prove contents as a condition of receiving and checking it. *Norfolk & W. R. Co. v. Irvine*, 37 Am. & Eng. R. Cas. 227, 85 Va. 217, 7 S. E. Rep. 233.

Whether a railroad company may or may not reasonably require a peddler who has been in the habit of transporting his wares as baggage to sign an affidavit as to the contents of his trunk, the court will not entertain an action at his instance when it appears that he had taken the trunk with nothing in it except wearing apparel, and insisted that it should be checked for the patent purpose of having the agent refuse to check it unless he should sign an affidavit as to its contents, and of making such refusal the foundation for an action against the company. *Norfolk & W. R. Co. v. Irvine*, 37 Am. & Eng. R. Cas. 227, 85 Va. 217, 7 S. E. Rep. 233.

#### VI. THE CARRIER'S LIEN UPON BAGGAGE.

**91. For passenger's fare.**—The fare paid by a passenger to a carrier includes transportation of his baggage; and the carrier has a lien thereon for the fare, and may detain the same until payment thereof. *Roberts v. Koehler*, 12 Sawy. (U. S.) 252, 30 Fed. Rep. 94.

A passenger purchased an unconditional ticket for a passage on the Oregon & C. railway from P. to A., and, after his ticket had been taken up by the conductor, stopped over at an intermediate point without his consent, leaving his baggage to be carried on to A. On the next day he got on the train to A. but refused to pay the fare thereto, when the conductor allowed him to remain on the train, but refused to deliver him his baggage at A. until he paid the additional fare. *Held*, that the journey from P. to A. was performed under one contract, modified by the action of the passenger in stopping over, whereby he incurred an additional charge for his transportation, for which the carrier had a lien on the baggage so long as it remained in its possession. *Roberts v. Koehler*, 30 Fed. Rep. 94, 12 Sawy. (U. S.) 252.

**92. For carriage of baggage.**—If a passenger holding an excursion ticket which does not allow him to carry luggage has a

portmanteau placed in the luggage-van, without informing the porter that he was travelling on an excursion ticket, he impliedly contracts for the carriage of the portmanteau for hire, and the company is justified in detaining it till the carriage is paid. *Rumsey v. North Eastern R. Co.*, 14 C. B. N. S. 641, 32 L. J. C. P. 244, 11 W. R. 911, 8 L. T. N. S. 666, 10 Jur. N. S. 208.

**93. For advance charges paid.**—A carrier who had carried plaintiff into this country agreed to forward her baggage. He sent it by another carrier, in care of defendant, who advanced certain charges thereon. *Held*, that he had a lien on the baggage for such advances, there being no proof that the charges had been paid to the first carrier. *Nordmeyer v. Loescher*, 1 Hilt. (N. Y.) 499.

**94. Liability for safety of baggage held under lien.**—A railroad is liable for articles taken from a trunk which it was holding under a lien for the payment of the fare of a passenger. *Southwestern R. Co. v. Bentley*, 51 Ga. 311.

#### VII. LIMITATION OF LIABILITY.

**95. Power to limit the common-law liability.\***—Carriers may limit their liability for the loss of baggage intrusted to them not resulting from their negligence. *Laing v. Colder*, 8 Pa. St. 479.—FOLLOWING *Atwood v. Reliance Transp. Co.*, 9 Watts (Pa.) 87; *Bingham v. Rogers*, 6 W. Tts & S. (Pa.) 495.—DISAPPROVED IN *Indianapolis, P. & C. R. Co. v. Allen*, 31 Ind. 394. FOLLOWED IN *Philadelphia & R. R. Co. v. Anderson*, 6 Am. & Eng. R. Cas. 407, 94 Pa. St. 351, 39 Am. Rep. 787.

It is competent for passenger carriers by specific regulations which are reasonable and not inconsistent with any statute or its duties to the public, and which are distinctly brought to the knowledge of the passenger, to protect themselves against liability as insurers of baggage exceeding a fixed amount in value, except upon additional compensation proportioned to the risk. *New York C. & H. R. R. Co. v. Fraloff*, 100 U. S. 24.—FOLLOWED IN *The Majestic*, 56 Fed. Rep. 244.

It is competent for a common carrier to contract for exemption from liability for jewelry carried as baggage, unless its value be made known and an extra charge paid

thereon. *The Bermuda*, 27 Fed. Rep. 476, 23 Blatchf. (U. S.) 554.—DISTINGUISHING *Lebeau v. General S. Nav. Co.*, L. R. 8 C. P. 88.

Common carriers can only relieve themselves from their common-law liability, as to baggage, by express contract and not by words stamped on a check, and in no case can they relieve themselves by contract for a loss resulting from a want of care. *Indianapolis & C. R. Co. v. Cox*, 29 Ind. 360.—DISAPPROVING *Moore v. Evans*, 14 Barb. (N. Y.) 524.

**96. What regulations are reasonable.**—A railway company is not precluded from making special arrangements for the exclusion of luggage by cheap excursion trains, although its charter requires it to carry a certain amount of passenger luggage without extra charge. *Rumsey v. North Eastern R. Co.*, 14 C. B. N. S. 641, 32 L. J. C. P. 244, 11 W. R. 911, 8 L. T. N. S. 666, 10 Jur. N. S. 208.

At the time a travelling salesman shipped his samples as baggage he paid an excess-baggage charge, and received in addition to the ordinary brass checks an excess-baggage coupon ticket, which expressly provided that it should be surrendered with the check in order to get the baggage. *Held*, that the requirement providing for a surrender of the excess-baggage coupon was reasonable and proper, and not an infringement of the statute providing that common carriers shall not limit their common-law liability. *Texas Mex. R. Co. v. Willis*, 3 Tex. App. (Civ. Cas.) 94.

**97. What limitations are unreasonable.**—The limitation of the liability of the carrier, authorizing recovery for wearing-apparel to the extent of one hundred dollars, and no more, is not valid. *Davis v. Chicago, R. I. & P. R. Co.*, 83 Iowa 744, 49 N. W. Rep. 77.

A regulation of a carrier that it would not be responsible for any passenger's luggage unless fully and properly addressed with the name and destination of the owner thereon, is not a just and reasonable condition, within the Railway and Canal Traffic Act, 1854, § 7, and will not be enforced. *Cutler v. North London R. Co.*, 31 Am. & Eng. R. Cas. 105, 19 Q. B. D. 64.

A railway company has no power to make a by-law relieving itself from responsibility for the care of baggage unless it is booked and paid for, in contravention of its act re-

\*Limiting liability for baggage, see note, 12 Am. & Eng. R. Cas. 292.

1 D. R. D.—36.

quiring it to carry personal effects as baggage with the liability of the common carrier. *Williams v. Great Western R. Co.*, 10 *Exch.* 15.

Plaintiff's ticket for transportation from Hamburg to New York City, issued by defendant, contained a condition limiting defendant's liability for loss of baggage to fifty dollars. Plaintiff's baggage, consisting of wearing-apparel for herself and two children, and valued at \$283, was lost on the way. *Held*, that a finding by a jury that the provision limiting defendant's liability was unreasonable was right. *Glovinsky v. Cunard Steamship Co.*, 4 *Misc. (N. Y.)* 266.

The plaintiff was a season-ticket holder on the defendants' line from B. to K. under a special contract, by which he undertook to abide by all the rules, regulations, and by-laws of the defendants. One of such regulations was that the defendants would not be responsible for any passenger's luggage unless fully and properly addressed with the name and destination of the owner. The plaintiff having with him a bag, which was not so addressed, saw it labelled for K. by one of the defendants' servants; he left the train at C., an intermediate station, and proceeded to K. by a subsequent train; on his arrival at K. his bag was missing. There was no evidence that the bag ever reached K. *Held*, that the regulation of the defendants was not a just and reasonable condition within § 7 of the R. & C. Tr. Act, 1854 (17 & 18 Vic. c. 31), and could not be enforced against the plaintiff. *Cutler v. North London R. Co.*, 19 *Q. B. D.* 64, 5 *Ry. & C. T. Cas.* ix.

**98. Effect of condition or notice printed on ticket.**—(1) *General rules.*—

To restrict the liability of a railroad company as a common carrier for the loss of the baggage of a passenger, there must be proof of actual notice to the passenger of such restriction before the cars are started; and an indorsement on the ticket given to the passenger is not enough, unless it is shown that he knew its purport before the cars started. *Wilson v. Chesapeake & O. R. Co.*, 21 *Gratt. (Va.)* 654. *Mauritz v. New York, L. E. & W. R. Co.*, 21 *Am. & Eng. R. Cas.* 286, 23 *Fed. Rep.* 765.

Discovery of the condition after the journey has commenced will not affect the rights of the passenger. *Rawson v. Pennsylvania R. Co.*, 48 *N. Y.* 212, 3 *Am. Ry. Rep.* 528; *affirming* 2 *Abb. Pr. N. S.* 220.—*FOL-*

*LOWING Blossom v. Dodd*, 43 *N. Y.* 264.—*DISTINGUISHED IN* *Elmore v. Sands*, 54 *N. Y.* 512. *FOLLOWED IN* *Kent v. Baltimore & O. R. Co.*, 31 *Am. & Eng. R. Cas.* 125, 45 *Ohio St.* 284, 10 *West. Rep.* 459, 12 *N. E. Rep.* 798.

Such a notice printed on the back of a ticket does not raise a legal presumption that the passenger knew of and assented to such condition before the journey was commenced; and whether the passenger did have actual notice of such condition before starting on the journey is a question for the jury. *Brown v. Eastern R. Co.*, 11 *Cush. (Mass.)* 97.—*DISTINGUISHING* *Austin v. Manchester, S. & L. R. Co.*, 10 *C. B.* 454; *Shaw v. York & N. M. R. Co.*, 6 *Railw. Cas.* 87, 13 *Q. B.* 347.—*DISTINGUISHED IN* *Grace v. Adams*, 100 *Mass.* 505; *Fonseca v. Cunard Steamship Co.*, 153 *Mass.* 553; *Malone v. Boston & W. R. Co.*, 12 *Gray (Mass.)* 388; *Kent v. Baltimore & O. R. Co.*, 31 *Am. & Eng. R. Cas.* 125, 45 *Ohio St.* 284, 10 *West. Rep.* 459, 12 *N. E. Rep.* 798. *QUOTED IN* *Blossom v. Dodd*, 43 *N. Y.* 264.

The fact that a passenger receives a ticket, printed on the face "Look on the back," where there is a provision limiting the carrier's liability, does not raise a legal conclusion that the passenger had notice of such provision. *Malone v. Boston & W. R. Corp.*, 12 *Gray (Mass.)* 388.

Words on a railroad ticket or baggage-check limiting the liability of the carrier to a specific amount for loss of baggage are not binding on a passenger unless, with knowledge of such limitation, he agrees to it; and the burden of showing such agreement is on the carrier. *Baltimore & O. R. Co. v. Campbell*, 3 *Am. & Eng. R. Cas.* 246, 36 *Ohio St.* 647, 38 *Am. Rep.* 617.—*FOLLOWING* *Welsh v. Pittsburg, Ft. W. & C. R. Co.*, 10 *Ohio St.* 65; *Cleveland, P. & A. R. Co. v. Curran*, 19 *Ohio St.* 1; *Cincinnati, H. & D. R. Co. v. Pontius*, 19 *Ohio St.* 221; *Union Exp. Co. v. Graham*, 26 *Ohio St.* 595; *United States Exp. Co. v. Backman*, 28 *Ohio St.* 144; *Gaines v. Union T. & I. Co.*, 28 *Ohio St.* 418; *Pittsburgh, C. & St. L. R. Co. v. Barrett*, 36 *Ohio St.* 448. *NOT FOLLOWING* *Burke v. South Eastern R. Co.*, 5 *C. P. Div. 1.*—*FOLLOWED IN* *Kent v. Baltimore & O. R. Co.*, 31 *Am. & Eng. R. Cas.* 125, 45 *Ohio St.* 284, 10 *West. Rep.* 457, 12 *N. E. Rep.* 798.—*Kansas City, St. J. & C. B. R. Co. v. Rodebaugh*, 34 *Am. & Eng. R. Cas.* 219, 38 *Kan.* 45, 15 *Pac. Rep.* 899.

Where bills issued by a railway company announce that luggage taken on excursion trains is at the passenger's risk, the company is not liable for the loss of the luggage of a passenger who took a ticket referring him to such bills, although he did not see them or know of the condition. *Stewart v. London & N. W. R. Co.*, 3 H. & C. 135, 10 Jur. N. S. 805, 33 L. J. Exch. 199, 12 W. R. 689, 10 L. T. N. S. 302.—OVERRULED IN *Cohen v. South Eastern R. Co.*, L. R. 2 Exch. D. 253, 46 L. J. Exch. 417, 36 L. T. N. S. 130, 25 W. R. 475.

(2) *Illustrations.*—Z. took a through ticket from the C. C. station of the S. E. R. Co. to P.; the ticket was in three coupons—(1) from L. to D.; (2) from D. to C.; (3) from C. to P. His luggage consisted of a portmanteau and a hat-box, which were registered through to P. Upon the ticket was printed the following condition: "The company is not responsible for loss or detention of or injury to luggage of the passenger travelling by this through ticket, except while the passenger is travelling by the company's trains or boats." The portmanteau was lost on the journey between C. & P. In an action for the loss—*held*, that the R. & C. Tr. Act, 1854, only applied to the traffic of the company on their own line, and therefore the company was at liberty to make the special contract contained in the ticket. *Zunz v. South Eastern R. Co.*, L. R. 4 Q. B. 539, 38 L. J. Q. B. 209, 3 Ry. & C. T. Cas. xix.

The plaintiff purchased from an agent a non-transferable return ticket which had printed on it a number of conditions, one of which limited the liability of the company for baggage to wearing apparel not exceeding \$100 in value, and another required the signature of the passenger for the purpose of identification and to prevent a transfer. The agent obtained the plaintiff's signature to the ticket, explaining that it was for the purpose of identification, but did not read or explain to her any of the conditions; and having sore eyes at the time she was unable to read them herself. An accident happened to the train, and plaintiff's baggage, valued at over \$1000, caught fire and was destroyed. In an action for damage for such loss—*held*, that there was sufficient evidence that the loss of the baggage was caused by defendant's negligence, and that, the special conditions printed on the ticket not having been brought to the

notice of plaintiff, she was not bound by them and could recover the full amount of her loss from the company. *Bate v. Canadian Pac. R. Co.*, 18 Can. Sup. Ct. 697.

A ticket contained a condition limiting the liability of the company for loss of baggage to \$100, below which was a contract agreeing to the condition in consideration of the reduced rate at which the ticket was sold, with a blank space for the purchaser's signature. The agreement was not signed, and it was shown that the ticket was not sold at a reduced rate. *Held*, that there was no agreement by the purchaser to the condition. *Anderson v. Canadian Pac. R. Co.*, 40 Am. & Eng. R. Cas. 624, 17 Ont. 747.

**99. Stipulations or conditions in receipts for baggage.**—A mere acceptance of a receipt containing a memorandum, attempting to limit the carrier's liability as to baggage to \$100, does not, as a matter of law, constitute a contract between the carrier and the passenger, where the passenger's attention is not called to such memorandum and he does not assent thereto. *Madan v. Sherard*, 73 N. Y. 329; *affirming* 10 J. & S. 353.—FOLLOWING *Blossom v. Dodd*, 43 N. Y. 264.—REVIEWED IN *London & L. Fire Ins. Co. v. Rome, W. & O. R. Co.*, 23 N. Y. Supp. 231, 68 Hun 598, 52 N. Y. S. R. 581.—*Limburger v. Westcott*, 49 Barb. (N. Y.) 283.

Proof that an express company gave a receipt for baggage, at night, in a dimly-lighted and rapidly-running car, which attempts to limit the carrier's liability, is not sufficient to constitute a contract, where the provision is obscurely printed and there is nothing to show that the passenger assented to it. *Blossom v. Dodd*, 43 N. Y. 264.—DISTINGUISHING *Grace v. Adams*, 100 Mass. 505; *Van Toll v. South Eastern R. Co.*, 104 E. C. L. 75. QUOTING *Butler v. Heane*, 2 Camp. 415; *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97.—*Madan v. Sherard*, 10 J. & S. (N. Y.) 353.—DISTINGUISHING *Grace v. Adams*, 100 Mass. 505; *Van Toll v. South Eastern R. Co.*, 104 E. C. L. 75. FOLLOWING *Blossom v. Dodd*, 43 N. Y. 264.

Notices attempting to limit a carrier's liability for lost goods or baggage are to be construed most strongly against the carrier. So a provision in a receipt attempting to limit such liability to \$100 "on any article" will be construed not as a limitation of liability to that amount for the whole contents

of a trunk, but as a limitation to that amount on each article that may be in the trunk. *Earle v. Cadmus*, 2 *Daly* (N. Y.) 237. *Hopkins v. Westcott*, 6 *Blatchf.* (U. S.) 64.

After a lady had left her baggage at the office of a carrier and given directions about where it should be taken, and received a check therefor, she turned back and asked a clerk to give her a receipt, which was given, containing a provision attempting to limit the carrier's liability to \$100, but which provision was not read by her until after a loss of her baggage. *Held*, that there was nothing showing such assent thereto as would constitute an agreement, and that she was therefore entitled to recover full value for the baggage lost. *Woodruff v. Sherrard*, 9 *Hun* (N. Y.) 322.

#### 100. Notices posted at stations, etc.

—Stage-coach proprietors are answerable as common carriers for the baggage of passengers, and cannot restrict their liability by a general notice that "the baggage of passengers is at the risk of the owners." *Hollister v. Nowlen*, 19 *Wend.* (N. Y.) 234. *Camden & A. R. & T. Co. v. Belknap*, 21 *Wend.* (N. Y.) 354.

Notice in the usual form, "All baggage at the risk of the owners," though brought home to the knowledge of the passengers, will not in such cases excuse the company. Common carriers cannot, by such notice, excuse themselves from the implied agreement that the vessel, coach, or other vehicle for the transportation of goods or baggage is sufficient for the business in which it is employed. *Camden & A. R. & T. Co. v. Burke*, 13 *Wend.* (N. Y.) 511.—FOLLOWED IN *Potts v. Wabash, St. L. & P. R. Co.*, 17 *Mo. App.* 394.—*Hollister v. Nowlen*, 19 *Wend.* (N. Y.) 234. DISTINGUISHED IN *Kimball v. Rutland & B. R. Co.*, 26 *Vt.* 247. FOLLOWED IN *Camden & A. R. & T. Co. v. Belknap*, 21 *Wend.* (N. Y.) 354. REVIEWED IN *Slocum v. Fairchild*, 7 *Hill* (N. Y.) 292.

A passenger's luggage cannot be said to be off the line of a railway company until it is out of its custody and in the custody of some person responsible for its loss, within the meaning of a notice that the company does not hold itself responsible for any loss arising "off its lines." *Kent v. Midland R. Co.*, *L. R.* 10 *Q. B.* 1, 44 *L. J. Q. B.* 18, 31 *L. T. N. S.* 430, 23 *W. R.* 25.

A steamboat passenger is not charged with notice posted about in the boat stating certain rules of the carrier touching the de-

livery of baggage; but if he be specially informed of such rules, he will be bound thereby so far as they are reasonable. *Gleason v. Goodrich Transp. Co.*, 32 *Wis.* 85.—QUOTING *Macklin v. New Jersey Steamboat Co.*, 7 *Abb. Pr. N. S.* (N. Y.) 241.

A statute provided that railway commissioners might make "regulations for the safe construction and working of the railways under their charge for the transmission of goods and passengers thereon," but that such regulations must be first approved by the governor in council. Notice was posted at stations limiting the carrier's liability, but which had not been approved by the governor in council, and of which plaintiff had no notice at the time of shipping baggage over the road, which was lost *en route*. *Held*, that defendants were liable for the loss as common carriers. *Willis v. European & N. A. R. Co.*, 13 *New Brun.* 157.

101. Limiting liability for negligence—Law of place.\*—Passengers' luggage is within §7 of the Railway and Canal Traffic Act, and railway companies are liable for the negligent loss of or injury to such luggage, notwithstanding any notice or condition made and given by them in any wise limiting such liability. *Cohen v. Southeastern R. Co.*, 46 *L. J. Exch. D.* 417, *L. R.* 2 *Exch. D.* 253, 36 *L. T. N. S.* 130, 25 *W. R.* 475; *affirming L. R.* 1 *Exch. D.* 217, 45 *L. J. Exch. D.* 298, 24 *W. R.* 522, 35 *L. T. N. S.* 213. APPROVED IN *Doolan v. Midland R. Co.*, 37 *L. T.* 317, *L. R.* 2 *App. Cas.* 792.

A railway company is not exempt from liability for damage caused by its own negligence under a special contract for the transportation of troops, whereby it is provided that "the baggage shall remain in charge of a guard provided by the troops, the company accepting no responsibility." *Martin v. Great Indian Peninsular R. Co.*, 37 *J. Exch.* 27, *L. R.* 3 *Exch.* 9, 17 *L. T. N. S.* 349.

If a ticket bought in England for an ocean passage, consisting of a large sheet of paper nearly covered on both sides with print and writing, with the printed heading on the face "Passengers' Contract Ticket," contains elaborate provisions for governing the conduct, rights, and liabilities of the parties till the steamship reaches the port of destination in Mas-

\* See also *ante*, 7.

Massachusetts, among other things exempting the carrier from liability for any loss arising from his negligence, the passenger, in accepting and using the ticket, even if he did not read it, will be conclusively held to have assented to its terms; and the stipulation, being valid in England, will be enforced here, notwithstanding that a similar contract made in Massachusetts would be void as against public policy. *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 27 N. E. Rep. 665.—DISTINGUISHING *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97; *Malone v. Boston & W. R. Co.*, 12 Gray (Mass.) 388; *Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470; *Quimby v. Vanderbilt*, 17 N. Y. 306; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655.—FOLLOWED IN *New York, L. E. & W. R. Co. v. Bennett*, 50 Fed. Rep. 496, 6 U. S. App. 95, 1 C. C. A. 544.

A contract made in the United States for the carriage of a passenger and his baggage into Canada, which contains a provision limiting the carrier's liability as to the baggage, is to be governed by the law of the latter country; and a provision of a state law, where the contract was made, allowing carriers to contract against certain liabilities, will not be enforced in Canada. *Brown v. Canadian Pac. R. Co.*, 4 Man. 396.

**102. No limitation as against wilful acts of servants.**—A special contract made between the carrier and a passenger, limiting the carrier's liability to a certain amount of baggage, is not binding as against the wilful acts or torts of its employés. *Mobile & O. R. Co. v. Hopkins*, 41 Ala. 486.

Where a railroad company issues a free ticket, containing the provision thereon that "the person accepting this free ticket in consideration thereof assumes all risk of accident, and expressly agrees that the company shall not be liable under any circumstances, whether of the negligence of their agents or otherwise, for any injury to the person or property," the company is not relieved thereby from liability for loss of baggage which results from the wilful act or tort of its employés. *Mobile & O. R. Co. v. Hopkins*, 41 Ala. 486.—CRITICISING *Indiana C. R. Co. v. Mundy*, 21 Ind. 48; *Wells v. New York C. R. Co.*, 24 N. Y. 181. FOLLOWED IN *Jacobus v. St. Paul & C. R. Co.*, 20 Minn. 125 (Gil. 110.) NOT FOLLOWED IN *Griswold v. New York & N. E. R. Co.*, 26 Am. & Eng. R. Cas. 280, 53 Conn. 371, 55 Am. Rep. 115.

**103. Special contracts limiting liability.**—While a common carrier cannot by a general notice free itself from all liability for property transported by it, yet it may reasonably qualify its liability by notice brought to the knowledge of the owner, and by special contract it may relieve itself from its common-law liability, except for such loss as results from negligence. Where a special contract exists, the burden to prove negligence is on the plaintiff. *Smith v. North Carolina R. Co.*, 64 N. Car. 235.—FOLLOWED IN *Capehart v. Seaboard & R. R. Co.*, 81 N. Car. 438.

In an action for loss of baggage, an instruction to the jury that gave them to understand that it was of little importance whether the plaintiff omitted to read the contract to which she had signed her name, which agreed to a limitation of the liability of the company, provided the railroad company had not called her attention specially to its terms, was erroneous, as it was her duty to read the contract if she had the opportunity of doing so, and no fraud, imposition, or deception was practised to prevent her from doing so. *Louisville, N. & C. R. Co. v. Nicholai*, 4 Ind. App. 119, 30 N. E. Rep. 424.

The defendant railroad company, in consideration of a sum paid to it by the plaintiff, undertook to safely carry the plaintiff and her baggage from Portland, Ore., to Indianapolis, Ind., by way of its own road and connecting lines. The ticket contained the following words: "None of the companies represented in this ticket will assume any liability on baggage except for wearing-apparel, and then only for a sum not exceeding \$100." Following this was the signature of the general passenger agent, and immediately after that the following: "I agree to the above contract.—Mrs. Osceola Nicholai." When the trunk reached its destination it was discovered that a sealskin sacque, jewelry, etc., of the value of three hundred dollars had been abstracted *en route*. *Held*, that where the exemption provided for by contract is not for loss or damage from a particular cause, but as to amount only (as in the case at bar), and the carrier will not account nor attempt to account for a refusal to deliver the property which it undertook to safely carry, the presumption is that there has been negligence on the part of the carrier, and the plaintiff may recover the full



amount of the loss she has sustained. *Louisville, N. A. & C. R. Co. v. Nicholai*, 4 Ind. App. 119, 30 N. E. Rep. 424.

### VIII. ACTIONS FOR LOSS OF BAGGAGE.

**104. Jurisdiction.**—Where a party sues for money shipped in baggage, and also for baggage lost *in transitu*, and the allegations of his petition are sufficient to warrant a recovery for the money lost, the facts that he did not recover for the money and that the value of the goods lost was not within the jurisdiction of the court, form no ground for sustaining a plea to the jurisdiction. *Missouri Pac. R. Co. v. York*, 18 Am. & Eng. R. Cas. 623, 2 Tex. App. (Civ. Cas.) 557.

**105. Right of action, generally.**—Formerly the only remedy for negligent loss of baggage or goods was either a special action on the case for breach of the carrier's public duty to safely carry and deliver, or assumpsit for a breach of the undertaking; and it seems that, under the Code, a plaintiff in drawing his complaint must still observe the distinction between a mere negligent loss and a conversion of the baggage. *Samuels v. McDonald*, 11 Abb. Pr. N. S. (N. Y.) 344. *Tolan v. National Steam Nav. Co.*, 5 Robt. (N. Y.) 318, 4 Abb. Pr. N. S. 316, 35 How Pr. 496.

Where porters are licensed and required to give bond, a passenger whose baggage is lost by the negligence of such porter may maintain an action on his bond. *Chillicothe ex rel. v. Raynard*, 80 Mo. 185.

The general railroad act of New York, passed in 1850, relating to actions against carriers for loss of baggage, is limited in its operation to domestic corporations. *Garvey v. Camden & A. R. Co.*, 1 Hill. (N. Y.) 280, 4 Abb. Pr. 171.

A gratuitous bailee is not liable in an action of assumpsit for the loss of a thing intrusted to him; therefore, an action of assumpsit will not lie against a carrier for the loss of baggage where it was carried free. An action for tort is the proper remedy in such cases, if there is negligence enough on the part of the carrier to support it. *Flint & P. M. R. Co. v. Weir*, 37 Mich. 111.

The fact that a passenger has, in a box containing his personal luggage, articles which he is not entitled to carry as such, will not prevent him from recovering for the loss of such as are personal luggage.

*Bruty v. Grand Trunk R. Co.*, 32 U. C. Q. B. R. 66.

**106. Demand before suit.**—Proof of a delivery of baggage to a carrier and its loss make a *prima facie* case against the carrier, and it is not necessary to show a demand and refusal before suit. *Garvey v. Camden & A. R. Co.*, 1 Hill. (N. Y.) 280, 4 Abb. Pr. 171.

Where baggage is lost, it is not necessary before suit to make a demand upon the carrier's directors. A demand upon an agent of the company who was charged with the duty of receiving and delivering the baggage is sufficient. *Cass v. New York & N. H. R. Co.*, 1 E. D. Smith (N. Y.) 522.

Where a passenger on a railroad, having lost the check of his baggage, applied for the latter to one of the company's employés at the station, who replied that the check or proof of the property by affidavit must be produced, and the passenger afterward assigned the baggage to the plaintiff, who in company with the passenger demanded it anew of a baggage-master at the station, who represented that it was not in the defendant's possession—*held*, that the plaintiff's right of action against the company for the value of the baggage was complete. *Cass v. New York & N. H. R. Co.*, 1 E. D. Smith (N. Y.) 522.

**107. Who may sue.**—(1) *Husband or wife.*—In equity, the paraphernalia of the wife is treated as her separate estate, and a court of equity will protect her in its possession and enjoyment. A court of admiralty is a court of equity, and upon equitable grounds may sustain a proceeding *in rem* by a married woman against a carrier to recover for loss of her wearing-apparel shipped as baggage. *Steamboat State of New York*, 7 Ben. (U. S.) 450.

The ordinary and necessary wearing-apparel of the wife, furnished by the husband with his own means, or bought by him on credit, does not constitute a part of her statutory estate, but is his property, and he may maintain an action against a common carrier for its loss; but if bought with the wife's earnings since the 28th February, 1887 (Code, §§ 2341, 2351), it is her separate property, and she alone can maintain an action for its loss. *Richardson v. Louisville & N. R. Co.*, 85 Ala. 559, 5 So. Rep. 308, 2 L. R. A. 716. *Curtis v. Delaware, L. & W. R. Co.*, 74 N. Y. 116.

A husband travelling with his wife, and

having a trunk checked without informing the company that it belonged to her, may maintain an action for its loss though he was travelling on a pass. *Malone v. Boston & W. R. Corp.*, 12 Gray (Mass.) 388.—FOLLOWING *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97.—DISTINGUISHED IN *Grace v. Adams*, 100 Mass. 505; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553. FOLLOWED IN *Kent v. Baltimore & O. R. Co.*, 31 Am. & Eng. R. Cas. 125, 45 Ohio St. 284, 10 West. Rep. 459, 12 N. E. Rep. 798.

When a trunk is shipped as baggage, part of the contents belonging to a husband and part to his wife, the husband's title to the whole is sufficient to enable him to recover for a loss. *Rogers v. Long Island R. Co.*, 1 T. & C. (N. Y.) 396; affirmed 56 N. Y. 620, mem.

(2) *Parent or child*.—Where a child's clothes are shipped as baggage, in the absence of other evidence the presumption is that they were furnished by its father, and he may therefore sue for a loss. *Richardson v. Louisville & N. R. Co.*, 85 Ala. 559, 5 So. Rep. 308, 2 L. R. A. 716.

The fact that clothing which was lost as baggage was prepared for a minor daughter of plaintiff does not divest him of the right to recover its value in an action against the carrier. *Baltimore Steam Packet Co. v. Smith*, 23 Md. 402.

The legal title to wearing-apparel and jewelry provided by a father for the use of his infant daughter remains in him, notwithstanding the possession of them by the infant. And for the purpose of an action by the father against a common carrier to recover for the loss of such property, the daughter must be treated as the legally constituted agent of the plaintiff. *Prentice v. Decker*, 49 Barb. (N. Y.) 21.

(3) *Principal and agent*.—Where an agent becomes a passenger and has his trunk checked, the principal cannot recover for loss of its contents, though they belong to him and such contents be money intended to pay the necessary expenses of the agent. *Weed v. Saratoga & S. R. Co.*, 19 Wend. (N. Y.) 534.—APPLIED IN *Merrill v. Grinnell*, 30 N. Y. 594. DISTINGUISHED IN *Milnor v. New York & N. H. R. Co.*, 53 N. Y. 363. FOLLOWED IN *Taylor v. Monnot*, 4 Duer (N. Y.) 116. QUOTED IN *Elkins v. Boston & M. R. Co.*, 19 N. H. 337.

A person living in a foreign country directed plaintiff to purchase certain goods

for him in New York and send them by a third party by vessel to him. The goods were purchased and placed in the hands of such third party, who delivered them to the vessel, but afterward decided not to go himself, and delivered the key of a trunk in which the goods were to plaintiff and directed him to recover the goods. *Held*, that plaintiff could maintain replevin against the vessel for the goods, as it was necessary for him to assume possession in order to deliver to his correspondent. *Tanco v. Booth*, 15 N. Y. Supp. 110.

(4) *Master and servant*.—A servant may sue for the loss of baggage though his master may have engaged the passage and paid the fare therefor, as the right of action in such cases does not depend upon a contract. *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr. N. S. (N. Y.) 229. *Marshall v. York, N. & B. R. Co.*, 11 C. B. 655, 16 Jur. 124, 21 L. J. C. P. 34.

(5) *Joint owners*.—Plaintiffs were the joint owners of a chest, but owners in severalty of certain articles contained in it. They shipped it as baggage on defendant's road, and a check was issued to them jointly therefor. *Held*, in a joint action to recover for the loss of both the chest and its contents, that, as the contract with them was joint, the company could not insist that the contract should be severed and separate actions brought thereon. (REED, J., dissenting.) *Anderson v. Wabash, St. L. & P. R. Co.*, 18 Am. & Eng. R. Cas. 377, 65 Iowa 131, 21 N. W. Rep. 485.

**108. Parties defendant**.—Suit in replevin was brought to recover baggage which had been delivered to defendants to be carried to a foreign port, while they were acting outwardly as the agents of a steamship line, but were in fact partners in the firm that operated the vessel. *Held*, that the action was properly brought. *Tanco v. Booth*, 15 N. Y. Supp. 110.

Upon the arrival of a vessel in the port of New York, carrying emigrants, under the rules of the commissioners of immigration they were, for the purpose of being landed, placed on barges which were owned and controlled by certain railroad companies which had offices on the grounds belonging to the commissioners. While one of the emigrants was ashore for the purpose of registering, his baggage was lost from the barge, while in care of the railroad company's agents. *Held*, that the commissioners

were not liable for its loss, the liability, if there was any, being upon the railroad company. *Semler v. Com'rs of Emigration*, 1 *Hill* (N. Y.) 244.

**109. Complaint — Declaration.** — Where the owner of baggage sues to recover for its loss, it is sufficient to describe it in the complaint as one trunk, containing articles described as clothing, jewelry, etc. *Montgomery & E. R. Co. v. Culver*, 22 *Am. & Eng. R. Cas.* 411, 75 *Ala.* 587.

The production of a baggage-check is *prima-facie* evidence that plaintiff was a passenger, and, in suing for lost baggage, it is not necessary to allege that he was a passenger and the owner of the lost baggage. *Illinois C. R. Co. v. Copeland*, 24 *Ill.* 332.—FOLLOWED IN *Candee v. Pennsylvania R. Co.*, 21 *Wis.* 582.

A party is not entitled to have baggage carried until the relation of carrier and passenger exists. So a complaint alleging a contract by a common carrier to carry plaintiff over a certain portion of its road and the delivery of baggage, and a subsequent loss of the baggage, is not open to the objection, on demurrer, that it states two causes of action, one a breach of contract and the other a tort. *Rothschild v. Grand Trunk R. Co.*, 38 *N. Y. S. R.* 869, 60 *Hun* 582, 14 *N. Y. Supp.* 807.

A charge in a complaint against a railroad company for the loss of a valise, setting out that plaintiff was a passenger on a train of the defendant company, having bought and paid for a ticket recognized by the agents of the company, sufficiently sets out a contract with the company for the safe carriage of himself and baggage. *Bonner v. De Mendoza*, 4 *Tex. App. (Civ. Cas.)* 392, 16 *S. W. Rep.* 976.

Where baggage is shipped to be transported over several connecting lines on a through ticket, a complaint against the initial carrier, which alleges a partnership between the defendant and the other carriers, is sufficient to show a separate liability of the defendant. *International & G. N. R. Co. v. Foltz*, 3 *Tex. Civ. App.* 644, 22 *S. W. Rep.* 541.

**110. Schedule attached to complaint.**—A plaintiff sued for a trunk and its contents, which were lost as baggage, and attached to the complaint a schedule containing a list of the contents and their value, sworn to as "correct and true." *Held*, that this did not estop plaintiff from filing

a further schedule showing that the trunk contained other articles, and fixing a higher value upon articles contained in the first schedule, especially where objection was not made to the amendment, but was raised at the trial, and on a motion for a new trial. *Forbes v. Davis*, 18 *Tex.* 268.

**111. Plea.**—Where a railroad company is sued for loss of baggage, a plea is good to the effect that it did not operate its road in the county where suit is brought, and had no office or agent therein, though it appears that the baggage was checked to a point in the county at a station on a connecting line. *Gulf, C. & S. F. R. Co. v. Jackson*, 4 *Tex. App. (Civ. Cas.)* 73, 15 *S. W. Rep.* 128.

In an action for the loss of a passenger's luggage, the defendant's plea that it contained merchandise and that the passenger had not paid for it as such was a good answer. *Belfast & B. R. Co. v. Keys*, 9 *W. R.* 793, 4 *L. T. N. S.* 841, 9 *H. L. Cas.* 556, 8 *Jur. N. S.* 367.

In an action for the loss of a passenger's portmanteau, the defendant's plea that plaintiff did not comply with the carriers' act, in declaring the nature and value of the goods which were lost while in its possession as a carrier by land, was good; but the same plea to a count alleging that the defendant refused to carry the plaintiff's portmanteau, but not alleging its loss, was bad. *Pianciani v. London & S. W. R. Co.*, 18 *C. B.* 226.

In an action by a military officer for the non-delivery of and for injury to his baggage, a plea by the company that the carriage was under a contract with the government, and that there was no contract between the company and the passenger, is an answer to the count for non-delivery, but not an answer to the count for negligence in causing injury to the luggage. *Martin v. Great Indian Peninsular R. Co.*, 37 *L. J. Exch.* 27, *L. R.* 3 *Exch.* 9, 17 *L. T. N. S.* 349.

Where a declaration against a company alleges the non-delivery of the passenger's luggage and injury thereto by the negligence of the company, a plea is good which alleges that the passenger was an officer travelling in command of soldiers, and that the non-delivery and injury were caused by the mutinous acts of the soldiers. *Martin v. Great Indian Peninsular R. Co.*, 37 *L. J. Exch.* 27, *L. R.* 3 *Exch.* 9, 17 *L. T. N. S.* 349.

**112. Replication.**—In an action for the loss of a passenger's luggage a replication to a plea that the luggage contained merchandise and was not paid for as such, alleging that the box manifestly contained merchandise and yet was received as luggage, was bad for not averring that the company had notice that the box contained merchandise. *Belfast & B. R. Co. v. Keys*, 9 W. R. 793, 4 L. T. N. S. 841, 9 H. L. Cas. 556, 8 Jur. N. S. 367.

When baggage is lost and the passenger sues the company, and declares on the contract to safely carry, and the company sets up the defense by plea that its liability was limited to "wearing-apparel, not exceeding \$100 in value," a replication setting up the gross negligence of the company is bad on demurrer. *Shaw v. Canadian Pac. R. Co.*, 5 Man. 334.

**113. Evidence for the plaintiff, generally.**—(1) *General rules.*—Where a trunk was lost as baggage, and no proof was given as to when or how it was lost, the legal inference is that it was lost or mislaid in consequence of the negligence or fraud of the carrier or his agent. *Camden & A. R. Co. v. Baldauf*, 16 Pa. St. 67.

A common carrier is liable for the safe transportation and delivery of baggage the same as of merchandise, and where the defendant company both received and delivered the baggage, it is rendered *prima facie* liable by proof showing that the baggage was in good condition when it received it, and that it was damaged when it delivered it. *Montgomery & E. R. Co. v. Culver*, 22 Am. & Eng. R. Cas. 411, 75 Ala. 537.

The provisions of the Mass. act of 1851, ch. 147, § 5, providing that, in actions to recover for lost baggage, the passenger shall be allowed to put in evidence a descriptive list of its contents, sworn to by himself, applies to a loss occurring where a trunk is placed in the hands of a baggage-master at the place of destination. *Harlow v. Fitchburg R. Co.*, 8 Gray (Mass.) 237.

Where a passenger sues to recover for a loss of baggage, and the question whether the relation of carrier and passenger actually existed is made, proof that plaintiff purchased a ticket of one who purported to be an agent of defendant, and that the conductor received it on the line over which he travelled, and demanded no other fare, is sufficient to establish such relation. *Glasco*

*v. New York C. R. Co.*, 36 Barb. (N. Y.) 557.

In an action against a carrier for the loss of a trunk the gist of the action is the non-delivery at the proper destination, and the *terminus a quo* is immaterial. *Woodward v. Booth*, 7 B. & C. 301. *Tucker v. Cracklin*, 2 Stark. 385.

Where baggage is lost by fire, the fact that the agents of the company in charge of the depot failed to take steps to prevent a traction-engine near the depot from being moved by steam at night is not evidence of negligence, as there was no reasonable ground to apprehend danger from escaping sparks, and therefore the court properly refused to submit the question of negligence to the jury. *Wald v. Louisville, E. & St. L. R. Co.*, 92 Ky. 645.

Testimony that a trunk was of a size and shape recognized by railroad men as a sample-trunk is not conclusive of the company's knowledge that it was not a baggage-trunk. *Rider v. Wabash, St. L. & P. R. Co.*, 14 Mo. App. 529.

(2) *Illustrations.*—Suit was brought to recover the value of certain articles that had been stolen from a trunk while it was being carried as baggage, but the evidence did not show where the articles were stolen. *Held*, that the company was not liable unless the evidence showed, with reasonable certainty, that they were not stolen before the trunk came to the possession of the defendant. *McQuesten v. Sanford*, 40 Me. 117.

Plaintiff's son, a lad eighteen years of age, was employed by him as travelling agent to sell goods by sample. He had two large trunks containing the samples, different from ordinary travelling trunks, and had a valise for his personal baggage. He delivered the trunks to a baggage-master at a railroad depot, and when asked where he wanted them checked to, replied that he did not then know, as he had sent a despatch to a customer at F. to know if he wanted any goods; if not he wanted them to go to R., where he expected to meet some customers. Soon afterward he had them checked to R., paying two dollars and receiving a receipt ticket for them, headed "receipt ticket for extra baggage," etc. They were not weighed, and no evidence was given as to any regulation of the company in reference to charging extra compensation for passengers' baggage. *Held*, that the

evidence justified the submission to the jury of the question of notice as to the contents of the trunks. *Sloman v. Great Western R. Co.*, 67 N. Y. 208, 15 Am. Ry. Rep. 113; reversing 6 Hun 546.—EXPLAINED IN *Blumantle v. Fitchburg R. Co.*, 127 Mass. 322.

On appeal from a justice's court, of a suit brought on account against a railway company for "breaking a trunk," and for damage and expenses incurred by delay of "goods checked," etc., there being no exception taken to the generality of the description—held, that evidence might be given in regard to the delay of any kind of property "comprehended within the meaning of such articles as a passenger on a railroad train might carry with him as baggage, and which might be checked." *International & G. N. R. Co. v. Philips*, 63 Tex. 590.—FOLLOWING *Deaton v. State*, 44 Tex. 446.

In such a suit, on such an account not excepted to, it was competent to show the damage plaintiff sustained by reason of being compelled to buy clothes to supply the place of those delayed in their delivery by the company, and of being compelled to wait for the arrival of the goods. *International & G. N. R. Co. v. Philips*, 63 Tex. 590.

**114. Competency of plaintiff to prove contents or value.**—(1) *Plaintiff a competent witness.*—In an action against a railroad company, as a common carrier, to recover damages for the loss of a passenger's baggage, the plaintiff may prove the contents and value of his trunk by his own oath. *Douglass v. Montgomery & W. P. R. Co.*, 37 Ala. 638.—DISAPPROVING *Snow v. Eastern R. Co.*, 12 Met. (Mass.) 44.—*Nolan v. Ohio & M. R. Co.*, 39 Mo. 114.

Proof may be made by the plaintiff's oath of the value of baggage lost or destroyed while in the custody of the carrier after arrival at place of destination. *Pelland v. Canadian Pac. R. Co.*, 7 Montr. L. R. (Sup. Ct.) 131.

That plaintiff's possession of baggage-check, with proof of the usage of the company to give checks for baggage to passengers, is sufficient proof of plaintiff's being a passenger to entitle him to testify, under the act of 1850, as to the contents of a trunk lost by the railroad company. *Davis v. Cayuga & S. R. Co.*, 10 How. Pr. (N. Y.) 330.

In an action for the value of a lost trunk, the *ex-parte* affidavit of the plaintiff is not competent evidence to prove the contents of the trunk, but plaintiff himself is a competent witness for that purpose. *Indiana C. R. Co. v. Gulick*, 19 Ind. 83.—EXPLAINING *Doyle v. Kiser*, 6 Ind. 242.

(2) *Plaintiff competent where there is no other means of proof.*—The evidence of the plaintiff, in an action to charge a common carrier for the loss of a trunk, to prove its contents, is in no case admissible if other evidence is attainable to prove it. If there is none, and it is proven that the defendant has committed spoliation upon the property, then the evidence of the plaintiff is admissible in *odium spoliatoris*. *Dibble v. Brown*, 12 Ga. 217.

The passenger's oath to establish the value of the contents of his lost trunk is admissible in such cases, on the ground of necessity, as no one but himself is likely to be acquainted with its contents. *Cadwalader v. Grand Trunk R. Co.*, 9 Low. Can. 169.

A party is admissible to prove the contents of a trunk when no other evidence is attainable, upon a policy in *favorem justitiae*, springing out of the necessity of the case and the nature of the subject. *Dibble v. Brown*, 12 Ga. 217.

The owner of lost baggage is not competent to prove the value of the lost articles when that can be established by description. *Davis v. Michigan S. & N. I. R. Co.*, 22 Ill. 278.—FOLLOWING *Parmelee v. McNulty*, 19 Ill. 558.

(3) *Plaintiff not competent.*—In an action against a common carrier to recover the value of goods delivered to him to be carried, the plaintiff cannot prove the contents of a trunk nor their value, on his own oath. *Bingham v. Rogers*, 6 Watts & S. (Pa.) 495. *Dill v. South Carolina R. Co.*, 7 Rich. (So. Car.) 158.

In an action against a railroad company to recover damages for the loss of a trunk by its negligence, the plaintiff is not a competent witness, although he has no other evidence. *Snow v. Eastern R. Co.*, 12 Met. (Mass.) 44.—DISTINGUISHING *Porter v. Hundred of Regland*, Peake's Add. Cas. 203; *East India Co. v. Evans*, 1 Vern. 308; *Herman v. Drinkwater*, 1 Me. 27.—DISAPPROVED IN *Douglass v. Montgomery & W. P. R. Co.*, 37 Ala. 638. REVIEWED IN *Garvey v. Camden & A. R. Co.*, 1 Hilt. (N. Y.) 280, 4 Abb. Pr. 171.—*Smith v. North*

*Carolina R. Co., 1 Wins. (N. Car.) 203.*

(4) *Competency of husband or wife.*—Either husband or wife may be admitted to prove the quantity and value of the wearing-apparel belonging to each, including in the catalogue the wife's jewelry, and every other article pertaining to her wardrobe that may be necessary or convenient to either in travelling. *McGill v. Rowand, 3 Pa. St. 451.*—APPROVED IN *Mad River & L. E. R. Co. v. Fulton, 20 Ohio 318.* DISTINGUISHED IN *Metz v. California Southern R. Co., 44 Am. & Eng. R. Cas. 433, 85 Cal. 329.*

The principle of necessity, which enables a party, under certain circumstances, to prove the contents of a lost box or trunk, applies with as much, if not greater, force to the wife as to the husband. *McGill v. Rowand, 3 Pa. St. 451.*

A husband may prove, in a suit by himself to recover for lost baggage, the articles lost by either himself or his wife; but on account of their interest, they are not permitted to prove their value. *Illinois C. R. Co. v. Taylor, 24 Ill. 323.*

The evidence of the wife of the owner is admissible to prove value and contents, but the rule for the admission of such evidence does not extend further than to the proof of such articles as are commonly carried in a travelling trunk. *Mad River & L. E. R. Co. v. Fulton, 20 Ohio 318.*—APPROVING *Whitesell v. Crane, 8 Watts & S. (Pa.) 369, McGill v. Rowand, 3 Pa. St. 451.*

(5) *Limitation of plaintiff's testimony.*—Plaintiff's testimony as to the contents of a box lost by the carrier should be limited to clothing and personal ornaments. *Pudor v. Boston & M. R. Co., 26 Me. 458.*

Where the owner sues for lost baggage he is a competent witness to prove the contents of the baggage and its loss, but not the value of such contents. The contents should be described and left to the knowledge of the jurors to assess the value. *Illinois C. R. Co. v. Copeland, 24 Ill. 332.*

Where suit is brought for lost baggage, the owner should only be permitted to testify as to the value of such articles as are ordinarily carried as baggage, and only then where the carrier has interfered in an unwarranted manner with the goods. *Garvey v. Camden & A. R. Co., 1 Hilt. (N. Y.) 280, 4 Abb. Pr. 171.*—REVIEWING *Snow v. Eastern R. Co., 12 Met. (Mass.) 44.*—*Mad River & L. E. R. Co. v. Fulton, 20 Ohio 318.*—APPROV-

ING *Whitesell v. Crane, 8 Watts & S. (Pa.) 369.*—REVIEWED IN *Dill v. South Carolina R. Co., 7 Rich. (So. Car.) 158.*

**115. Admissions and declarations.**—Where a carrier has been such for the recovery of lost baggage, an admission by one of its officers, against the carrier's interest, is not competent evidence. *Green v. New York C. R. Co., 12 Abb. Pr. N. S. 472, 4 Daly 553.*

In case of a disaster resulting in the destruction by fire of a baggage car and its contents, the company can in no event be bound by the subsequent declarations of one of its brakemen as to the cause of the disaster. *Michigan C. R. Co. v. Carrow, 73 Ill. 348.*

A passenger by railroad train, as soon as practicable after its arrival at the place of destination, presented to the agent in charge of the baggage-room a check for his baggage and demanded the same, which baggage he had delivered to the carrier when he took passage on the train. The agent, being unable to find the baggage, took the number of the check and requested the passenger to call again. On the same evening the passenger returned to the depot, but the agent informed him that he had made further search and the baggage could not be found. *Held*, that such acts and declarations of the agent were competent evidence for the passenger in his action against the carrier for loss of such baggage. *Baltimore & O. R. Co. v. Campbell, 3 Am. & Eng. R. Cas. 246, 36 Ohio St. 647, 38 Am. Rep. 617.*

C. sought to recover the value of a trunk and contents lost from cars of defendant. On the trial evidence was admitted that B. (who was since deceased), a clerk in an office of defendant, declared some time after the loss that he had discovered what had become of the trunk—that it had been put off the cars at a certain point and the contents lost, etc. *Held*, that there being no effort in the case to fix the liability of the defendant by reason of any act or agreement of the supposed agent, B., but a mere attempt to prove by his declarations a fact with which he was not in any way connected, and of which he did not appear to have any personal knowledge, the evidence was improperly admitted. *Baltimore & O. R. Co. v. Christie, 5 W. Va. 325.*

**116. Offers to compromise.**—Where baggage is lost the company will not be made liable by an offer to pay a certain



amount as compromise, nor by the voluntary acts of its agents in assisting in looking after it. *Michigan S. & N. I. R. Co. v. Meyers*, 21 Ill. 627.

Suit was brought to recover for a trunk lost by a train going through an opening in a bridge caused by a flood. It appeared that the company had offered to settle for the loss connected with the disaster by paying \$50 to all claimants, where no value was fixed upon the baggage at time of shipment, which was so as to plaintiff's baggage, and that amount was offered to plaintiff. At the trial it was admitted that plaintiff was entitled to \$175, if entitled to recover at all. *Held*, that a judgment for plaintiff should be affirmed, as it would be taken that the court below understood the offer to pay \$50 as an admission of liability, and that being established, he had a right to recover the \$175. *Fox v. Adams Exp. Co.*, 116 Mass. 292.

**117. Burden of proof.**—In an action against a carrier of passengers for loss of baggage, the burden of showing delivery of the baggage is upon defendant; transportation of the baggage to the place of destination is not sufficient to discharge from responsibility. *Matteson v. New York C. & H. R. R. Co.*, 76 N. Y. 381.

In an action for the loss of baggage, which had been stolen from the place where it had been deposited by the carrier at the place of destination, if the latter seeks to avoid liability as a carrier, and places his defense on the ground that he is only liable as warehouseman, the burden of proof is upon him to show that the baggage was stored in a safe and secure warehouse. *Bartholomew v. St. Louis, J. & C. R. Co.*, 53 Ill. 227.—FOLLOWED IN *St. Louis & C. R. Co. v. Hardway*, 17 Ill. App. 321.

In an action against a railway company for not delivering luggage to another railway company at B., to be carried by such last-mentioned company from B. to C., the plaintiff must give such evidence of a non-delivery at B. as preponderates over the presumption of a delivery. It is not enough to show that the luggage never reached C., or to give evidence of a loss which is equally consistent with a loss by the one company as by the other. *Midland R. Co. v. Bromley*, 17 C. B. 372, 2 Jur. N. S. 140, 25 L. J. C. P. 94.

**118. Variance.**—An averment, in an action to recover for lost baggage, that the

defendant company alone agreed to transport the baggage to a certain place and there deliver it to plaintiff, is not supported by proof that the contract was to carry to a certain place and there deliver to a connecting carrier. *Montgomery & E. R. Co. v. Cuker*, 22 Am. & Eng. R. Cas. 411, 75 Ala. 587.

**119. What may be shown in defense, generally.**—A common carrier is not liable for the loss of money of one passenger from the valise of another passenger, shipped as the property of the latter. *Dunlap v. International Steamboat Co.*, 98 Mass. 371.

Where persons are sued as receivers of a railroad for loss of baggage, it is competent on defense to show that the receivers had been discharged and their possession ended before the loss. *Corser v. Russell*, 20 Abb. N. Cas. (N. Y.) 316.

Where a passenger in sailing from the United States to a foreign port takes merchandise on board the vessel in his trunk, to be carried as baggage, in the absence of anything to show fraud or concealment the owners of the vessel cannot confiscate it as an attempt to violate the laws of the United States, though it may have been taken on the vessel in violation of the carrier's rules. *Tanco v. Booth*, 15 N. Y. Supp. 110.

In an action against a railroad to recover the value of baggage lost by the company, the evidence tended to show that it belonged to a third person, who took it away from the depot without the knowledge of the agent and then procured plaintiff to bring suit for its recovery. *Held*, that a letter written by such third person to a stranger to the transaction, going to show the conspiracy, was admissible in evidence against the plaintiff. *Chicago, R. I. & P. R. Co. v. Collins*, 56 Ill. 212, 4 Am. Ry. Rep. 453.

A railway company, when sued for loss of baggage, defended on the ground that the baggage was carried under a condition in the passenger's ticket limiting the carrier's liability to \$100, and at the trial offered a letter written by the baggage agent to the passenger agent, asking why the plaintiff had not signed the ticket, and if her attention had been called to the conditions of it, and the reply of the ticket agent, stating that the ticket was sold at full rates, and that under the rules of the company it was not necessary that it be signed. *Held*, that the letters were admissible as evidence, but that

they were of no consequence where the ticket showed on its face that it was not sold subject to the conditions to which the letters related. *Anderson v. Canadian Pac. R. Co.*, 40 *Am. & Eng. R. Cas.* 624, 17 *Ont.* 747.—FOLLOWING *Kirkstall Brewery Co. v. Furness R. Co.*, L. R. 9 Q. B. 468.

**120. Contributory negligence as a defense.**—Where a passenger's baggage is checked to the wrong station, his failure to read a check given to him, which would have shown the mistake, is such contributory negligence as to defeat a recovery for a delay in having it returned to him. *Gonthier v. New Orleans, J. & G. N. R. Co.*, 28 *La. Ann.* 67.

**121. Questions of fact for the jury.**—Where a passenger sues for a loss of baggage, and it appears that he was travelling by boat under a contract exempting the carrier from liability except for gross neglect, the case should be submitted to the jury where the only proof of negligence is that the vessel was burned at sea. *Downey v. Inman & I. S. S. Co.*, 2 *N. Y. Supp.* 659.

**122. Instructions to the jury.**—Where suit is brought to recover for the value of a trunk which was burned in the company's station, and the evidence shows that the company's employes were occupied at the time in saving property, which was in the line of their duty, an instruction to the effect that the company would not be liable as warehouseman for the negligence of its employes when not acting in the line of duty is properly refused, as not applicable to the facts of the case. *Galveston, H. & S. A. R. Co. v. Smith*, 81 *Tex.* 479, 17 *S. W. Rep.* 133.

Where a trunk is burned in the company's station, and it is sued as warehouseman, and the jury has been instructed to find for plaintiff if they find a want of ordinary care, it is error to refuse when requested to further charge that the company was not liable if the jury find that ordinary care was exercised. *Galveston, H. & S. A. R. Co. v. Smith*, 81 *Tex.* 479, 17 *S. W. Rep.* 133.—DISTINGUISHING *Aldrich v. Boston & W. R. Co.*, 100 *Mass.* 31.

Where a steamboat passenger sues for a loss of baggage from his state-room, and the owners of the vessel defend on the ground that the passenger had notice that no baggage was allowed in state-rooms, without regard to what it might be used for, they are not entitled to an instruction

to the effect that the carrier might require all baggage "not necessary for daily use" to be deposited in a baggage-room. *Macklin v. New Jersey Steamboat Co.*, 7 *Abb. Pr. N. S. (N. Y.)* 229.

**123. Damages recoverable, generally.**—In case of loss or injury to baggage through the carrier's fault, the measure of damages is the value of the baggage at the place of destination. In such case the value of clothing carried as baggage is its value to the owner for use, and not merely what it could be sold for in money. *Lake Shore & M. S. R. Co. v. Warren*, 21 *Am. & Eng. R. Cas.* 302, 6 *Pac. Rep.* 724. *Fairfax v. New York C. & H. R. R. Co.*, 73 *N. Y.* 167; *affirming* 11 *J. & S.* 18; *referring to* 67 *N. Y.* 1, 15 *Am. Ry. Rep.* 141, *which reversed* 5 *J. & S.* 516. *Texas & P. R. Co. v. Taylor*, 3 *Tex. App. (Civ. Cas.)* 234.

Where baggage is lost, the true measure of damages is the value of the articles, and not what it cost the owner to buy other articles to replace them. *New Orleans, J. & G. N. R. Co. v. Moore*, 40 *Miss.* 39.

The true measure of damages for lost baggage is the value of the articles lost at the place where the suit is brought, and not at the place from which they were shipped. *Douglass v. The Railroad*, 1 *Phila. (Pa.)* 337.

The measure of damages for lost baggage is its market value with interest, if it has a market value, and if not, then the value of its use to the plaintiff. *Spooner v. Hannibal & St. J. R. Co.*, 23 *Mo. App.* 403. *Texas & P. R. Co. v. Ferguson*, 9 *Am. & Eng. R. Cas.* 395, 1 *Tex. App. (Civ. Cas.)* 724. *Texas & P. R. Co. v. Cook*, 2 *Tex. App. (Civ. Cas.)* 576.

In the absence of proof as to the contents of a trunk and their value, which is lost as baggage, the jury may give damages proportioned to the value that the articles were worth, in their judgment, with what the trunk did and might fairly contain. *Dill v. South Carolina R. Co.*, 7 *Rich. (So. Car.)* 158.—REVIEWING *Mad River & L. E. R. Co. v. Fulton* 20 *Ohio* 318.

Where a trunk is checked as baggage and arrives at its destination with some of the contents lost and others damaged, and the same is tendered by the company to the owner in a reasonable time, it is his duty to receive it, and upon failure to do so the amount of recovery against the company is limited to the value of the goods actually

lost and the damage to the others, and not the whole value of the trunk and its contents. *Gulf, C. & S. F. R. Co. v. Jackson*, 4 *Tex. App. (Civ. Cas.)* 73, 15 *S. W. Rep.* 128.

Suit was brought against a railroad company to recover for laces which had been transmitted without purchase for many generations, and therefore had no known market value, and which were shipped as baggage. *Held*, that their value could not be assessed upon mere conjecture, and that, in the absence of any evidence to show their market value, only nominal damages could be recovered for the loss. *Fraloff v. New York C. & H. R. R. Co.*, 10 *Blatchf. (U. S.)* 16.

**124. Expenses of search.**—The owner of lost baggage cannot recover for money expended in searching for it. *Mississippi C. R. Co. v. Kennedy*, 41 *Miss.* 671. *Texas & P. R. Co. v. Ferguson*, 9 *Am. & Eng. R. Cas.* 395, 1 *Tex. App. (Civ. Cas.)* 724. *St. Louis, I. M. & S. R. Co. v. Hindsman*, 1 *Tex. App. (Civ. Cas.)* 82. *Provencher v. Canadian Pac. R. Co.*, 5 *Montr. L. R. (Sup. Ct.)* 9.

In an action for loss of baggage plaintiff is not entitled to recover damages for expenses incurred in searching for his baggage, except such as were necessarily incurred in ascertaining whether the baggage had reached its destination. *Texas & P. R. Co. v. Ferguson*, 9 *Am. & Eng. R. Cas.* 395, 1 *Tex. App. (Civ. Cas.)* 724.

Plaintiff, a passenger on defendant's railway, gave his baggage in charge of its servants. The baggage having been lost, plaintiff sued for the value of the articles and for damage sustained in consequence of such loss, both in expense incurred thereby and in loss of time. *Held*, that the damage must be confined to reasonable expenses of searching for the baggage, such as telegraphing, cab hire in going to defendant's office, etc. *Morrison v. European & N. A. R. Co.*, 15 *New Brun.* 295.

Suit was brought against a railroad company, claiming \$50 for the value of baggage lost; increased travelling expenses, hotel bills, etc., incurred by reason of the loss of baggage, \$64.20; for loss of an engagement as a school-teacher and preacher, resulting from the loss of baggage, \$350. *Held*, that the two last items were special, and were not recoverable unless the company was informed at the time the baggage was shipped of the facts which would render such damage probable in the event of a

loss. *Texas & P. R. Co. v. Taylor*, 3 *Tex. App. (Civ. Cas.)* 234.

**125. Damages for delay.**—Where a passenger sues to recover for a delay in the delivery of baggage, the measure of damages is the value of the baggage to the owner during the time of the delay. *Gulf, C. & S. F. R. Co. v. Vancil*, 2 *Tex. Civ. App.* 427, 21 *S. W. Rep.* 303.

The ordinary measure of damages in case of delay in the transportation and delivery of baggage is the value of the use of the same during the delay, which in most cases would be the rental value of the property during the time of the delay; but this rule does not apply where the delayed baggage is the passenger's own wearing-apparel, which might have no rental value, the measure of damages in such case being the value of the use of the apparel to the owner during the time, excluding from the estimate damages which are remote, speculative, or uncertain. *Texas & P. R. Co. v. Taylor*, 3 *Tex. App. (Civ. Cas.)* 234.

**126. Excessive damages.**—What is wearing apparel is necessarily a question of fact, and what is reasonable and customary wearing apparel to be carried by a traveller upon a particular journey is also a question of fact, to be determined with reference to the tastes and habits of the traveller, his pecuniary circumstances, position in society, and the conveniences and necessities of the particular journey. So where a foreign lady of high rank and large estate was travelling extensively in the United States and other countries, it was held to be a question of fact for the jury to determine the amount and value of the baggage that she had a right to carry as such; and where the question was properly left to the jury, under evidence warranting their finding, a verdict in her favor for \$10,000 for laces lost from her trunk while in the hands of a railroad company will not be disturbed. *Fraloff v. New York C. & H. R. R. Co.*, 48 *How. Pr. (N. Y.)* 535; *affirmed*, 100 *U. S.* 24.

A lady travelling away from home had all her clothes, except those that she was wearing, in her trunk, which was shipped as baggage, and by the negligence of the carrier they were delayed about one month. *Held*, that a verdict in her favor for \$125 would not be set aside as excessive. *Gulf, C. & S. F. R. Co. v. Vancil*, 2 *Tex. Civ. App.* 427, 21 *S. W. Rep.* 303.

**127. Costs.**—Where baggage has been

found after suit has been brought, and it has been accepted by the owner, the company is only responsible for the taxable costs incurred up to date of delivery. *Provencher v. Canadian Pac. R. Co.*, 5 *Montr. L. R. (Sup. Ct.)* 9.

#### IX. CLOAK ROOMS PARCEL ROOMS.

**128. Duty of company to deliver thing deposited.**—In the absence of any stipulation, there is an implied contract between a railway company and a passenger depositing a parcel in a cloak-room at a station, paying the usual charge, that the company will deliver the parcel on reasonable request and in a reasonable time. *Stallard v. Great Western R. Co.*, 2 *B. & S.* 419, 8 *Jur. N. S.* 1076, 31 *L. J. Q. B.* 137, 10 *W. R.* 488, 6 *L. T.* 217.

A railway company which receives a passenger's portmanteau in its cloak-room, giving him a ticket providing that it would not deliver up luggage except to persons presenting the proper receipt, is bound to deliver up the portmanteau on Sunday as well as on other days, on a reasonable request and within a reasonable time. Whether there is an unreasonable delay owing to which the passenger loses his train and is compelled to stay overnight is a question for the jury. *Stallard v. Great Western R. Co.*, 2 *B. & S.* 419, 31 *L. J. Q. B.* 137.

**129. Liability for loss, generally.**—Where a commercial traveller deposits a case of patterns in a station waiting-room and it is lost, in an action against the company as warehouseman he cannot recover damages beyond the actual value of the article lost. *Anderson v. North Eastern R. Co.*, 4 *L. T.* 216, 9 *W. R.* 519.

17 & 18 *Vic. c. 31, § 7*, does not apply to the loss of a travelling-bag deposited by a passenger in the cloak-room at a railway station, the passenger taking and paying for a ticket therefor. *Van Toll v. South-Eastern R. Co.*, 12 *C. B. N. S.* 75, 31 *L. J. C. P.* 241, 8 *Jur. N. S.* 1213, 10 *W. R.* 578, 6 *L. T.* 244.

**130. Limitation of liability in ticket or check.**—If a railway company stipulates that it will not be liable for articles deposited in its cloak-room exceeding the value of £10, this stipulation protects it from liability for delay in delivering an article exceeding the value named, at least where the delay is not caused by its wilful

act. *Pepper v. South Eastern R. Co.*, 17 *L. T.* 469.

Conditions in a ticket received by a passenger depositing parcels in a station cloak-room, exempting the company from liability for any package beyond the value of £5 unless the value is declared and increased charges are paid, are applicable to a loss owing to the failure of the servants of the company to put the parcels into the cloak-room, leaving them in a vestibule without any protection. *Harris v. Great Western R. Co.*, 45 *L. J. Q. B.* 729, 1 *R. 1 Q. B. D.* 515, 25 *W. R.* 63, 34 *L. T.* 647.

The owner of a bag exceeding the value of £5 deposited it in a railway cloak-room and received a ticket with the following conditions: "The company are not to be answerable for loss of any article exceeding the value of £5 unless at the time of delivery the true value be declared, and a sum at the rate of 1d. for every 20s. of the declared value be paid for such article," above the ordinary charge. The bag was delivered by mistake to a wrong person and was never recovered. Held, that the word "loss" included misdelivery and that the railway company were not liable. *Skipwith v. Great Western R. Co.*, 59 *L. T.* 520, 6 *Ry. & C. T. Cas.* lxx.

**131. Depositor, when bound by conditions on check.**—A passenger depositing a travelling-bag in a cloak-room at a station will be presumed to have assented to the terms of a notice on the ticket which he received for it. *Van Toll v. South-Eastern R. Co.*, 12 *C. B. N. S.* 75, 31 *L. J. C. P.* 241, 8 *Jur. N. S.* 1213, 10 *W. R.* 578, 6 *L. T.* 244.

Where a ticket given to a person depositing a parcel in a station cloak-room plainly refers to conditions printed on the back, the depositor is bound thereby although he may not have read the conditions. *Harris v. Great Western R. Co.*, 45 *L. J. Q. B.* 729, 1 *R. 1 Q. B. D.* 515, 25 *W. R.* 63, 34 *L. T.* 647.

When a person delivers a parcel at a station cloak-room and receives a ticket with conditions on the back limiting the company's liability, he is not bound if he does not know there is writing on the ticket; but if he knows there is writing containing conditions he is bound; if he knows there is writing but does not know that it contains conditions he is bound, if in the opinion of the jury reasonable notice is given. *Parker*

*v. South Eastern R. Co.*, 37 L. T. 540, 25 W. R. 564, L. R. 2 C. P. D. 416, 46 L. J. C. P. 768, 3 Ry. & C. T. Cas. xiii.

It should not be left to the jury to decide whether a passenger who deposited a parcel in a station cloak-room was aware of a condition printed on the back of the ticket he received limiting the liability of the company, and whether he was under any obligation to make himself aware of it, the face of the ticket having on it the words "See back." *Parker v. South Eastern R. Co.*, 37 L. T. 540, 25 W. R. 564, L. R. 2 C. P. D. 416, 46 L. J. C. P. 768; *reversing L. R. 1 C. P. D. 618*, 45 L. J. C. P. 515, 34 L. T. 654.

### BAGGAGE CARS.

Injury to passenger riding in, see CARRIAGE OF PASSENGERS, III, 7.

### BAGGAGE-MASTER.

Effect of delivery of baggage to, see BAGGAGE, 49, 63.

### BAILMENT.

Of baggage by passenger after arrival, see BAGGAGE, 71.

Right of bailee to sue for killing stock, see ANIMALS, INJURIES TO, 314.

See also PLEDGE, etc.; WAREHOUSEMEN.

**1. Sale or bailment.** — Certain boat-builders engaged to build boats for a canal company, which kept lumber for such purpose, but not for sale generally. Lumber had been delivered at various times, and at first it was paid for in cash, but afterward credited on the price of the boats. The lumber in suit was furnished and a bill sent to the builders, who became insolvent and sold the lumber to plaintiffs, from whom the canal company took it without permission. *Held*, in an action for such taking, that whether the delivery to the builders was a sale or a bailment was for the jury. *Crosby v. Delaware & H. C. Co.*, 35 N. Y. S. R. 763, 59 Hun 617, 13 N. Y. Supp. 306; *reversed in* 128 N. Y. 641, *mem.* 40 N. Y. S. R. 85, 3 *Sibb. App.* 550. — FOLLOWING *Crosby v. Delaware & H. C. Co.*, 119 N. Y. 334, 29 N. Y. S. R. 453.

**2. Rights and liabilities of bailee.\*** — Where a bailment of and an injury to goods

\* Liability of common carrier as bailee, see note, 6 L. R. A. 853.

while in the hands of a bailee are proved, the law presumes negligence, and imposes upon the bailee the burden of showing the degree of care required by the nature of the bailment. *Rice v. Illinois C. R. Co.*, 22 Ill. App. 643.

In an action for goods lost by a bailee it is generally optional with the plaintiff to declare against the bailee in form *ex contractu*, or in tort; but in whatever form he may frame his declaration the action is still one of contract, wherever the liability of the defendant in fact arises out of a contract. *Belmont Coal Co. v. Richer*, 31 W. Va. 858, 8 S. E. Rep. 609.

Bailments for the benefit of the bailor *depositum* or *mandatum* are founded upon express contract, and require the assent of the bailee to make him responsible. In such case the bailee is required to use only slight care, and he can be made liable only for fraud or gross negligence. *Belmont Coal Co. v. Richer*, 31 W. Va. 858, 8 S. E. Rep. 609.

The delivery of a non-negotiable instrument to a bailee for the purpose of transmitting it to a third party does not so clothe such bailee with the *indicia* of title as to give validity to a fraudulent transfer of such instrument. *New Jersey Midland R. Co. v. Hitchcock*, 14 Am. & Eng. R. Cas. 598, 37 N. J. Eq. 549.

A bailee cannot avail himself of the title of a third person (though the person be the true owner), for the purpose of keeping the property for himself, in any case where he has not yielded to the paramount title. But he can show that his bailor has parted with his title. *Cole v. Wabash, St. L. & P. R. Co.*, 21 Mo. App. 443.

The owner of a horse, who hires it to a street-railway company, undertakes that it is reasonably fit and suitable for the work of hauling cars for which it is hired, and the company has the right to rely upon its being fit and suitable for such work, and is only required to use and treat it with reasonable care; but if, after trying the animal at such work, it is plainly manifest that it is unfit for it, and that further use at such work would be injurious and would endanger its health and life, it is the duty of the company to abstain from further use without notifying the owner; the company has no right to abuse the animal. *Bass v. Cantor*, 123 Ind. 444, 24 N. E. Rep. 147.

It is the usage in this country for all railroad companies receiving cars from

other roads to make necessary repairs at their own expense, unless the car is inspected and branded as defective when received; and in view thereof, a company which claims cars belonging to another road, and pending a judicial determination of the title thereto, is by agreement permitted to retain and use them, subject to a rental in case the decision is against it, cannot, after such decision, set off against the rental any claim for the cost of repairs. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 50 *Fed. Rep.* 857.

A railroad company hired a slave from the plaintiff to work on its road, and it was agreed that the slave should not be employed on the cars or locomotives, but that he might be carried on the cars or locomotives "from any one place to another place on the railroad where his services may be required." The slave, with the knowledge of the conductor, went on the cars and was carried beyond the place at which his services were that day required, and in jumping from the cars while they were in motion, was killed. *Held*, that the company was liable to the plaintiff for the loss. *Duncan v. South Carolina R. Co.*, 2 *Rich. (So. Car.)* 613.

The defendant in error hired to the plaintiff in error, for the year 1856, two slaves. The contract of hiring contained the following stipulation: "And all risks incurred, or liability to accidents whilst in said service, is compensated for and covered by the pay agreed upon; the said railroad company assuming no responsibility for damages from accident, or any cause whatever." The stipulation does not relieve the company from liability for any injury or loss resulting from the wilful wrong or gross negligence of said company or its agents, but it is responsible for the same. *Memphis & C. R. Co. v. Jones*, 2 *Head (Tenn.)* 517.—APPROVED IN *Runt v. Herring*, 21 *N. Y. Supp.* 244. REVIEWED IN *Nashville & C. R. Co. v. Carroll*, 6 *Heisk. (Tenn.)* 347.

**3. Care and diligence required.**—It is well settled that if a mandatory undertake the business submitted to him he is bound to use a degree of diligence and attention adequate to the performance of his undertaking, and whether or not such diligence has been used is a question for the jury, in an action against him by the mandator for loss. *Kirtland v. Montgomery*, 1 *Swan (Tenn.)* 452.

1 D. R. D.—37.

Where a bailment is made for the exclusive benefit of the bailor, as in the case of a railway company carrying a passenger's trunk containing articles of great value without reward and without knowledge of its contents, the bailee is only obligated to slight care, and is liable only for gross negligence. *Michigan C. R. Co. v. Carrow*, 73 *Ill.* 348.—APPROVING *Collins v. Boston & M. R. Co.*, 10 *Cush. (Mass.)* 506. DISTINGUISHING *Jordan v. Fall River R. Co.*, 5 *Cush. (Mass.)* 69; *Cincinnati & C. A. L. R. Co. v. Marcus*, 38 *Ill.* 219; *Kuter v. Michigan C. R. Co.*, 1 *Biss. (U.S.)* 35.

Persons receiving baggage as bailees without hire can be held liable only upon proof of want of ordinary care in keeping it, or of an actual subsequent appropriation of it to their own use; but in order to establish the liability in either case it must be shown that the baggage came into their possession for the purpose of being kept by them subject to the call of the owner. *Samuels v. McDonald*, 11 *Abb. Pr. N. S. (N. Y.)* 344, 42 *How. Pr.* 360.

A railroad company allowing goods to remain on the cars at the place of destination as an accommodation to the consignee is a bailee without reward, and therefore only liable for a loss resulting from its gross neglect. *Knowles v. Atlantic & St. L. R. Co.*, 38 *Me.* 55.

When the bailor or depositor not only knows the general character and the habits of the bailee, but the place where and the manner in which goods deposited are to be kept, he must be presumed to assent in advance that his goods should be thus treated, and if under such circumstances they are damaged or lost, the bailee is not liable. So *held*, where a railroad company, after carrying goods to the end of its line, permitted the owner to push the car onto its wharf, there to remain until it should be convenient for the owner to reship by vessel, and the goods were lost by reason of the wharf giving way. *Knowles v. Atlantic & St. L. R. Co.*, 38 *Me.* 55.

**4. Bailee's lien.**—A railway company entered into an agreement with A. for the delivery to it of a certain quantity of coal, to be carried by it for hire, in A.'s cars, the company to have the right to detain any cars of A. on certain defaults on his part. A. agreed with B. to supply a portion of the coal in cars which had been hired for a term from A. by B., but relet for hire



from him to A. A. made default, and the company seized and detained the cars then on the line, which were in fact sent by B. under his agreement with A. *Held*, that company could not retain such cars as against B. *North v. Great Northern R. Co.*, 6 *Jur. N. S.* 98.

**5. Redelivery of subject of bailment.**—Where property is not put in bailee's charge by the owner, but comes into his possession through the owner's neglect—as where a passenger inadvertently leaves a satchel on a car—and where he may not know to whom it belongs, or by whom it was left, he should not be held responsible for delivering it to the wrong person, if he has exercised all the care and vigilance that could reasonably be expected of him under the circumstances. *Morris v. Third Ave. R. Co.*, 1 *Daly (N. Y.)* 202, 23 *How. Pr.* 345.

If a slave hired for a term die during the term, the hire must be apportioned, even though his death was caused by the negligence of the hirer. *Muldrow v. Wilmington & M. R. Co.*, 13 *Rich. (So. Car.)* 69.

**6. Action by bailee against third persons.**—Where the bailee of property delivers it to a carrier for transportation, either the bailee or bailor may maintain an action against the carrier for the loss of the property. *Elkins v. Boston & M. R. Co.*, 19 *N. H.* 337.

A bailee of property who has an interest in it may maintain an action in his own name for any injury done to it, either tortious or by the breach of any obligation or duty which another may be under in reference to it. *White v. Bascom*, 28 *Vt.* 268.

A bailee has a right to sue for damages for injury to the thing bailed which goes beyond the particular loss which he, by reason of his possession, has sustained. So where a horse was injured by coming in contact with a street car while in the possession of one who had hired it for the day, it was *held*, that he might recover for the full injuries to the animal. *Jatho v. Green & C. St. Pass. R. Co.*, 4 *Phila. (Pa.)* 24.

Cloth was sent to plaintiff to be made into suits and returned. After being made up plaintiff delivered it to a railroad company to be carried back to the owners. *Held*, that he had not such an interest as bailee as would entitle him to recover for a loss. *Morse v. Androscoggin R. Co.*, 39 *Me.* 285.

## BALTIMORE & OHIO R. CO.

**1. Appointment of directors.**—The city of Baltimore held a large amount of stock in the Baltimore & Ohio Railroad Company, which stock was increased by taking additional shares derived from dividends declared on the original stock. The city was entitled to appoint directors of the company to represent its original stock. *Held*, that it was not entitled to appoint further directors to represent the additional stock. *Wheeling v. Mayor, etc., of Baltimore*, 1 *Hughes (U. S.)* 90.

**2. Charter powers, generally.**—The B. & O. R. Company is not an ordinary private corporation, created only for the pecuniary benefit of its stockholders. The powers granted to it are of the most extensive and comprehensive kind, involving in their exercise great public interests, to promote which was the chief object of its charter. *Mayor, etc., of Baltimore v. Baltimore & O. R. Co.*, 21 *Md.* 50.

To induce the company to accept the act of March 6, 1847, the city of Wheeling and the company entered into a contract by which Wheeling undertook to do certain things therein specified; and the committee of the company agreed to recommend to it to accept said act: "it being the intention of the parties to the agreement, among other things, to secure to the city of Wheeling the practical benefits of the terminus of the Baltimore & O. R. according to the provisions of said law." *Held*, that the company is not forbidden by the contract to connect with the Ohio river, or with a railroad in the state of Ohio, at any point between the mouth of Grave creek and Wheeling. *Baltimore & O. R. Co. v. Wheeling*, 13 *Gratt. (Va.)* 40.

**3. Power to act as warehouseman.**—The Maryland act 1826, ch. 123, did not authorize the company to carry on the general and ordinary business of a warehouseman; and if the act 1830, ch. 117, or any subsequent act, did authorize the company to receive and charge for the storage of grain and other freight generally, the gross receipts derived from the exercise of this special privilege or franchise were liable to the tax imposed by the act 1872, ch. 234. *State v. Baltimore & O. R. Co.*, 48 *Md.* 49.

If no such power had been conferred, and these structures were owned and used by the company for the purpose of carrying on

a business separate from its business and obligations as a carrier, then such structures were taxable according to valuation as other real property. *State v. Baltimore & O. R. Co.*, 48 Md. 49.

**4. Power to run hotels.**—The company is not authorized by its charter to build and conduct hotels for the accommodation of the public generally, but as hotels for the accommodation of its passengers are necessary to its business, they are therefore within its charter, which would include its Cumberland and Viaduct hotels, being mainly designed for the accommodation of passengers and for ticket and telegraph offices and waiting-rooms; and under its general charter, exempting its stock from taxation, the gross receipts of these hotels are exempt; but its Oakland and Deerpark hotels, being used primarily as summer resorts, and not being necessary to the operation of the road, are not so exempt; but they can only be taxed as other real property and are not liable to a tax on their receipts, under the Maryland act of 1872, ch. 234. *State v. Baltimore & O. R. Co.*, 48 Md. 49.

**5. Power to construct or control lateral roads—Taxation.**—The authority given to the company by the Maryland act 1836, ch. 276, to subscribe towards the construction of any lateral or connecting road, and to acquire an interest therein, not exceeding two-fifths of the estimated cost of constructing such road, is a distinct privilege or franchise granted to the company, and the gross receipts derived from the interest thus acquired in such lateral or connecting road are liable to the tax levied by the act 1872, ch. 234. *State v. Baltimore & O. R. Co.*, 48 Md. 49.

The Metropolitan Railroad, having been built, not under the provision in the original charter which authorized the Baltimore & Ohio Railroad Company to construct lateral roads, but under the act 1865, ch. 70, which did not exempt the projected road or its franchises from taxation, the gross receipts of the Metropolitan road were subject to the tax imposed by the act 1872, ch. 234; but no separate account having been kept of such receipts, they having been mingled with those derived from the main stem of the Baltimore & Ohio Railroad, the only rule by which to approximate to the receipts of the former was to make them bear the same proportion to the entire gross receipts

derived from the main stem in the state, as the number of miles of the Metropolitan road bears to the entire length of the Baltimore & Ohio Railroad. *State v. Baltimore & O. R. Co.*, 48 Md. 49.

No power is conferred on the company by its charter to acquire or hold any interest in steamship or steamboat lines; but such power is granted by the Maryland act of 1868, ch. 471, § 218, and being a separate and distinct franchise, the receipts or dividends derived from the interest acquired in such steamship or steamboat lines are liable to the gross-receipt tax imposed by the act of 1872. *State v. Baltimore & O. R. Co.*, 48 Md. 49.

Bonds of other railroad companies, held outside of the franchises of the company, sought to be taxed are liable to taxation according to their market value, as other bonds. *State v. Baltimore & O. R. Co.*, 48 Md. 49.

The gross receipts derived from all properties and investments owned by the company under franchises granted subsequent to its charter, and upon which no exemption from taxation was engrafted, were liable to the tax imposed by the act 1872, ch. 234, if earned in the state. *State v. Baltimore & O. R. Co.*, 48 Md. 49.

A short lateral road diverges from the main stem of the Baltimore & Ohio Railroad at Benwood and terminates upon the bank of the Ohio river, opposite to Belair, the station of the Central Ohio Railroad, and communication between the two roads for goods and passengers is kept up by a steam ferryboat. *Held*, that, under the Md. act of 1836, ch. 276, which authorized the Baltimore & Ohio Railroad Company "to subscribe towards the construction of any lateral, continuing, or connecting road, and to acquire any interest therein, to an extent not exceeding two-fifths of its estimated cost," the Central Ohio Railroad is a connecting road, and that the Baltimore & Ohio Railroad Company may lawfully loan or furnish money to aid in its construction and take a mortgage or other security therefor. *Mayor, etc., of Baltimore v. Baltimore & O. R. Co.*, 21 Md. 50.

**6. Use of track by other roads.**—The company is not subject to the operation of the act of 1874, ch. 446, of Maryland, requiring railroads crossed by or connecting with any other railroads to allow the latter the use of their tracks for a certain fixed

compensation. *Pennsylvania R. Co. v. Baltimore & O. R. Co.*, 14 Am. & Eng. R. Cas. 79, 60 Md. 263.

**7. Use of track of other roads.**—The company had a contract with the Philadelphia, Wilmington & Baltimore Railroad, which was controlled by the Pennsylvania Railroad, to form a connection at Philadelphia, and for the latter road to receive the cars of the Baltimore & Ohio road at Philadelphia and transport the same to New York, which contract, by its terms, might be terminated on thirty days' notice. Upon such notice being given the Baltimore & Ohio Company filed a bill to compel the Pennsylvania Company, as a common carrier, to receive and transport its cars. *Held*, that in order to justify a mandatory injunction, as prayed for, upon filing the bill, plaintiff's right should be quite clear, and not being so, the injunction was refused. *Baltimore & O. R. Co. v. Pennsylvania R. Co.*, 17 Phila. (Pa.) 569.

**8. Suits by and against.**—Under the Va. act of March 8, 1827, the Baltimore & Ohio Railroad Company became a domestic corporation as to that state, and may sue and be sued in its courts as such. *Baltimore & O. R. Co. v. Gallahue*, 12 Gratt. (Va.) 655. —APPROVED IN *Goshorn v. Supervisors*, 1 W. Va. 308. QUOTED IN *Dixon v. Order of Ry. Conductors*, 49 Fed. Rep. 910. *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.*, 10 Am. & Eng. R. Cas. 444, 17 W. Va. 812. REVIEWED IN *Baltimore & O. R. Co. v. Wightman*, 29 Gratt. (Va.) 431.

## BALTIMORE & POTOMAC R. CO.

**1. Terminal facilities at Washington.**—The charter of the Baltimore & Potomac Railroad Company, act of Congress of February 5, 1867, authorizes it to take and use for depot purposes, with the turnouts necessary to reach it, any lots of ground in the city of Washington contiguous to the line of its road; that is to say, any lots between the front of which and the line of the road no other lots intervene; and for this purpose square 232 is contiguous to the line of the road, although by the recess caused by the intersection of several streets it does not touch Maryland avenue, along which the road runs. *Baltimore & P. R. Co. v. Edmonds*, 3 Mackey (D. C.) 526.

The company has no legal authority to use its tracks on Maryland avenue, between

Ninth and Tenth streets, in the city of Washington, as a general shifting-ground for its cars. *Fitzgerald v. Baltimore & P. R. Co.*, 8 Mackey (D. C.) 513.

The act of congress permitting the company to lay in the city of Washington, at or near its depots or stations, "as many tracks as its president and board of directors may deem necessary," does not authorize the company to use those tracks for the purpose of shifting cars and making up and breaking up trains in the conduct of its general business; but the use of such tracks must be limited and restricted to the necessary operations of said railroad, connected with the careful use of the depot or station at or near which the said tracks are laid. *Hopkins v. Baltimore & P. R. Co.*, 6 Mackey (D. C.) 311.—REVIEWED *District of Columbia v. Baltimore & P. R. Co.*, 114 U. S. 460.

On February 5, 1867, congress authorized the company to construct a lateral branch of their road into the District of Columbia, and prescribed how the road might pass along the public streets and alleys to the point of terminus within the city of Washington, and in no way subjected the railroad corporation to the control or supervision of the municipal government of said city. *Held*, therefore, that said corporation was exempted from all interference from such city government, and that it was erroneous to admit in evidence on the trial an ordinance of the common council in reference to the use of a street by said company. *Barnes v. District of Columbia*, 1 MacArth. (D. C.) 322.

## BANKRUPTCY.

**1. Operation of the act upon railroads.**—Railroad corporations are "moneyed business or commercial corporations," within the meaning of the bankrupt act of 1867, § 37, and may therefore be proceeded against as such. *In re California Pac. R. Co.*, 3 Sawy. (U. S.) 240.—QUOTING *Winter v. Iowa, M. & N. P. R. Co.*, 7 Bankr. Reg. 291.—*Winter v. Iowa, M. & N. P. R. Co.*, 2 Dill. (U. S.) 487.—APPROVING *Alabama, etc., R. Co. v. Jones*, 5 Bankr. Reg. 97; *Adams v. Boston, etc., R. Co.*, 4 Bankr. Reg. (99) 314; *Sweatt v. Boston, H. & E. R. Co.*, 3 Cliff. (U. S.) 339, 5 Bankr. Reg. 234.—FOLLOWED IN *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501.—*Adams v. Boston, H. & E. R. Co.*, 1 Holmes (U. S.)

30.—QUOTING *Hall v. Sullivan R. Co.*, 11 Law. Rep. 138.—FOLLOWED IN *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501. —*Rankin v. Florida, etc., R. R. Co.*, 1 Bankr. Reg. (196) 647; *Adams v. Boston, etc., R. Co.*, 4 Bankr. Reg. (99) 314; *Alabama, etc., R. Co. v. Jones*, 5 Bankr. Reg. 97; *Sweatt v. Boston, H. & E. R. Co.*, 5 Bankr. Reg. 234; *In re Southern Minn. R. Co.*, 10 Bankr. Reg. 86; *In re Union Pac. R. Co.*, 10 Bankr. Reg. 178.

It is within the general power of congress to enact bankrupt laws, and there is nothing to prevent such laws from embracing in their effect railroad corporations which are chartered by state laws; such corporations are not "institutions or means of governments," such as congress has no jurisdiction over. *Sweatt v. Boston, H. & E. R. Co.*, 3 Cliff. (U. S.) 339.

Characteristics of a public nature attach to every corporation, inasmuch as they are created for the public benefit; but if a corporation is not created for the administration of political or municipal power, it is private, within the meaning of the bankruptcy act, unless the whole interest belongs to the government. *Sweatt v. Boston, H. & E. R. Co.*, 3 Cliff. (U. S.) 339.

The district courts of the United States have the same jurisdiction to adjudge railroad corporations bankrupt as any other debtors. *Sweatt v. Boston, H. & E. R. Co.*, 3 Cliff. (U. S.) 339.

A railroad company is a private corporation, and is not such a public corporation as to be a necessary means of state government, which would exclude federal control; and therefore the general power of congress to pass uniform bankrupt laws includes the power to authorize the federal courts or registers in bankruptcy to sell and transfer a railroad franchise in proceedings in bankruptcy, though the railroad was chartered by state laws. *Sweatt v. Boston, H. & E. R. Co.*, 3 Cliff. (U. S.) 339.

The fact that a railroad company is created under state laws, subjecting it to certain duties and liabilities, and declaring that these liabilities are not transmissible, and that the corporation's duties cannot be delegated, the corporation itself not being vested with the power of transferring these duties, does not operate to exempt them from the effect of the general bankrupt laws. *Adams v. Boston, H. & E. R. Co.*, 1 Holmes (U. S.) 30.

**2. Jurisdictional questions.\***—The United States bankruptcy court has jurisdiction to declare a railroad company a bankrupt and to administer its property. *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 5 Sup. Ct. Rep. 1009.—FOLLOWING *Adams v. Boston, H. & E. R. Co.*, 1 Holmes (U. S.) 30; *Sweatt v. Boston, H. & E. R. Co.*, 5 Bankr. Reg. 234; *Alabama & C. R. Co. v. Jones*, 5 Bankr. Reg. 97; *Winter v. Iowa, M. & N. P. R. Co.*, 2 Dill. (U. S.) 487.

In the absence of an express provision, the question of where corporations may be sued will be determined by the judiciary act of Sept. 24, 1789, § 11, which forbids that any civil suit shall be brought in either the district or circuit courts of the United States, by original process, against an inhabitant of the United States, except in the district where he is an inhabitant or in which he may be found and served; and therefore a railroad corporation must be proceeded against in the district where its road is built, maintained, and operated. *In re Alabama & C. R. Co.*, 9 Blatchf. (U. S.) 390.

The provision of the general bankrupt act, § 37, providing that suits shall be brought in the district in which the debtor "has resided or carried on business," when applied to a railroad corporation, must be confined to the state creating the corporation. *In re Alabama & C. R. Co.*, 9 Blatchf. (U. S.) 390.

Where mortgaged property is sold under a decree of a court of bankruptcy, the court has no power to settle the accounts between the mortgage trustee and his *cestui que trustent*, nor to ascertain what is due to the trustee's counsel. *In re Blue Ridge R. Co.*, 2 Hughes (U. S.) 224, 3 Fed. Cas. 750.

Where a bankrupt court authorizes the sale of property upon which there are liens, and the proceeds of sale amount to no more than is sufficient to discharge such liens, the fund is not chargeable with any costs excepts the actual costs of sale, and the court has no power to divert the funds from the payment of such liens. *In re Blue Ridge R. Co.*, 2 Hughes (U. S.) 224, 3 Fed. Cas. 750.

Under the act of June 22, 1874, amending the general bankrupt laws, a single creditor

\* Exclusive jurisdiction of court appointing receiver as against assignee in bankruptcy, see note, 20 L. R. A. 391.

of a corporation cannot subject it to compulsory bankruptcy. *In re Detroit Car Works*, 14 Bankr. Reg. 243.

The Boston, H. & E. R. Co. was a corporation chartered by the state of Connecticut. It afterwards received a grant of corporate privileges, and was declared a corporation by a statute of Massachusetts, in which state it had an office and carried on business. In October, 1870, a petition was filed by A., in the district court for Massachusetts, in bankruptcy, upon which the corporation was, on the second of March, 1871, adjudged bankrupt. In December, 1870, J. filed a petition in the district court for Connecticut, praying that the corporation be adjudged a bankrupt by that court. Pending this latter petition A. petitioned the district court for Connecticut, and set forth in his petition, and in a supplemental petition, his proceedings in Massachusetts and the adjudication there made, averring also that the proceedings in Connecticut were collusive between the corporation and J., and would prejudice the creditors of the corporation, create expense and conflict, and embarrass the settlement of the estate, and praying that he, A., might be allowed to appear and defend against the petition of J. The district court for Connecticut dismissed such petition of A., and proceeded to an adjudication of bankruptcy against the corporation, and issued a warrant. *Held*: (1) that A. being in fact a creditor of the corporation, his petition to the district court for Connecticut should have been entertained, and that the facts set forth therein warranted his intervention; (2) that whether the bankrupt was to be regarded as a single corporation or as several corporations united in interest, having one and the same corporators, and common property, rights, and franchises, and owing the same creditors, the district court for Massachusetts should be permitted to exercise the jurisdiction it had acquired over the bankrupt and the estate, and carry the proceedings in bankruptcy to their final conclusion without the interference of the district court for Connecticut, and that all proceedings in that court should be stayed. *In re Boston, H. & E. R. Co.*, 9 Blatchf. (U. S.) 101; *affirmed* 9 Blatchf. 409.

An action begun in a state court by attachment of the property of a corporation, against which, pending the action, but not within four months after the attachment

had been made, proceedings in bankruptcy have been instituted, will not on motion of the assignees in bankruptcy of the corporation be dismissed for want of jurisdiction. *Munson v. Boston, H. & E. R. Co.*, 120 Mass. 81.

**3. Voluntary bankruptcy.**—A corporation may be authorized to institute proceedings in bankruptcy by a majority of its stockholders, and such proceedings cannot be prevented by the resignation of its directors for the purpose of embarrassing stockholders or preventing such proceedings. *Davis v. Alabama & F. R. Co.*, 1 Woods (U. S.) 661.

**4. Acts of bankruptcy.**—It is not an act of bankruptcy for a railroad corporation to mortgage its property and franchise in good faith to raise funds to equip and operate the road, or to secure other unsecured debts. *Re Union Pac. R. Co.*, 10 Bankr. Reg. 178.

An unexecuted agreement by a railway company to transfer certificates of its stock to a creditor is not an act for which the company can be forced into bankruptcy. *Winter v. Iowa, M. & N. P. R. Co.*, 2 Dill. (U. S.) 487.

It is not an act of bankruptcy for a railroad corporation to suspend payment of its commercial paper for a period of 14 days, under the general bankrupt act, § 39, as amended July 14, 1870, providing that any person "residing and owing debts as specified in the act, who being a banker, broker, merchant, trader, manufacturer, or miner, who has fraudulently stopped payment or who has stopped or suspended and not resumed payment of his commercial paper within a period of 14 days," shall be subject to the act, where the railroad company is chartered without any power to act as a banker, broker, merchant, trader, manufacturer, or miner. *Winter v. Iowa, M. & N. P. R. Co.*, 2 Dill. (U. S.) 487.

**5. Service of papers.**—Under the general bankrupt act the word "person" is declared to include corporations, and the provision of the statute requiring service of process to be made "personally" is sufficiently complied with, when issued against a corporation, by delivering it to its head or principal officers; and the words "usual place of abode," describing where defendant may be served with process, when applied to corporations, mean their principal place of business, where only they can be said to

abide. *Re California Pac. R. Co.*, 3 *Sawyer* (U. S.) 240, 11 *Bankr. Reg.* 193.

**6. What passes to the assignee\*—**

**Liabilities.**—Assignees in bankruptcy, except in cases of fraud, take only such rights and interest in the property of the bankrupt as he himself had, and could have himself claimed and asserted at the time of his bankruptcy; and they are affected with all the equities which would affect the bankrupt himself if he were asserting those rights and interests. *Barnard v. Norwich & W. R. Co.*, 4 *Cliff.* (U. S.) 351.

The franchise, or right to lay railroad tracks on streets, under an ordinance of the city council, passes to the assignee in a bankruptcy sale of the road and franchises, and does not revert to the city. *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 5 *Sup. Ct. Rep.* 1009.—FOLLOWED IN *People v. O'Brien*, 36 Am. & Eng. R. Cas. 78, 111 N. Y. 1, 18 N. E. Rep. 692, 19 N. Y. S. R. 173; reversing 10 N. Y. S. R. 596, 45 Hun 519.

An assignee or receiver in bankruptcy of an insolvent railroad corporation, who, as such assignee, is running and operating its road, in the absence of evidence that he assumed to act other than as assignee, or that he held himself out as a carrier of passengers other than as an officer of the court, is not liable in an action for negligence causing the death of a passenger, where no personal neglect is imputed to him, either in the selection of agents or in the performance of any duty, but the negligence charged was that of a subordinate whom he necessarily and properly employed in compliance with the order of the court. *Cardot v. Barney*, 6 N. Y. 281.—DISTINGUISHED IN *Kain v. Smith*, 2 Am. & Eng. R. Cas. 545, 80 N. Y. 458. LIMITED IN *Little v. Dusenberry*, 25 Am. & Eng. R. Cas. 632, 46 N. J. L. 614.

After a railroad company had mortgaged its present and after-acquired property to a trustee, it leased another road and subsequently went into bankruptcy, and the assignee in bankruptcy brought suit to compel the lessors to account to him for the profits of the leased road. *Held*, that the property in the lease vested in the mortgage-trustee, and that the lessors could not be compelled to so account for such

profits. *Barnard v. Norwich & W. R. Co.*, 4 *Cliff.* 351.

The unpaid subscriptions to stock of a railroad pass to the assignees, and may be recovered by them from the stockholders in default. *West Chester & P. R. Co. v. Thomas*, 2 *Phila. (Pa.)* 344.

A special receiver or assignee of the property of a railroad corporation, appointed in bankruptcy proceedings, involuntary on its part, is not an agent or servant of the corporation, and it is not liable for damages occasioned by his negligence. *Mets v. Buffalo, C. & P. R. Co.*, 58 N. Y. 61.—FOLLOWED IN *Davis v. Duncan*, 17 Am. & Eng. R. Cas. 295, 19 Fed. Rep. 477.

**7. Sales by assignee—Rights of purchasers.**—It seems that, upon a sale by an assignee in bankruptcy of the tracks, fixtures, rolling stock, and franchises of a railroad corporation, the corporation, as a legal entity, does not vest in the purchasers, and they do not become stockholders or incorporators therein. Nor are the purchasers liable for damages resulting from negligence of those operating the road, between the time of sale and the confirmation thereof by the court. *Mets v. Buffalo, C. & P. R. Co.*, 58 N. Y. 61, 7 Am. Ry. Rep. 92, 9 Am. Ry. Rep. 480.—DISTINGUISHING *Com. v. Central Pass. R. Co.*, 52 Pa. St. 506.

**8. Setting aside transfers in fraud of the act.**—Where an insolvent railroad company makes provision for paying one of its creditors, without provision for the other creditors, and it appears that such preferred creditor is one of the company's directors, and was present at the meetings that devised and carried out the plan for such payment, such arrangement will be set aside as fraudulent as to the company's assignees in bankruptcy subsequently appointed, and such creditor will be enjoined from setting up any claim to the property turned over by the company in such payment. *Bradley v. Farwell*, 1 *Holmes (U. S.)* 433.—QUOTING *European & N. A. R. Co. v. Poor*, 59 Me. 277.—*Bradley v. Converse*, 4 *Cliff.* (U. S.) 375.

**9. Discontinuance proceedings—Securing creditors.**—After proceedings in bankruptcy were instituted against a railroad company, its stockholders bought up all the indebtedness of the company except a very few small claims, and asked that the bankruptcy proceedings be discontinued. *Held*, that their petition should be

\* Powers of assignees in bankruptcy and of receivers, with respect to unpaid subscriptions to stock, see note, 3 AM. ST. REP. 833.



granted, upon giving security to the few minority creditors securing their claims. *In re Indianapolis, C. & L. F. R. Co.*, 5 Biss. (U. S.) 287.

A court of bankruptcy will not retain possession of the property of a railroad to assist a few small creditors to coerce payment, where the stockholders, after bankruptcy proceedings have been instituted, have bought up all of the debts, and desire that the bankruptcy proceedings be discontinued. *In re Indianapolis, C. & L. F. R. Co.*, 5 Biss. (U. S.) 287.

A court of bankruptcy may allow the discontinuance of proceedings against a railroad company where all the debts have been adjusted except a very few, but it will require a deposit sufficient to recover such claims, and require them to be prosecuted in a reasonable time. *In re Indianapolis, C. & L. F. R. Co.*, 5 Biss. (U. S.) 287.

#### 10. Rights of company on bankruptcy of persons dealing with them.

—One who contracts with a railroad company to grade and build its road is not, by virtue of such contract and his acts under it, a merchant or trader within § 39 of the bankrupt act; and the suspension of his commercial paper is therefore not an act of bankruptcy. *In re Smith*, 2 Low. (U. S.) 69.

The proper procedure defined where bankrupts hold certain shares of stock in a corporation, where the mortgage bondholders of the corporation are proceeding to compel the corporation to make assessments on stockholders to pay accrued interest on bonds, where the charter provides that stock shall be forfeited to the company upon a failure to pay assessments, charging that fictitious certificates have been issued for stock not paid for. *Gibson v. Lewis*, 11 Bankr. Reg. 247.

A railroad company transported and delivered coal to the consignee, agreeing to waive a lien thereon for freight, so long as there was no default in payment of such freight. Certain coal was delivered, and before there was any default the consignee went into bankruptcy. *Held*, that, after default, and after the property in the coal became vested in the assignee in bankruptcy, the railroad company could not set up a lien on it for its freight as against such assignee. *Sicard v. Buffalo, N. Y. & P. R. Co.*, 15 Blatchf. (U. S.) 525.

The bankrupts, while solvent, agreed to build an engine for a railroad company,

and about the time the engine should have been completed informed the president of the company that the engine had been shipped and drew on the company for the price, which was paid. As a matter of fact, the engine at that time had not been completed or shipped, but there were two engines in the shops which were nearing completion, one of which was subsequently finished and sold to third parties, but which seemed not to be the one intended for the railroad company. Before the second engine was shipped the builders went into bankruptcy. *Held*, in an action by the company to obtain possession of the engine from the assignees, that as the bankrupts themselves would have been estopped from claiming that the engine in the shops was not the one intended for the company, the assignees were also estopped, as they held no better title than the bankrupts, and that the company therefore might claim the engine. *Ex parte Rockford, R. I. & St. L. R. Co.*, 1 Low. (U. S.) 345.

A shareholder became bankrupt, and afterward, and before he obtained his certificate, calls were made. The assignees possessed themselves of the scrip, and a correspondence took place between the official assignee and the trade assignee, in the course of which the latter sent the former a statement of the bankrupt's property, comprising in it the value of the shares, and resulting in an estimate of the probable amount forthcoming to work the fiat and pay dividends. The trade assignee subsequently wrote to the official assignee, suggesting the propriety of selling the shares, which continued in the possession of the assignees. *Held*, that there was no sufficient evidence to warrant a jury in concluding that the assignees had accepted the shares. *South Staffordshire R. Co. v. Burnside*, 6 Railw. Cas. 611, 5 Exch. 129, 20 L. J. Exch. 120.

11. Rights of creditors.—A contract between an express company and a railroad corporation for carrying express matter provided that the corporation should furnish transportation, and that the company should credit it with forty per cent of the gross receipts of the business as compensation; that this forty per cent should be credited on promissory notes due from the corporation to the company for sums to be advanced; and that, when these notes were discharged, the share of the corporation in the gross receipts should be paid to it monthly

in cash until such notes were paid. Before the notes were paid, pending the foreclosure of a mortgage, which provided that until default the control of the premises should remain with the corporation, and that on a default continuing for six months the trustees should operate the railroad, receivers were appointed to run the railroad. On petition of the express company that the receivers should carry out the contract, the court ordered the performance of the service required by the contract, but that the compensation therefor should not be credited on the notes. Afterward the railroad corporation was adjudged bankrupt, and the trustees placed in possession of the property. The receivers and the trustees both claimed the compensation due for carrying express matter. *Held*, that the lien of the mortgages attached to the earnings of the railroad only from the time of their being put into possession of the property of the corporation, but that they were entitled to be repaid their advance to the receivers so far as it was applied to the expenses and charges of the receivers in managing the ordinary business of the corporation in their hands, and also, with the assent of the assignees, to all the compensation which was earned after the date of the bankruptcy, not needed for the expenses of the receivers; and that as to the compensation earned before the bankruptcy, the express company must pay so much as was necessary to reimburse the receivers for their expenses and charges, and the balance, if any, they could apply to the reduction of the debt of the corporation to them. *Ellis v. Boston, H. & E. R. Co.*, 107 Mass. 1.—APPROVED IN *Wilmer v. Atlanta & R. A. L. R. Co.*, 2 Woods (U. S.) 409. FOLLOWED IN *Smith v. Eastern R. Co.*, 124 Mass. 154; *Union L. & T. Co. v. Southern Cal. M. R. Co.*, 49 Fed. Rep. 267. QUOTED IN *Brown v. Warner*, 78 Tex. 543; *Douglass v. Cline*, 12 Bush (Ky.) 608.

### BANKS.

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### BARBED-WIRE FENCES.

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### BENEFICIARIES.

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### BENEFITS.

Deductions for, see ELEVATED RAILWAYS, III, 6; EMINENT DOMAIN, XI, 11.

What recoverable from Relief Associations, see RELIEF ASSOCIATIONS, 1, 2.

### BERGEN TUNNEL.

See also TUNNELS.

1. **Precedence of trains.**—Under the acts of March 4th and 11th, 1858 (*Pamph. Laws N. J.* 204 and 312), the Delaware, Lackawanna, and Western Railroad Company have a right of way through the Bergen tunnel, and the consequent right to connect their tracks with those running through the tunnel. *Delaware, L. & W. R. Co. v. Erie R. Co.*, 21 N. J. Eq. 298.

Under the acts of 1858, the Erie Railway Company's trains of every description have the right of precedence over those of the Delaware, Lackawanna, and Western Railroad Company through the Bergen tunnel. But any unlawful use of this privilege, with a view to embarrass or impede the Delaware, Lackawanna, and Western Railroad Company in the use of the tunnel, or the road connected with it, will, upon a proper case being made, be a ground of interference by this court. Such case, however, is not made by the present pleadings. *Delaware, L. & W. R. Co. v. Erie R. Co.*, 21 N. J. Eq. 298.

The contract of November 1st, 1859, between the Long Dock Company and the Hoboken Land and Improvement Company (the grantors of the defendants and the complainants respectively) limits the trains having precedence through the tunnel to those run in conformity with the time-tables, and, at the present stage of these proceedings, those trains only will be allowed precedence. *Delaware, L. & W. R. Co. v. Erie R. Co.*, 21 N. J. Eq. 298.

That part of the regulations of the Erie Company giving preference to extra or irregular trains enjoined. *Delaware, L. & W. R. Co. v. Erie R. Co.*, 21 N. J. Eq. 298.

### BEST AND SECONDARY EVIDENCE.

Generally, see EVIDENCE, IV.

In stock-killing cases, see ANIMALS, INJURIES TO, 408.

### BILL.

By judgment-creditors, see CREDITORS' BILL.

For injunction, see INJUNCTION, 10.

In equity, sufficiency of, see EQUITY, 28.

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### BILL OF EXCEPTIONS.

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### BILLS, NOTES, AND CHECKS.

Debentures, how far analogous to, see DEBENTURES, 2.

Effect of taking in payment, see PAYMENT, 3.

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#### I. COMMON-LAW REQUISITES.

1. What is a bill or note.—An order drawn by the secretary of a corporation upon the treasurer thereof, for the payment of a sum of money actually due from the corporation to the payee, may be treated by the holder, at his option, as the mere promissory note of the corporation, payable at a particular place, or perhaps as a bill of exchange. *Indiana & I. C. R. Co. v. Davis*, 20 Ind. 6.—*OVERRULING* Wardens, etc., v. Moore, 1 Ind. 289; *English v. Board*, etc., 6 Ind. 437; *Marion & M. R. Co. v. Dillon*, 7 Ind. 404; *Marion & L. R. Co. v. Lomax*, 7 Ind. 648; *Marion & M. R. Co. v. Hodge*, 9 Ind. 163.

Where the president of a company draws

upon its treasurer for a certain sum in favor of a creditor, the draft is in the nature of a promissory note, and is not a bill of exchange; and where it is made payable at the office of the treasurer it need not be presented there for payment. *Fairchild v. Ogdensburgh, C. & R. R. Co.*, 15 N. Y. 337. —*FOLLOWING* *Miller v. Thomson*, 3 M. & G. 576.

Orders drawn by employés of a railroad company on its paymaster for a certain sum of money, after deducting whatever credits the company may be entitled to, as having been paid to the employés themselves, being payable upon a contingency and for a less sum than the face of the order, are not bills of exchange. *Stebbins v. Union Pac. R. Co.*, 2 Wyom. 71.

A writing reciting that the treasurer of a railroad company named would pay to A. or order \$1700, and purporting to be executed by the board of directors, and signed by the company's president and secretary, is a bill or note within the meaning of Wagn. Mo. St. p. 1014, § 5, providing that where the suit is founded upon "a bond, bill, or note" for the direct payment of money or property, and the defendant has been served with process, he shall demur or answer before the second day of the term. *Gilstrap v. St. Louis, M. & O. A. L. R. Co.*, 50 Mo. 491, 3 Am. Ry. Rep. 245.

A paper in the following words is, *prima facie*, a good promissory note, viz.: "Rome, September 10, 1846, \$500. Due the Memphis Branch Railroad and Steamboat Company of Georgia five hundred dollars, payable on demand. D. R. Mitchell." *Mitchell v. Rome R. Co.*, 17 Ga. 574.

2. What is a negotiable bill or note.—The essentials of a negotiable promissory note are, that it must be payable at all events, and not dependent on any contingency, nor payable out of a particular fund; and that it must be for the payment of money only, and not for the performance of any other thing or in the alternative. *Arnold v. Rock River V. U. R. Co.*, 5 Duer (N. Y.) 207.

The obligations of a municipal corporation, acknowledging it to be indebted to a certain railroad company in a certain sum with interest, as set forth in the coupons attached, and agreeing to pay the sum to the order of the railroad company, and properly signed by the municipal officers, are negotiable instruments under the law-merchant,

the same as ordinary promissory notes. *Burleigh v. Rochester*, 5 Fed. Rep. 667.

A note given by a railroad company, which is otherwise negotiable, is not affected by a provision reciting the deposit of bonds as collateral security, with power to sell them if the note is not paid on maturity, and a further provision for the payment of the balance of the note, if the bonds should not sell for enough to pay it in full. *Arnold v. Rock River V. U. R. Co.*, 5 Duer (N. Y.) 207.

Where an instrument is drawn in the form of an ordinary promissory note, its negotiability is not affected by a recital that it is one of a series given for cars, and providing that the title thereto shall remain in the payee until all of the series are paid, and that upon a failure to pay any one of the series all should at once become due. *Merchants' Nat. Bank v. Chicago R. Equipment Co.*, 25 Fed. Rep. 809.

An instrument in writing, having in every respect the form of a promissory note, except that the corporate seal was impressed, whereby a railroad corporation promised to pay to the order of A. a certain sum of money—held, to be a negotiable promissory note. *Central Nat. Bank v. Charlotte, C. & A. R. Co.*, 5 So. Car. 156.

A railroad company issued instruments in writing, by which it agreed to pay at a place named and to a certain person "or order \$1000, with interest semi-annually, as per interest-warrants hereto attached, as the same shall become due; or upon the surrender of this note together with the interest-warrants not due to the treasurer at any time until six months of its maturity," in which case it would exchange stock therefor. Held, that the writings were negotiable promissory notes. *Hodges v. Shuler*, 22 N. Y. 114; affirming 24 Barb. 68.

A note falling due in four months contained a further provision that it was one of a series of 25 given for the price of a lot of cars, the title to which was retained in the vendor, and that it should fall due upon a failure to pay principal and interest of any one of the series. Held, a negotiable promissory note, under the law of Illinois and the general mercantile law, unaffected by the condition that it might fall due before the lapse of four months on a failure to pay any one of the series, or that the title to the cars was retained by the vendor. *Chicago R. Equipment Co. v. Merchants' Bank*, 136 U. S. 268, 10 Sup. Ct. Rep. 999.

**3. What instruments are not negotiable.**—Interest warrants payable to bearer, detached from bonds, convertible into stock at maturity, if not sooner paid, are not negotiable notes within Mass. Pub. St. § 9, and are not entitled to days of grace. *Chaffee v. Middlesex R. Co.*, 146 Mass. 224, 6 N. Eng. Rep. 59, 16 N. E. Rep. 34.

A promise to pay money by a corporation, signed by its officers and under seal, is a specialty, and not a promissory note negotiable by the law-merchant; and where the payee, on account of citizenship, could not sue in the federal courts thereon, his assignee cannot do so, under the act of congress March 3, 1875, § 1, providing that no circuit court shall have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law-merchant and bills of exchange. *Coe v. Cayuga Lake R. Co.*, 19 Blatchf. (U. S.) 522, 8 Fed. Rep. 534. — DISTINGUISHED IN *Farr v. Town of Lyons*, 21 Blatchf. (U. S.) 116.

**4. Execution.**—*Prima facie* a corporation has the power to execute notes, and as such notes can only be executed through agents or officers, a complaint in a suit thereon need not allege that such agents or officers were appointed by a written or sealed commission. *Hamilton v. Newcastle & D. R. Co.*, 9 Ind. 359.

Where the charter of a railroad company authorizes it to make contracts, this extends to the power to contract by executing promissory notes, and where such notes do not disclose on their face the object for which they were made, it will be presumed, until the contrary be shown, that they were executed for purposes authorized by the charter. *Mitchell v. Rome R. Co.*, 17 Ga. 574.

Where a railroad company is authorized by its charter to contract for the use of other roads, it is impliedly authorized to execute bills or notes for the expense of altering the gauge of a road so contracted for, so that its cars can be run over it. *Smead v. Indianapolis, P. & C. R. Co.*, 11 Ind. 104.

If a corporation is empowered by an amendment to its charter to draw bills of exchange, and afterward draws a bill, an acceptance of the amended charter will be

presumed without showing any direct act of acceptance by the corporation or its authorized agents. *Wetumpka & C. R. Co. v. Bingham*, 5 Ala. 657.

Under the original charter of the Indianapolis and Bellefontaine Railroad Company that corporation had no general power to execute promissory notes and bills of exchange. *Smead v. Indianapolis, P. & C. R. Co.*, 11 Ind. 104.

A company chartered for the specific purpose of constructing a railroad from Indianapolis to the Ohio state line, to connect there with a certain Ohio railroad,—no express power to execute bills and notes being given,—could make only such as might be necessary or proper in carrying through that undertaking. *Smead v. Indianapolis, P. & C. R. Co.*, 11 Ind. 104.—APPLIED IN *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47. DISTINGUISHED IN *Board of Com'rs v. Lafayette, M. & B. R. Co.*, 50 Ind. 85.

And could not execute accommodation paper, or paper to aid an undertaking not contemplated by its charter; and such paper, if executed, would be void in the hands of an assignee. *Smead v. Indianapolis, P. & C. R. Co.*, 11 Ind. 104.

A railway company has no power to draw, accept, or indorse bills of exchange. *Bateman v. Mid-Wales R. Co.*, 35 L. J. C. P. 205, 12 Jur. N. S. 453, L. R. 1 C. P. 499, 1 H. & R. 508, 14 W. R. 672.

All companies registered under the Companies Act 1862 do not have power, by § 47 of such act, to issue negotiable instruments; such power exists only when it appears that it was intended to be conferred by the memorandum and articles of association. *Peruvian R. Co. v. Thames & M. M. I. Co.*, L. R. 2 Ch. 617, 36 L. J. Ch. 864, 16 L. T. N. S. 644, 15 W. R. 1002.

Where the articles of association of a railway company give the directors power to do all things and make all contracts which in their judgment are necessary and proper for carrying into effect the object mentioned in the memorandum, they have power to issue negotiable instruments. *Peruvian R. Co. v. Thames & M. M. I. Co.*, L. R. 2 Ch. 617, 36 L. J. Ch. 864, 16 L. T. N. S. 644, 15 W. R. 1002.

The defendant railway, desiring to raise money, drew a bill and requested the plaintiff railway to endorse it for their accommodation, which the plaintiffs did, and defend-

ants having discounted and failed to meet it, the plaintiffs paid it to the bank. Held that, assuming that the defendants had no power to draw the bill, they were nevertheless liable to the plaintiffs as for money paid for them. *Brockville & O. R. Co. v. Canada C. R. Co.*, 41 U. C. Q. B. 431.

A railway company, chartered with certain enumerated powers, but without any provision conferring power on the company or its officers to make or sign promissory notes, will be deemed not to have the power. A provision in the charter that "in case of the absence or illness of the president, the vice-president shall have all the powers of the president, and shall be competent to sign all notes, bills, debentures, or other instruments," will not confer such power in the absence of some direct provision to show that the president possessed such power when present and not ill. *Topping v. Buffalo, B. & G. R. Co.*, 6 U. C. C. P. 141.

**5. Acceptance of bills.**—Where a written order for the payment of money, or a bill of exchange, is drawn upon a corporation in the name of its vice-president and is accepted by the corporation, either orally or in writing, such acceptance binds the corporation. *Louisville, E. & St. L. R. Co. v. Caldwell*, 98 Ind. 245.

Where a bill of exchange or written order, drawn on a corporation by its creditor in favor of a creditor of the drawer, is orally accepted by the corporation, the acceptance is not within the second clause of § 4904, Rev. St. 1881, of the statute for the prevention of frauds and perjuries, and is valid and binding, though not in writing, and its payment may be enforced by action against the acceptor. *Louisville, E. & St. L. R. Co. v. Caldwell*, 98 Ind. 245.

The provisions of Louisiana act of 1880, ch. 134, form part of a contract between railroad companies and other parties undertaking public works and their contractors. Hence, a railroad company cannot be held liable on an order for money drawn by one of its contractors before the latter has made provision for the payment of the wages due to his laborers, as provided by the statute, or to those of his subcontractors, when the company has refused to accept such order. *Meyer v. Vicksburg, S. & P. R. Co.*, 35 La. Ann. 897.

A railway company with the usual powers cannot accept bills of exchange. *Bateman v. Mid-Wales R. Co.*, L. R. 1 C. P. 499, 35 L. J.

*C. P. 205, 12 Jur. N. S. 453, 14 W. R. 672.*

Under Companies Act of 1862, § 47, a corporation not otherwise authorized cannot accept bills of exchange. *Peruvian R. Co. v. Thames & M. M. I. Co.*, 36 L. J. Ch. 864, L. R. 2 Ch. 617, 15 W. R. 1002.

Under 7 & 8 Vic. c. 110, § 45, if a bill drawn upon a company regulated by that act is accepted by two directors, the acceptance is void if not expressed to be accepted by such directors on behalf of the company, though the clause does not contain any words of nullification. But where a bill drawn upon the company by its corporate name and sealed with its seal, having the name of the company circumscribed, was accepted by two persons styling themselves directors, appointed to accept the bill, and the acceptance was countersigned by the company's secretary—*held*, that such acceptance was sufficiently express. *Halford v. Cameron's C., etc., R. Co.*, 16 Q. B. 442, 15 Jur. 335, 20 L. J. Q. B. 160 S. P., *Edwards v. Cameron's C., etc., R. Co.*, 16 Q. B. 336 note, 6 Exch. 269.

A person doing a banking business accepted drafts of a railroad company under an agreement that he should hold bonds of the company as collateral, which he might sell to reimburse himself if the company failed to provide funds to pay the drafts as they fell due, and that in the meantime he might use the bonds, to be replaced by others if the drafts were paid before maturity. It was agreed that the money realized on the drafts was to be used in completing the company's road. *Held*, that the acceptances were not merely as an accommodation, but were for value on the part of the banker, where there was nothing to show that he used the bonds, or lost anything thereon; and that, being so, it was immaterial whether the company used the money to complete its road or not, or whether persons to whom they were indorsed paid value therefor or not. *Moore v. Ward*, 1 Hill. (N. Y.) 337.

A bill of exchange addressed "To the President, Midland Railway," was accepted in these words: "For the Midland Railway of Canada, accepted, H. Read, Secretary; Geo. A. Cox, President." *Held*, that defendant Cox (who was admitted to be the president) was personally liable, the bill not being drawn on the company. *Madden v. Cox*, 44 U. C. Q. B. 542.

**6. Consideration.**—Where a note is given in consideration of stock in a railroad, a subsequent illegal increase of the stock by the company's directors may be set up as a good defense to an action on the note. *Merrill v. Beaver*, 46 Iowa 646.—FOLLOWING *Merrill v. Gamble*, 46 Iowa 615.

But such defense is good only upon proof that the stock illegally issued could not be distinguished from the legal stock. *Merrill v. Beaver*, 50 Iowa 404.

A promissory note given as a voluntary contribution in aid of a railroad will not be held invalid for want of consideration where the proposed road has been constructed and put in operation. *Wright v. Irwin*, 35 Mich. 347.

Notes given to induce a railway company to construct its road to a given point are not void as against public policy, and the construction of the road constitutes a sufficient consideration therefor. *First Nat. Bank v. Hendrie*, 49 Iowa 402.—DISTINGUISHING *Pacific R. Co. v. Seely*, 45 Mo. 212; *Fuller v. Dame*, 18 Pick. (Mass.) 472; *St. Joseph & D. C. R. Co. v. Ryan*, 11 Kan. 602; *Butternuts & O. T. Co. v. North*, 1 Hill (N. Y.) 518; *Ft. Edward & Ft. M. P. R. Co. v. Payne*, 15 N. Y. 583. NOT FOLLOWING *Holladay v. Patterson*, 5 Ore. 177.

The consideration of a note given to a railroad for the payment of money when the road shall have been completed is such completion of the road, and a plea averring that the only consideration was a contemporaneous parol agreement of the railroad to complete the road within a given time is bad. Were such plea allowed to alter the written agreement of the parties, the parol agreement to complete the road within a given time would have been only a condition, and not the consideration for the note. *Cairo & V. R. Co. v. Parker*, 84 Ill. 613.—FOLLOWED IN *Cairo & V. R. Co. v. Delap*, 7 Ill. App. 60.

A note was given to aid in the construction of a railroad which was to be payable on the arrival of the first train of cars on the road at a certain place, and if the road was not completed by a certain day and the cars running, the note was to be null and void. It appeared that the cars did run to the place named on the day named over a temporary track laid down for the purpose, but that it was some four months afterward before they were running regularly. *Held*, that the road, though not finished in every par-



ticular, should have been so far completed that the cars might have been run with reasonable regularity, and that, not being so finished at the time specified, the note was void. *Freeman v. Matlock*, 67 Ind. 99.

The defendants gave their notes in 1869 for balances of subscriptions made by them to aid in the building of a railway. The work on the road had ceased for want of funds, and the notes were given for the purpose of raising funds for the prosecution of the work, and they were payable when the cars were running between certain named points on the road. The cars were not so running until more than fourteen years after the notes were given. *Held*, that the notes contemplated that the condition of payment should be fulfilled within a reasonable time, that the consideration had failed, and that defendants were not liable thereon. *Blake v. Brown*, 80 Iowa 277, 45 N. W. Rep. 751.

Defendants took an assignment of a government contract for carrying mails, the contract being one which, under the law, might be cut down and the pay reduced, which was done after the assignment and after a promissory note had been executed for such assignment. *Held*, that the reduction by the government could not be set up in a suit on the note as a partial failure of consideration, and that parol evidence was inadmissible to show a verbal agreement that if the pay were cut down defendants should only be liable for a corresponding proportion of the note. *Wells v. Carr*, 11 Sawy. (U. S.) 272.

**7. Renewals.**—A note given by a director of a railway company as a renewal of a similar note originally given as accommodation paper to raise money to pay the debts of the corporation incurred in the course of its legitimate business, and transferred by the company in payment of a debt due, *held* valid, as against the maker. *Lucas v. Pitney*, 27 N. J. L. 221.

A common carrier who, by a written agreement with the owner of notes, has undertaken to procure their renewal or to return them, cannot excuse himself for the non-performance of his undertaking by proving that an indorser, to whom he had delivered them for examination and comparison prior to the renewal, was summoned as trustee of a subsequent indorser, and thereupon refused to give them up or

renew them. *Wareham Bank v. Burt*, 5 Allen (Mass.) 113.

## II. VALIDITY AND INTERPRETATION.

**8. Validity, generally.**—The charter of a railroad corporation authorized the corporation to "make contracts." The corporation took a promissory note. *Held*, that *prima facie* the note is to be considered evidence of such a contract as the corporation was authorized to make. *Mitchell v. Rome R. Co.*, 17 Ga. 574.

In a promissory note in the following words, "For value received, I promise to pay to Quincy Railway Company or order one thousand and thirty dollars, in six months," the inserting of the words "the order of E. P." over "Quincy Railroad Company or order," without erasing the latter words, by the treasurer of said company, unknown to the maker, in an action brought by the payee against the maker—*held*, in the absence of fraud, not to be an alteration affecting the validity of the note. *Granite R. Co. v. Bacon*, 15 Pick. (Mass.) 239.

A railroad corporation, by its charter, was prohibited from issuing, for circulation, any notes or bills, or from making contracts for the payment of money except under its corporate seal, and then only for debts contracted by it. The railroad corporation subsequently made a contract with the Branch Bank of the State of Alabama at Montgomery, by which the latter agreed to receive in payment of debts and to pay out in circulation, such notes as the former should issue in payment of its debts. The railroad corporation issued certain bills single, in sums of from one to twenty dollars, engraved as bank notes, in payment of debts due from it, and these were received by the bank under its contract with the railroad corporation. Afterward the bank loaned the bills single thus received and certain bills of exchange, at the request of the borrower, the bills being made for the purpose of effecting the loan. *Held*, that these transactions on their face were not illegal so as to prevent the bank from recovering in a suit on the bills of exchange; that if the bills were lawfully issued by the railroad corporation they could be lawfully received by the bank and again loaned by it; but if the contract was a mere pretext to avoid the prohibition of the charter, it would be void, and the bills single invalid in the hands of any one connected with the illegal contract. *Held*,

also, that the validity or invalidity of the transaction depended upon the intention with which the bills single had been issued and received, and that that was a question for the jury. *Branch Bank v. Crocheron*, 5 Ala. 250.

**9. — of checks.**—A check drawn to the order of an individual as treasurer of a corporation, before he is elected to that office, which check is in payment of the 10 per cent on stock necessary to be paid, under the statute, before filing articles of association, does not affect the validity of the payment. *In re Staten Island R. T. R. Co.*, 38 Hun (N. Y.) 381.

A check drawn by a committee of a railway company, not dated as drawn at any place, but headed with the name of the company, does not indicate any place so as to satisfy the terms of the statute exempting checks from duty, and is void. *Ward v. Oxford R. Co.*, 2 DeG. M. & G. 750, 22 L. J. Ch. 905.

Three directors of a railway company, in fraud of the company, drew a check upon the company's bankers in favor of one of them. This check, though bearing the company's stamp and countersigned by the secretary, did not purport to be drawn on behalf of the company, nor did the drawers describe themselves as directors. *Held*, that the company was not liable for the amount to a *bona-fide* holder for value. *Serrell v. Derbyshire, S. & W. J. R. Co.*, 9 C. B. 811, 19 L. J. C. P. 371.

**10. How construed, generally.**—In interpreting obligations or subsidy notes given by citizens to a railroad as an inducement to the latter to build to a certain place, the railroad's charter, with all its obligations thereunder, is to be considered as entering into and forming a part of the agreement. *Miller v. Gulf, C. & S. F. R. Co.*, 24 Am. & Eng. R. Cas. 158, 65 Tex. 659.

Where money is borrowed to pay interest on railroad bonds, provisions in notes given therefor to the effect that a certain part of the gross earnings of the company was pledged in liquidation of the notes, do not give such notes any priority over its bonded debt. *McIlhenny v. Bins*, 80 Tex. 1, 13 S. W. Rep. 655.

A promissory note, payable to the treasurer of the Chicago & C. S. R. Co., was made "in consideration of the construction of" the railway through or within half a mile of the village of D. "within three years

after this date, and the building of a passenger and freight depot" at D.; and it was made payable "in thirty days after said road and depot are constructed as aforesaid." The articles of incorporation of the railway company named Chicago as one of the termini. The track was laid through D. and the depot put up, but instead of extending the road to Chicago it was connected with other routes at a point beyond D., so as to form a through line. *Held*, that the note was made to afford aid in constructing the road, and was intended to be payable in case of the completion, as agreed, of the portion built, regardless of the failure to extend it to Chicago within three years, as stipulated. *Stowell v. Stowell*, 9 Am. & Eng. R. Cas. 598, 45 Mich. 364, 8 N. W. Rep. 70.—FOLLOWING *Swartwout v. Michigan A. L. R. Co.*, 24 Mich. 389.—FOLLOWED IN *Gardner v. Walsh*, 95 Mich. 505.

**11. Conditions.**—A condition in a note given in aid of a railroad that the road shall be completed within a designated time is of the essence of the contract. (PATERSON, J., dissenting.) *McLaughlin v. Clausen*, 85 Cal. 322, 24 Pac. Rep. 636.—OVERRULING *Front St., M. & O. R. Co. v. Butler*, 50 Cal. 574.

When a note is executed payable to a railroad company, but to be held by a trustee and not delivered unless the road is completed to a certain place within a given time, a delivery by the trustee in violation of the contract does not make the note binding on the maker. (PATERSON, J., dissenting.) *McLaughlin v. Clausen*, 85 Cal. 322, 24 Pac. Rep. 636.

Where a note is given for stock in a railway company, payable on condition that a depot be established within so many rods of a town, the question whether the depot was established within that distance must be determined by the corporate limits of the town at the time when the note was given, and not according to a subsequent extension of the corporate limits. *Davenport & St. P. R. Co. v. Rogers*, 39 Iowa 298, 9 Am. Ry. Rep. 92, 20 Am. Ry. Rep. 85.

Where a note is executed for stock in a railroad company, payable on condition that a depot be located at a designated place, the maker, when sued on it, cannot, in the absence of anything to show fraud or mistake, recover, by way of counterclaim, partial payments voluntarily made on it, upon showing that such depot had not been established. *Davenport & St. P. R. Co. v.*

*Rogers*, 39 Iowa 298, 9 Am. Ry. Rep. 92, 20 Am. Ry. Rep. 85.

Defendant gave his note to a railroad company, agreeing to pay a certain sum of money if it would build its depot on a certain lot. Subsequently the company procured such an amendment to its charter as to make it substantially a different corporation, among other things materially changing the route of the road; but the road was built and the depot erected on the lot designated. *Held*, that it being substantially a different corporation the maker of the note was not bound, and that the fact that the depot was of the same benefit to him as it would have been had the corporation remained the same was of no importance. *Carlisle v. Terre Haute & R. R. Co.*, 6 Ind. 316.—APPROVED IN *Pacific R. Co. v. Seely*, 45 Mo. 212.

A promissory note was executed by the defendant, payable to the Grinnell & M. R. Co. upon the completion of its road and the running of trains thereon within a given time. The initial point of said road, as designated by the articles of incorporation of the company, was the town of G. *Held*, that the construction of the road from a point on another line, three and one-half miles from G., and the running of trains from G. over such other road for that distance, did not constitute a compliance with the conditions of the note authorizing its collection. *Cooper v. McKee*, 53 Iowa 239, 5 N. W. Rep. 121.

Where a note executed on the 5th of July, 1869, was made "demandable and payable as soon as, and not before, the legislature shall pass an act recognizing a certain class of bonds"—*held*, in an action on the note: (1) that, by the provisions of ch. 175, acts 1874-75, the state recognized the bonds so issued as valid; (2) that the note, in legal effect, imported a promise to pay on that contingency; and (3) that, according to the true construction of the contract, a right of action accrued to the plaintiff upon said recognition, and that he was entitled to judgment for the value of the note. *Leak v. Bear*, 80 N. Car. 271.

**12. Bills and notes executed by agents and officers.**—A bill drawn as of a railroad company, signed by its president with the abbreviation of his office added to his signature, is the bill of the company, where it appears that it was for the benefit of the company and was to be charged to it.

*Olcott v. Tioga R. Co.*, 27 N. Y. 546; *affirming* 40 Barb. 179.—QUOTED IN *Hirschmann v. Iron Range & H. B. R. Co.*, 97 Mich. 384.

Where a draft is drawn which purports to be that of a railroad company, and is signed by the president, with the words "Prest. T. N. Co." after it, his signature will be deemed official, where there is proof that such person was the president of the company, and that he drew the draft in his official capacity for the benefit of the company, which received the proceeds of the draft. *Thompson v. Tioga R. Co.*, 36 Barb. (N. Y.) 79.

Where the directors of a corporation gave authority to its president and secretary to execute a note for a certain sum and interest, the insertion of an attorney-fee clause in the note was in excess of the authority given, and did not bind the corporation. *Hardin v. Iowa R. & C. Co.*, 40 Am. & Eng. R. Cas. 394, 78 Iowa 726, 6 L. R. A. 52, 43 N. W. Rep. 543.

Where one made a promissory note commencing, "I promise to pay," etc., and signed it with his own name, adding, "Agt. Bellamy Man. Co.," and at the same time executed a mortgage in the name of the company to secure the payment of it—*held*, that the note would bind the company, as their promissory note, if the individual had authority at the time to execute the note, or if the transaction was subsequently ratified by the company. *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205.

A note running "We promise to pay," and signed "B. & S. R. Co.," with the words "V. K. Moore, A. Tr.," underneath, is *prima facie* the note of the company, and does not bind the estate of Moore. *Turner v. Potter*, 56 Iowa 251, 9 N. W. Rep. 208.

"I, G. W. C., land agent of the Ohio and Mississippi Railroad Co., agree to pay to A. six hundred dollars for waste grounds, which cover some eight town lots on the south side of the railroad; also, two hundred and fifty dollars for waste grounds and wood-yard on the north side of the road, making a total of \$850. Witness my hand and seal." (Signed) "G. W. C., land agent." [Seal.] *Held*, that this document was the personal contract of the signer. *Prather v. Ross*, 17 Ind. 495.

A superintendent of a railroad belonging to a state was authorized by statute to contract in sums not exceeding \$3000 in connection with the management of the road, but the statute provided that "all contracts for

a sum above that amount must be submitted to the governor and approved in writing." *Held*, that notes executed by the superintendent above \$3000, without having been approved by the governor, were void in the hands of innocent purchasers, and that this was so although other similar notes had been paid by the superintendent. *Elliott Nat. Bank v. Western & A. R. Co.*, 2 *Lea (Tenn.)* 676.

The fact that the president and manager of a corporation had executed negotiable notes in the corporate name, which they had taken care of without the knowledge of the board of trustees, will not render the corporation liable on other notes issued by such officers without the authority of the board of trustees, although the president and manager were two of the five trustees. *Ekwell v. Puget Sound & C. R. Co.*, 7 *Wash.* 487, 35 *Pac. Rep.* 376.

**13. Bills and notes payable to agents and officers.**—A note made payable to a person, as treasurer of a railroad company, is payable to him as an individual, and not to the company, the addition to the name of such person being but descriptive of the individual. *Chadsey v. McCreery*, 27 *Ill.* 253.

A note payable to the president of a railroad company individually can be assigned so as to give the holder the rights of an assignee, but only in his own name. In no other way can the legal title to the note pass. *Peck v. Bligh*, 37 *Ill.* 317.

### III. TRANSFERS AND CONSEQUENT RIGHTS AND LIABILITIES.

**14. Power to transfer or indorse.**—A railroad company has power to take notes originating in a transaction, or to secure an indebtedness within the scope of its corporate undertaking; and as a general proposition a corporation has power to assign a note that it has power to take. *Hardy v. Merriweather*, 14 *Ind.* 203.

A corporation may authorize its proper officer to assign a note by delivery. *Blake v. Holley*, 14 *Ind.* 383.

A railroad company has necessarily the right to take a promissory note and negotiate it in the ordinary course of business, and an assignment by the secretary is *prima facie* the act of the company. *Frye v. Tucker*, 24 *Ill.* 180.

It is within the powers of the president of a railroad company to assign notes and

mortgages by indorsement which are given to aid in the construction of the road, and where so transferred before maturity the holder will take them freed from any equities existing between the maker and the company. *Irwin v. Bailey*, 8 *Biss. (U. S.)* 523.

Where a note and mortgage are transferred as collateral to a bond of a corporation, a subsequent indorsement by the company's president will pass the legal title to the equitable owner. A subsequent indorsee, though he has no actual interest in the note, may sue in his own name if it was indorsed to him for that purpose. *Irwin v. Bailey*, 8 *Biss. (U. S.)* 523.

An indorsement, on a promissory note made payable to a railroad company, of the name of the company "per M. S. Henry, Prest." in assigning the note, is *prima facie* the act of the corporation by its authorized officer. *Goodrich v. Reynolds*, 31 *Ill.* 490.

A note was executed to aid in the construction of a railroad, with the understanding that it and others, executed for the same purpose, should be delivered to the company if they aggregated a certain amount. The notes did not aggregate the amount, and the company to which they were payable did not build the road, but the note was assigned to another company which did. *Held*, that the note was collectible upon complying with the conditions imposed upon the first company. *Merrill v. Gamble*, 46 *Iowa* 615, 16 *Am. Ry. Rep.* 65.

The president of a corporation indorsed and transferred a note in the name of the company, and also indorsed it individually. There was evidence that he paid the amount of the note to the company himself. When sued the company claimed that the president was not authorized to indorse notes, and the evidence showed that his act of so indorsing had been approved by a vote of three of the five directors, at an impromptu meeting, without notice to the other two. *Held*, that if the president paid for the note he could transfer it by his individual indorsement; but that in any event a judgment for plaintiffs would not be disturbed because the trial court instructed the jury that, as a rule, the three directors could not act without notice to all, but that the jury "might take into consideration the course of dealing of a particular corporation." *Hitchings v. St. Louis, N. O. & O. C. & T. Co.*, 52 *N. Y. S. R.* 247, 22 *N. Y. Supp.* 719, 68 *Hun* 33.

The New York act of 1866, ch. 433, provided that a certain city might issue bonds in aid of a railroad, and § 4 provided that they should be paid by a tax upon the taxable property in the city, and when collected should be paid to the railroad commissioners and by them applied to the discharge of such bonds. *Held*, that an indorsement to a bank by such commissioners of an order on the city treasurer, to be paid out of such fund, drawn by the county commissioners, did not give the bank title to the fund so as to authorize a mandamus to the city treasurer to pay over the amount of the order. *People v. Stupp*, 18 N. Y. S. R. 500, 49 Hun 544, 2 N. Y. Supp. 537.

**15. Rights of bona-fide holders.**—The transfer, before maturity, of negotiable paper as security for an antecedent debt merely, without other circumstances—if the paper be so indorsed that the holder becomes a party to the instrument—although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case the bona-fide holder is unaffected by equities or defenses between prior parties of which he had no notice. *Brooklyn City & N. R. Co. v. National Bank*, 102 U. S. 14. —FOLLOWED IN *St. Paul R. M. Co. v. Great Western D. Co.*, 27 Fed. Rep. 434.

A bill or note executed within the power of a corporation, but by an abuse of that power in the particular instance, would, if governed by the law-merchant, be valid in the hands of a bona-fide holder; but if executed entirely without the corporate power it would not, if, indeed, there could be a bona-fide holder of such paper. *Smead v. Indianapolis, P. & C. R. Co.*, 11 Ind. 104.

A bona-fide purchaser of paper assets formerly owned by a corporation and indorsed by the proper officers thereof may assume that the indorsement was duly authorized, and is not bound to search the corporation books for such authority before completing his purchase. *Walker v. Detroit Transit R. Co.*, 47 Mich. 338, 11 N. W. Rep. 187.

If the directors of a railway company which has no power to accept bills accept a bill for the company and put it within the power of the drawer to negotiate it, they are guilty of the false representation that they have authority to accept, and are personally liable to the innocent purchaser. *West London*

*Commercial Bank v. Kitson*, L. R. 13 Q. B. D. 360, 53 L. J. Q. B. Div. 345, 50 L. T. N. S. 656, 32 W. R. 757; affirming *S. C. L. R. 12 Q. B. Div. 157*, 53 L. J. Q. B. Div. 218, 50 L. T. N. S. 208, 32 W. R. 431, 47 J. P. 824.

The trustees and managers of a railroad company issued notes to raise money to pay a floating debt for the construction of the road, reciting that they were issued under a vote of stockholders and a special act of the state legislature and a decree of the court of chancery. By an indorsement thereon the company guaranteed their payment, and ordered the contents to be paid to the bearer. *Held*, that the company was bound by this guarantee to an innocent purchaser for value of the notes, but that it was not be bound to pay a rate of interest specified in the notes above the legal rate. *Codman v. Vermont & C. R. Co.*, 16 Blatchf. (U. S.) 165.

Defendants were engaged in the construction of a railroad, and procured a charter for a construction company, which was never organized, and was irresponsible, and they drew a draft on such pretended company, and procured certain bankers to cash it on false representations that the construction company had secured large funds from abroad. *Held*, that the assignees of the bank could sue for damages based upon such false representations. *Kelly v. Gould*, 6 N. Y. Supp. 845; affirming 2 N. Y. Supp. 600.

A note was given to a railroad company with a condition that it was to be negotiated and that the proceeds were to be applied solely to the construction of the railroad, but before maturity it was negotiated or pledged, and the money obtained was not spent in the construction of the road. *Held*, that the holder of the note, having taken it before maturity and without any knowledge of the facts impeaching its validity, was a bona-fide holder to the extent of the amount paid for it. *Bond v. Wiltse*, 12 Wis. 611.

A railroad company executed to plaintiff its bond for a certain sum, and attached thereto a certain note payable to the company, in the same amount, and a mortgage securing it, reciting in the bond that the note and mortgage were transferred as security, and that both should be transferable in connection with the bond and not otherwise. *Held*, (1) a sufficient indorsement to pass the legal title to the note, and that parol evidence was not admissible to show that

the company transferred it for the purpose of having a different effect; (2) that plaintiff being a purchaser for value took the note freed from all defenses, as against the railroad company, of which he had no notice. *Crosby v. Roub.*, 16 Wis. 616.—FOLLOWED IN *Andrews v. Hart*, 17 Wis. 297.

**16. Transferee, when put upon inquiry.**—One who takes the notes or securities of a corporation from one of its officers in payment of, or as security for, his individual liability is bound to inquire into the circumstances under which the officer obtained possession of the notes or securities, and if he fails to make such inquiry he does so at his peril. *Cheever v. Pittsburgh, S. & L. E. R. Co.*, 55 N. Y. S. R. 181, 72 Hun 380.—FOLLOWING *Wilson v. Metropolitan El. R. Co.*, 120 N. Y. 145, 30 N. Y. S. R. 787.

The purchaser of a promissory note purporting to have been issued by a corporation, who makes the purchase under circumstances which impose upon him the duty of inquiry as to its validity, assumes no greater risk, by his failure to make inquiry, than the burden of proving that the facts he could have discovered, had he made inquiry, would have protected him. *Wilson v. Metropolitan El. R. Co.*, 120 N. Y. 145, 24 N. E. Rep. 384, 30 N. Y. S. R. 787; *affirming* 14 *Daly* 171, 6 N. Y. S. R. 234.

Where a railroad negotiated one of its bonds and delivered with it the note of defendant as security, but without indorsement, but the bond contained an assignment of such note, which was made transferable with the bond and not otherwise—*held*, that the bond of the company was the principal, and the note the incident, and was not transferred as an independent instrument, and that such a transfer of the note should have put the party receiving it upon his guard as to any defenses the maker might have. *Haskell v. Brown*, 65 Ill. 29.

A railroad company executed notes to enable its president to purchase rolling stock, the notes being payable to the president's private secretary. The president used the notes in his private affairs, and they came to the hands of plaintiff, after maturity, from the one to whom the president had transferred them. *Held*, in an action thereon, that the first transferee was bound to inquire into the circumstances under which the notes were held, and that, having failed to do so, and it appearing that inquiry

would have revealed the fact that the president was not authorized to transfer them as he did, neither he nor those holding under him after maturity could recover. *Cheever v. Pittsburgh, S. & L. E. R. Co.*, 55 N. Y. S. R. 181, 72 Hun 380.

**17. Transfers after maturity.**—A subscriber to railroad stock took a negotiable promissory note from the company, with the understanding that it be paid out of the next assessments on his stock. A subsequent assessment was made larger than the amount of the note. The subscriber paid the difference but did not surrender the note. *Held*, that one taking the note from him when overdue could not recover. *Paine v. Central Vt. R. Co.*, 25 Am. & Eng. R. Cas. 37, 118 U. S. 152, 6 Sup. Ct. Rep. 1019; *affirming* 14 *Fed. Rep.* 269.—APPLIED IN *Bound v. South Carolina R. Co.*, 47 Fed. Rep. 30.

**18. Presentment and demand.**—If the certificate of a notary who protested a note shows that notice of demand and non-payment was served on the indorser at any time during the day following demand, it is sufficient to bind him as indorser; it need not show that it was during business hours. *Bonner v. New Orleans*, 2 *Woods* (U. S.) 135.

A bill drawn by the president of a railroad company on the treasurer of the company, payable on demand, is, when dishonored, properly sued on as a bill of exchange, and to recover on it in a suit against the company, presentment for payment and notice of the dishonor must be proved or an excuse for failing to do so shown. *Wetumpka & C. R. Co. v. Bingham*, 5 Ala. 657.

In such a case, if it be doubtful from the face of the bill whether it was drawn by one in his private character or as agent of the corporation and by its authority, parol evidence is admissible to show the true nature of the transaction. *Wetumpka & C. R. Co. v. Bingham*, 5 Ala. 657.

A complaint in an action on drafts drawn by the president of a railroad company on the treasurer is bad on demurrer if it does not allege that the drafts had been presented or state the excuse for not presenting them. *Marion & M. R. Co. v. Dillon*, 7 *Ind.* 404.

Where a debt is due from a corporation, and it is the duty of one officer or set of officers to allow demands and draw for payment upon another officer, who has the custody of and is charged with the duty



of disbursing the funds, the order must, as a general rule, be presented in a reasonable time for payment. *Marion & M. R. Co. v. Dillon*, 7 Ind. 404.—FOLLOWED IN *Marion & M. R. Co. v. Spence*, 8 Ind. 415; *Marion & M. V. R. Co. v. Lomax*, 8 Ind. 459. OVERRULED IN *Indiana & I. C. R. Co. v. Davis*, 20 Ind. 6.

Where the secretary of a corporation draws an order upon the treasurer for a debt actually due from the corporation to the payee, the latter need not present it to the treasurer for payment within a reasonable time after receiving it, or at any time before suing upon it, as a condition precedent to such suit. *Indiana & I. C. R. Co. v. Davis*, 20 Ind. 6.

Plaintiff, a ticket agent, acting on his individual responsibility, accepted from various persons sums of money and a bank draft on deposit, with a right in the depositors to recall their money or take tickets for an excursion which was to leave on the 14th of April, the draft being received on the 9th. On the 14th the parties took their tickets, and plaintiff, on the next day, in the usual course of business, made up his ticket account and forwarded the draft. The referee held the delay reasonable. *Held*, that this finding was not legally erroneous. *Nutting v. Burked*, 48 Mich. 241, 12 N. W. Rep. 184.

An agent, residing in New York, who was charged with the collection of certain dividends upon railroad stock, requested a person in another state to collect the dividends and transmit them to him by draft. The dividends were collected and remitted by New York draft, but the agent left New York before receiving it. *Held*, that it was his duty to have left some one to receive the check and present it for payment, and that a failure to present the check for four days, during which time the drawee failed, discharged the drawer. *Brady v. Little Miami R. Co.*, 34 Barb. (N. Y.) 249.

#### IV. ACTIONS ON BILLS AND NOTES.

**19. The right of action.**—An order drawn by an incorporated company upon its own treasurer in favor of a third person is a clear acknowledgment of an indebtedness in favor of the drawee, and may be the foundation of an action. Such orders must be presented for payment. *Marion & M. R. Co. v. Hodge*, 9 Ind. 163.—OVERRULED IN *Indiana & I. C. R. Co. v. Davis*, 20 Ind. 6.

Where a promissory note given to aid in

the construction of a railroad provides that on the payment of the money the maker shall receive certificates of stock therefor, the payee or indorsee must prove a tender of the stock certificates to entitle him to recover. *Cooper v. McKee*, 49 Iowa 286.—FOLLOWED IN *Lawrence v. Smith*, 50 Iowa 703.

Where a note is executed by a railroad company at its office in Iowa, but is made payable at a particular place in New York, a failure to pay it in New York constitutes a breach of contract, but not a "cause of action" in New York, within the meaning of the attachment laws of that state. The "cause of action" is the contract or promise made in Iowa. *Cantwell v. Dubuque W. R. Co.*, 17 How. Pr. (N. Y.) 16.

A railroad company in Vermont drew a bill of exchange upon its treasurer in Boston, which was accepted by him, payable in New York. *Held*, in an action on the note, that the cause of action arose in New York, and that the holder of the bill might sue there and attach the company's property. *Bank of Commerce v. Rutland & W. R. Co.*, 10 How. Pr. (N. Y.) 1.

A bill of exchange was drawn, indorsed, and accepted by some of the trustees of a Masonic corporation for the purpose of raising money to pay a debt incurred by them for its benefit, and was discounted by a railroad company without any authority under its charter, and the money so raised by the Masonic corporation was expended by it in paying the debt incurred by the trustees. *Held*, that the railroad company might maintain an action for money had and received against the drawer, although no recovery could be had on the bill of exchange. *Waddill v. Alabama & T. R. R. Co.*, 35 Ala. 323.—FOLLOWED IN *Wilks v. Georgia Pac. R. Co.*, 79 Ala. 180.

An instrument executed by the treasurer of a railroad company, in the form of an advance receipt for taxes voted in a certain township in aid of the company, which provided that it should be received by the company from the county treasurer in payment of so much of such taxes—*held*, not to be collectible from the company or an indorser until it had been tendered in payment of the taxes specified, and refused by the county treasurer. *Lisle v. Iowa, M. & N. P. R. Co.*, 54 Iowa 499, 6 N. W. Rep. 696.

**20. Parties.**—Where the assets of a railroad company are sold in bankruptcy,

and the purchaser transfers them to another, who organizes a new company, and in the papers the purchaser expressly recognizes the new company as assignee from him of the assets, this is a sufficient assignment to enable the new company to bring suits upon obligations given to the old company. *Wilcox v. Toledo & A. A. R. Co.*, 9 Am. & Eng. R. Cas. 518, 43 Mich. 584, 5 N. W. Rep. 1003.

A railroad-aid note was given whereby the makers, in consideration of the building of the Van Buren division of the Toledo & S. H. R., promised to pay to said company or order \$200, in thirty days after notice of its completion. When the note was given the Toledo & S. H. R. Co. was not in existence, and no company of that name was ever organized, but an independent corporation by the name of the Van Buren Division of the Toledo & S. H. R. Co. was afterwards created, with a different purpose from that of the original undertaking. *Held*, that the promisee in the note was the Toledo & S. H. R. Co., and that the Van Buren Division, as afterwards organized, could not recover upon it without showing that the promisors had consented to the change of scheme, nor without declaring on the new agreement. *Van Buren Division, T. & S. H. R. Co. v. Lamphear*, 20 Am. & Eng. R. Cas. 643, 54 Mich. 575, 20 N. W. Rep. 590.

Plaintiff executed to a railroad company his note for \$800, which, together with subscriptions by other citizens of a municipal corporation, amounted to \$25,000, which was given to a railroad company as a bonus, and which was payable each in four installments as the work of constructing the road progressed. At the same time the company executed its bond with sureties in the same amount to trustees, to secure the persons furnishing the bonus. Plaintiff paid the first and second installments of his note, and, when sued upon the others, defended on the ground that the company had not maintained a station in the municipality as agreed upon, and by reconvention made the sureties upon the companies bond parties, and asked to recover back what he had already paid, and for damages for the failure to maintain the depot. The bond was given only to cover the obligation of the company to construct the road. *Held*: (1) that there could be no recovery for failing to maintain the depot, as the bond did not

cover it; (2) that the trustees in the bond were necessary parties, and there could not be a recovery without making them parties; (3) that all the parties interested in the bond should have been brought in, and that, if there was a liability on the company, one judgment should be taken for the benefit of all. *Williams v. Ft. Worth & N. O. R. Co.*, 82 Tex. 553, 18 S. W. Rep. 206.

**21. Declaration or complaint.**—Where a railroad company sues on promissory notes, a complaint which sets up a good cause of action is not affected by a further statement that, under an agreement with the defendant, the plaintiff had transported certain freights, and had drawn the bills in suit as payment of the freight, which had been accepted. *Central Ohio R. Co. v. Thompson*, 2 Bond (U. S.) 296.

In a complaint against a corporation it is not necessary to aver that the agent of the company who made the note sued on was appointed by a written or sealed commission. *Hamilton v. Newcastle & D. R. Co.*, 9 Ind. 359.

In an action against a railroad company, upon certain orders for the payment of money drawn by their proper officers upon the treasurer of the company, the complaint did not allege that the orders had ever been presented to the treasurer for payment. Judgment was given against the company by default. *Held*, that the judgment was erroneous. *Marion & L. R. Co. v. Lomax*, 7 Ind. 648.—FOLLOWED IN *Marion & L. R. Co. v. Lomax*, 9 Ind. 162. OVERRULED IN *Indiana & I. C. R. Co. v. Davis*, 20 Ind. 6.

Complaint upon a promissory note. The first paragraph alleged that the note was made payable to the Madison, I. & P. R. Co.; that the Peru & I. R. Co. then, etc., became the owner of the note, and then, etc., sold and assigned the same to the plaintiffs, who are now the owners, etc. *Held*, substantially good on demurrer. *Farnsworth v. Drake*, 11 Ind. 101.

The second paragraph alleged the making and transfer, as in the first, and added that the Madison, I. & P. R. Co., the payee, was formed by a union of the M. & I. and the P. & I. companies; that the union was subsequently judicially declared illegal and void; and that this note was awarded to the P. & I. Co. *Held*: (1) that if the Madison, I. & P. R. Co. is to be regarded as existing *de facto* before it was declared illegal, etc., so that its assignment of the note would have

passed the title, then the delivery of the note by it, pursuant to an order of court at its dissolution, to the P. & I. Co. was sufficient and is well pleaded; (2) but if that company is to be regarded as never having had even a *de facto* existence, then the note was made payable to a fictitious payee, and hence that any *bona-fide* holder might sue upon it and need not aver in his complaint that he is a *bona-fide* holder. *Farnsworth v. Drake*, 11 Ind. 101.

The third paragraph of the complaint alleged a partnership between the companies, and that the note was made to them as such by the name, etc.; that afterward the partnership was dissolved; that the M. & I. Co. assigned its interest by delivery to the P. & I. Co., and that the latter assigned to the plaintiffs by indorsement—the M. & I. Co., the equitable assignor, being made a party. *Held*, that if the companies were legally in partnership the paragraph was good; but that if they were not, and yet had a joint interest in the subject-matter of the note, perhaps it inured to them as joint payees, and thus the transfer might be good. *Farnsworth v. Drake*, 11 Ind. 101.

Where a declaration alleged that a railroad company, by its treasurer, P., made a promissory note payable to the order of P., for the purpose of being sold on the market in order to raise money to meet the liabilities of the said company; that said note was at the same time approved by the directors, and was indorsed by P.; that defendants entered into a contract, which was indorsed on the note as follows: "We hereby guarantee the payment of the within note, waiving demand, notice, and protest;" that said note was delivered to plaintiff for a valuable consideration by P., as treasurer of said company; that plaintiff received the same before it was due and payable; and that said note was not paid—*held*, that there was not a fatal variance between said declaration and proof that notes similar to the one in suit had been authorized by the directors of the company, and similar guarantees had been indorsed upon them by the defendants, and that the plaintiff had loaned to P. certain sums of money soon after the date of the notes, taking the note in suit as collateral to secure another note signed by P.—P. stating that the money borrowed was for the use of the company. *Jones v. Dow*, 26 Am. & Eng. R. Cas. 98, 142 Mass. 130, 7 N. E. Rep. 839.

**22. Plea or answer.**—Since the adoption of Ala. Code of 1852, an objection to an averment in a complaint against a corporation, that the defendant indorsed a bill of exchange by its president, A. S., involving a denial of the execution of, or of authority to bind by, the indorsement, can only be taken advantage of by plea verified by affidavit. *Montgomery & E. R. Co. v. Trebles*, 44 Ala. 255.

Where a note given to a railroad company is sued on, an answer setting up an agreement by which it was to be held by a trustee, and not delivered to the company until the road was completed to a certain place within a designated time, which was not done, and alleging that the company was not avoidably prevented from so doing, that the note was therefore without consideration, and that, by reason of the company failing to build the road as agreed, the defendant had been damaged by failing to sell his land for as much as he might have done had the road been built, sets up a good defense, and is not demurrable. *McLaughlin v. Clausen*, 85 Cal. 322, 24 Pac. Rep. 636.

A plea to an action on a note given to a railroad company that the only consideration of the note was that a railroad should be built within a certain time, which was not done, is bad on demurrer, where the note is made payable "when the track of said railroad shall be laid through White county, and cars shall have run thereon." *Cairo & V. R. Co. v. Delap*, 7 Ill. App. 60.—FOLLOWING *Cairo & V. R. Co. v. Parker*, 84 Ill. 613.

In an action against a railway company on an acceptance, a plea denying the acceptance properly raises the question of the power of the company to give it, although in fact the acceptance was given by order of the directors and under the company's seal. *Bateman v. Mid-Wales R. Co.*, L. R. 1 C. P. 499, 1 H. & R. 508, 12 Jur. N. S. 453, 35 L. J. C. P. 205, 14 W. R. 672.

A railroad company transported certain animals to defendant, and drew on him for the freight, which bills were accepted but not paid. In an action thereon defendant filed a plea alleging injury to the animals through the carelessness of the company, whereby the same were injured in a sum greater than the amount of the bills. *Held*, that such plea was defective in not responding to the cause of action set out in the

declaration. *Central Ohio R. Co. v. Thompson, 2 Bond. (U. S.) 296.*

A railroad company drew on the consignee for freight charges, and the bills were accepted but not paid. When sued thereon the consignee filed a plea claiming damages in a sum larger than plaintiff's claim, by reason of injuries to the freight while being carried. *Held*, that the plea was open to the objection of duplicity, being an attempt both to plead in bar and to recover damages sustained. *Central Ohio R. Co. v. Thompson, 2 Bond. (U. S.) 296.*

Suit was brought on a conditional promise to pay money to the order of a railroad company. The promise was in writing, and was filed with the justice as the sole cause of action. Upon it was endorsed the name of a person, who added to his name the word "assignee." The defendant pleaded the general issue, and went to trial. It was shown on the trial that the payee in the promise had been put in bankruptcy, and that the indorser of the paper was assignee in bankruptcy thereof. *Held*, that the objection that the plaintiff did not by its declaration aver its right to recover as assignee would not be sustained on the final submission of the case. *Wilcox v. Toledo & A. A. R. Co., 9 Am. & Eng. R. Cas. 518, 43 Mich. 584, 5 N. W. Rep. 1003.*

**23. Defenses.**—(1) *What available.*—Where a note is given for stock of a railroad company, an illegal increase of the stock thereafter is a good defense to an action on the note. *Merrill v. Gamble, 46 Iowa 615, 16 Am. Ry. Rep. 65.*—FOLLOWED IN *Merrill v. Beaver, 46 Iowa 646.*

The note of a corporation, though in its form of words strictly negotiable, is a specialty if attested by the seal of the corporation, and, in an action upon it by the holder, is subject to the defense of a want of consideration. *Hopkins v. Cumberland Valley R. Co., 3 Watts & S. (Pa.) 410.*

Directors have no power to dispose of stock below the price fixed by charter, and where stock is sold at a less price, and a note given therefor, such fraudulent sale is a good defense to an action on the note. *Sturges v. Stetson, 3 Phila. (Pa.) 304.*

(2) *What not available.*—An agreement by the Branch Bank of the State of Alabama to receive such bills as a railroad company could lawfully issue, and to pay the same out as circulation, will not avoid a recovery on bills of exchange given for the

loans by the bank of such bills, as being contrary to the policy of the laws of the state with reference to its banking institutions. *Branch Bank v. Crocheron, 5 Ala. 250.*

A note given for the purchase-money of town lots, at a place which was the contemplated terminus of a railroad then in process of construction, was made payable "when the first locomotive engine on the M. railroad shall arrive" at the town. *Held*, that the fact that the railroad company was sold out and the road completed by another company subsequently incorporated is available (if at all) as a defense at law, and therefore constitutes no ground for a resort to equity. *Askew v. Hooper, 28 Ala. 634.*

Where the board of directors of a railroad company, at a regular meeting, directed its promissory note to be executed by the president of the company, in payment of the salary of one of its officers, when a by-law of the company provided that notes should be drawn by the auditor to the president, etc., it is not a good defense to an action on the note that there had not been a strict compliance with all the requirements of the by-law, in the execution of the note. The services having been performed for the payment of which the note was issued by the company, any matter of form and not of substance ought not to defeat the recovery. *St. Louis, Ft. S. & W. R. Co. v. Tiernan, 40 Am. & Eng. R. Cas. 525, 37 Kan. 606, 15 Pac. Rep. 544.*

A person who buys railroad bonds and gives his promissory note in payment thereof, cannot, when sued upon the note, defend on the ground that the company agreed to have the bonds indorsed by another company before maturity, but had failed to do so. *Stanton v. Maynard, 7 Allen (Mass.) 335.*

Where a note is given to a railroad company, the only consideration being the building of the road, the maker of the note cannot defend on the ground that the road was built by another company. *Toledo & A. A. R. Co. v. Johnson, 55 Mich. 456, 21 N. W. Rep. 888; former appeal, 49 Mich. 148.*

The maker of a note given in aid of the construction of a railroad, the payment of which is conditioned upon the running of cars on the road by a certain date, becomes liable for such payment if the railroad company begins to run construction trains over the road by the date named, although the

road is not ballasted nor in fit condition for use, and freight and passenger trains are not run thereon until some months after said date. *Pontiac, O. & P. A. R. Co. v. King*, 68 Mich. 111, 12 West. Rep. 422, 35 N. W. Rep. 705.

Under the statute a corporation may contract to pay more than the legal rate of interest; hence a note given by a railroad company at 12 per cent interest, payable semi-annually, is binding on the corporation, and, being binding on it, is binding on its guarantors, who sustain the relation of sureties. *Rosa v. Butterfield*, 33 N. Y. 665.

Suit upon promissory notes. Answer, that the defendant, on, etc., subscribed for sixty shares of the stock of a railroad company, upon condition that the road should be located within a mile of B.; that on, etc., the agent of the company, to induce him to execute notes for the nominal amount of said stock, falsely represented that the company were about to locate and construct the road according to the condition, and that to enable them to do so it was necessary that they should have such notes; that defendant, relying upon such representations, executed the notes in suit; that the company have not located nor constructed the road within a mile, etc., nor did they, when such representations were made, intend to do so. The defendant failed to pay the notes at maturity. It did not appear that the company had abandoned the work, nor that they had incapacitated themselves in any way from complying with the condition. *Held*: (1) that the performance of the condition by the company was not intended to precede the payment of the notes; (2) that the defendant, having failed to pay the notes at maturity, could not set up the failure of the company to perform the condition. *Keller v. Johnson*, 11 Ind. 337.

**24. Evidence.**—The execution of a note to a corporation by its corporate name is an admission of the fact, and is *prima-facie* evidence of the existence of the charter of the company, and of user under it, under the plea of *nul tiel corporation*. *Montgomery R. Co. v. Hurst*, 9 Ala. 513.

When a note was made payable at the "Branch Bank of Montgomery," parol evidence to prove that at the time the note had been made it had been agreed that if the note were sent to the bank the maker should be exonerated from payment, is inadmissible

because it contradicts one of the terms of contract. The case might be varied by proof that under this promise the note was fraudulently obtained. *Montgomery R. Co. v. Hurst*, 9 Ala. 513.

Evidence to establish the relation in which defendant stood to the railway company is competent. *Delaware County Bank v. Duncombe*, 48 Iowa 488.

Proof of the conversation between the engineer who procured the acceptance of the draft and defendant at the time the draft was accepted, is admissible. *Delaware County Bank v. Duncombe*, 48 Iowa 488.

The authority of the officers of a railroad company to execute a note having been put in issue by the sworn answer of the company, some preliminary proof of their authority should have been given before the note was read in evidence; but this error was cured by the subsequent introduction of evidence tending to show all the circumstances under which the note was executed. *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 40 Am. & Eng. R. Cas. 525, 37 Kan. 606, 15 Pac. Rep. 544.

Where a bill of exchange is so drawn as to leave it doubtful whether a railroad company or its president individually is the drawer, it will be presumed that it is the individual bill of the president, but it may be shown by parol evidence what the intention of the parties was. *Kean v. Davis*, 21 N. J. L. 683.

The defendant, the general manager of a railroad company, made a contract with I. for the grading of a part of the road, and I. sublet some of the work to D., who, having performed a portion of what he had agreed to do, by a fraudulent collusion with the engineer procured the acceptance of a draft by the defendant for work done under the subcontract, notwithstanding such work had already been paid for by the contractor. *Held*, in an action upon the draft, that the defendant might be permitted to testify to the particulars of the contract between the contractor and the railway company. *Delaware County Bank v. Duncombe*, 48 Iowa 488.

A railroad company of which plaintiff was president drew drafts on the defendant in favor of the plaintiff, which defendant accepted. In an action on the drafts it appeared that plaintiff, as president of the railroad company, made a demand upon the defendant for settlement for bonds sold,

and the evidence tended to show that the defendant was then owing the railroad company on account of bonds much more than the amount of the drafts, and that the drafts were given in settlement. *Held*, that a general verdict for plaintiff, and a special finding that the drafts were accepted in settlement of a disputed claim made by the railroad company, and that defendant had not paid the company the amount due for its bonds, were sufficiently supported by the evidence. *Gafford v. American M. & I. Co.*, 77 Iowa 736, 42 N.W. Rep. 550.

**25. Damages.**—In a suit upon a promissory note payable in certain railroad scrip, where the maker had failed to pay in such scrip, the market value of the scrip is the measure of damages. *Parks v. Marshall*, 10 Ind. 20.

### BILLS OF LADING.

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Power to bind company by, see STATION AGENTS, 4.

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CARRIAGE OF MERCHANDISE, VIII.  
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#### I. GENERAL NATURE, INTERPRETATION, AND EFFECT.

##### 1. Definition; Execution; Issuance.

**1. What deemed to be a bill of lading.\***—A bill of lading is a memorandum or acknowledgment in writing, signed by the captain or master of a ship or other vessel, that he has received in good order, on board of his ship or vessel therein named, at the place therein mentioned, certain goods therein specified, which he promises to deliver in like good order (the danger of the seas excepted) at the place therein appointed for the delivery of the same, to the consignee therein named, or to his assigns, he or they paying freight for the same. *Union R. & T. Co. v. Yeager*, 34 Ind. 1.

The instrument in writing provided for by Texas Rev. St. art. 280, enacting that "Common carriers are required, when they receive goods for transportation, to give to the shipper, when it is demanded, a bill of lading or memorandum in writing stating the quantity, character, order, and condition of the goods," constitutes a bill of lading, and is binding upon both the shipper and the carrier. *Schloss v. Atchison, T. & S. F. R. Co.*, 85 Tex. 601, 22 S.W. Rep. 1014.

An account for freight, usually called a freight-bill, is not a bill of lading. *Coosa River Steamboat Co. v. Barclay*, 30 Ala. 120.

Where Y. purchased flour to be manufactured by a mill in St. Louis, and agreed orally with L. for the sale of such flour, terms cash on delivery, an instrument styled a bill of lading, dated before the flour was manufactured, given to L. by a freight company, acknowledging the receipt of the flour by the company and agreeing to transport it to M. in Boston, cannot be regarded as a bill of lading. *Union R. & T. Co. v. Yeager*, 34 Ind. 1.

**2. Analogy of the bill to a bill of exchange†—Alteration.**—Where the maker of a note uses a printed blank and fills in the amount for which he intends to become liable, leaving a space to the left of the amount, in which, after the note has been put in circulation, words are fraudulently inserted, which increase the amount of the note, the maker's liability is

\* What is a bill of lading, see note, 38 AM. DEC. 407.

† Nature of a bill of lading, see note, 40 AM. & ENG. R. CAS. 89; 23 Id. 701.

† See post, 108-128.



extinguished, and no recovery can be had thereon against him; and this rule applies with even greater force to bills of lading. *Lehman v. Central R. & B. Co.*, 4 *Woods* (U. S.) 560, 12 *Fed. Rep.* 595.

A carrier is no more bound by a bill of lading issued by his agent, for goods not received by him, than a person is bound by a bill of exchange signed in his name by one who has no authority to sign it. *Hunt v. Mississippi C. R. Co.*, 29 *La. Ann.* 446.

**3. Execution of bill by carrier's agent.\***—The agent of a carrier has no authority to execute a bill of lading for goods which he has not received. *Hunt v. Mississippi C. R. Co.*, 29 *La. Ann.* 446.

As between a carrier and third persons, the true limit of a railway agent's authority to bind his company by a bill of lading is the apparent authority with which he is invested. *Brooke v. New York, L. E. & W. R. Co.*, 21 *Am. & Eng. R. Cas.* 64, 108 *Pa. St.* 529, 1 *Atl. Rep.* 206.

Express authority of an agent to make a receipt or bill of lading for goods need not be shown, he having acted as such agent in the proper place for receiving goods for the company, and having been in possession of the company's stamp to be used on such receipts, and the company having taken possession of the goods and caused them to be shipped, presumably with knowledge of the receipt. *Hansen v. Flint & P. M. R. Co.*, 37 *Am. & Eng. R. Cas.* 628, 73 *Wis.* 346, 41 *N. W. Rep.* 529.

The position of one authorized to make contracts for the transportation of freights for a carrier is one of special trust and confidence, and cannot be discharged by a substitute. So a bill of lading which should have been signed by such person is not valid if signed by a substitute. *Pendall v. Rench*, 4 *McLean* (U. S.) 259.

**4. Execution by one carrier as agent for another.**—A bill of lading for goods received to be carried over more than one line recited that "the several railroad companies between Boston and Zanesville agree to carry," etc., and was signed by the defendant in his own name, "for the corporations," but the names of the several railroad companies were not given. *Held*, that defendant was not personally bound thereby. *Lyon v. Williams*, 5 *Gray* (Mass.) 557.

\* Limitation of agent's authority to issue bills of lading, see note, 21 *AM. & ENG. R. CAS.* 68.

Where a second carrier is sued for the loss of goods, and the complaint sets up the making of a bill of lading by the initial carrier, but does not charge any partnership or arrangement between the initial carrier and defendant, or that the latter authorized the execution of the bill of lading, the defendant may deny that it is bound thereby without filing a plea of *non est factum*. *Dillingham v. Fischl*, 1 *Tex. Civ. App.* 546, 21 *S. W. Rep.* 554.

Where a railroad company delivers to a shipper a bill of lading guaranteeing a certain rate over connecting lines, it holds itself out to the shipper as authorized to enter into a binding contract on behalf of the connecting carriers, and if their charges exceed those guaranteed it is liable to refund the excess. *Little Rock & Ft. S. R. Co. v. Daniels*, 32 *Am. & Eng. R. Cas.* 479, 49 *Ark.* 352, 5 *S. W. Rep.* 584.

A statutory penalty for refusal to deliver freight upon the payment of the charges shown in the bill of lading applies only where the railroad sought to be charged has either executed the bill of lading or authorized another company to do so, or has ratified it by voluntary act; and the acceptance of freight by the railroad company from a connecting company being compulsory under the statutes, such acceptance cannot be deemed a ratification of the bill of lading; nor can an acceptance of the terms of the bill of lading be presumed from the fact that the defendant offered to deliver up the goods upon the payment of the freight specified therein, provided the shipper would surrender the bill of lading and execute a receipt to the railroad company for the overcharge demanded by reason of freight rates over its own line, the purpose of the carrier evidently being to look for reimbursement to the connecting carrier. *Gulf, C. & S. F. R. Co. v. Dwyer*, 55 *Am. & Eng. R. Cas.* 442, 84 *Tex.* 194.

**5. Signature of carrier a question of fact.**—Whether a carrier did or did not sign a bill of lading is a question of fact for the determination of the jury. *Royal Canadian Bank v. Grand Trunk R. Co.*, 23 *U. C. C. P.* 225.

**6. Execution by shipper—Signature.\***—It is not necessary for the shipper of goods to sign the bill of lading issued therefor by the carrier. *Piedmont M. Co. v.*

\* See post, 28.

*Columbia & G. R. Co.*, 16 *Am. & Eng. R. Cas.* 194, 19 *So. Car.* 353. *Adams Exp. Co. v. Haynes*, 42 *Ill.* 89. *Cincinnati, H. & D. R. Co. v. Pontius*, 19 *Ohio St.* 221.

Under § 1261, *Dak. Civ. Code*, providing that "the obligations of a common carrier, etc., may be limited by special contract," bills of lading must be signed by the consignor or consignee. *Hartwell v. Northern Pac. Exp. Co.*, 37 *Am. & Eng. R. Cas.* 635, 5 *Dak.* 463, 3 *L. R. A.* 342, 41 *N. W. Rep.* 732.

Where the consignee brings his action in the state of Illinois against a carrier, he is bound by a bill of lading issued in New York, executed and signed by the consignor as the agent of the consignee, containing the stipulation to the effect that only the connecting line over which the goods are to be transported shall be liable for their loss by fire while in transportation. *Brown v. Louisville & N. R. Co.*, 36 *Ill. App.* 140.

**7. Leaving blank space for consignee's name.**—The execution of a bill of lading with the space for the name of the consignee left blank is equivalent to a contract on the part of the carrier to deliver the goods therein mentioned to the consignor or his assignee. *Garden Grove Bank v. Humeston & S. R. Co.*, 23 *Am. & Eng. R. Cas.* 695, 67 *Iowa* 526, 25 *N. W. Rep.* 761.

**8. Executed in duplicate.**\*—Where two papers are executed in duplicate as a bill of lading limiting a carrier's liability, one of the parties signing one of the papers and the other party signing the other, both papers together are to be treated as one document. *Richmond & D. R. Co. v. Shomo*, 90 *Ga.* 496.

**9. Carrier's duty to issue the bill.**—An undertaking by a railroad company to accept freight and deliver it at a point beyond its own line is a matter of contract between it and the shipper; but it cannot be compelled to give a bill of lading for the safe delivery of the goods beyond its own line. *Lotspeich v. Central R. & B. Co.*, 18 *Am. & Eng. R. Cas.* 490, 73 *Ala.* 306.

There is no rule of the common law, and no provision of the Massachusetts statutes, which requires a railroad company to give bills of lading. When such companies transport goods in connection with carriers by water it is a convenient and proper arrangement, but it can only be made essential by

contract or custom. *Johnson v. Stoddard*, 100 *Mass.* 306.

**10. Penalty for refusal to issue.**\*—If a bill of lading is demanded and refused the party injured has his remedy under the Texas statute in a penalty of from \$5 to \$500. *Missouri Pac. R. Co. v. Douglass*, 16 *Am. & Eng. R. Cas.* 98, 2 *Tex. App. (Civ. Cas.)* 32.

Where a railroad company gives a bill of lading for lumber, described as a carload when the shipper demands that the weight be stated, the company incurs the penalty provided by Texas Rev. St. 1879, art. 280, imposing a penalty on common carriers for refusing to give, on demand, a bill of lading stating the quantity, character, and condition of the goods shipped. *Texas & P. R. Co. v. Cuteman*, 4 *Tex. App. (Civ. Cas.)* 17, 14 *S. W. Rep.* 1069.

Under Texas Rev. St. art. 280, prescribing a penalty of from \$5 to \$500 for refusing to execute and deliver a bill of lading, an action to recover the penalty may be maintained by the shipper, whether he is the owner of the goods or not; but if the action be under art. 279, then it can only be maintained where the plaintiff is the owner of the goods. *Missouri Pac. R. Co. v. Price*, 3 *Tex. App. (Civ. Cas.)* 430.

**11. Seller's duty to procure and forward to purchaser.**—There is no rule of law, in the absence of custom, which makes its obligatory upon the seller of goods delivered to be carried on a railroad, and by the railroad forwarded by steamboat, to take out an "internal bill of lading," and forward it to the purchaser at or about the time of sending the goods. *Johnson v. Stoddard*, 100 *Mass.* 306.

## 2. The Bill Considered as a Receipt.

**12. Generally.**†—A bill of lading partakes of the nature both of a receipt and of a contract. *Wayland v. Moseley*, 5 *Ala.* 430. *McTyer v. Steele*, 26 *Ala.* 487. *Louisville, E. & St. L. R. Co. v. Wilson*, 40 *Am. & Eng. R. Cas.* 85, 119 *Ind.* 352, 21 *N. E. Rep.* 341. *Steamboat Missouri v. Webb*, 9 *Mo.* 193. *Wolfe v. Myers*, 3 *Sandf. (N. Y.)* 7. *Casero v. Welsh*, 8 *Phila. (Pa.)* 130. *Van Elten v.*

\* Penalty for refusing to give a bill of lading under the Texas statute, see 45 *AM. & ENG. R. CAS.* 311 *abstr.*

† Bill of lading regarded in double aspect of a receipt and a contract, see note, 4 *L. R. A.* 244.

\* See *post*, 51.

*Newton*, 134 N. Y. 143, 45 N. Y. S. R. 768, 31 N. E. Rep. 334.

A bill of lading issued by a carrier is to be treated as a receipt and subject to explanation in that respect. *Tibbits v. Rock Island & P. R. Co.*, 49 Ill. App. 567. *Bissel v. Price*, 16 Ill. 408.

So far as affects the carrier's liability there is no difference between a carrier's receipt and a bill of lading. The receipt of the carrier is really a bill of lading for goods to be transported by land. *Dodge v. Meyer*, 61 Cal. 405.

**13. Parol evidence to vary or explain.**—A bill of lading, so far as it is in the nature of a receipt, may be contradicted, varied, or explained by parol evidence. *Wayland v. Mosely*, 5 Ala. 430. *Louisville, E. & St. L. R. Co. v. Wilson*, 40 Am. & Eng. R. Cas. 85, 119 Ind. 352, 21 N. E. Rep. 341. *Steamboat Missouri v. Webb*, 9 Mo. 193. *Caffero v. Welsh*, 8 Phila. (Pa.) 130. *Tibbits v. Rock Island & P. R. Co.*, 49 Ill. App. 567. *Meyer v. Peck*, 28 N. Y. 590, 26 How. Pr. 601; affirming 33 Barb. 532. *Van Etten v. Newton*, 134 N. Y. 143, 45 N. Y. S. R. 768, 31 N. E. Rep. 334.

A bill of lading stating that the article carried is "at owner's risk of breakage" may be explained by proof of a verbal contract between the shipper and the company's agent that in consideration of the payment of extra freight on delivery by the carrier, the risk shall be borne by the latter; the shipper being told by the agent, at the time of handing him the bill of lading, that it was "a receipt" for the goods shipped, and the shipper taking the paper without reading it. *Union Pac. R. Co. v. Marston*, 30 Neb. 241.

**14. As evidence that carrier received goods, generally.**—A bill of lading is *prima-facie* evidence of the receipt by the carrier of the articles enumerated in it and of the terms of the contract of carriage. *Little Rock & Ft. S. R. Co. v. Hall*, 32 Ark. 669.

That part of a bill of lading which relates to the receipt by the carrier of the goods therein specified may be explained by parol evidence. *Meyer v. Peck*, 28 N. Y. 590, 26 How. Pr. 601; affirming 33 Barb. 532.

In a case free from fraud, a receipt given by a common carrier for a barrel, box,

trunk, or other article, shown to be hollow and to contain goods, means that the party who executes it has received the contents of the barrel, box, trunk, or other hollow article, as well as the article itself. *Harmon v. New York & E. R. Co.*, 28 Barb. (N. Y.) 323.

The Mississippi act of 1886, which makes a bill of lading in the hands of an innocent purchaser conclusive evidence of the receipt of the items mentioned therein, is not a mere rule of evidence, but changes the character and legal effect of the contract evidenced by the bill of lading, and is not retroactive. *Hazard v. Illinois C. R. Co.*, 42 Am. & Eng. R. Cas. 455, 67 Miss. 32, 7 So. Rep. 280.

Defendant having received from a person, representing himself to be a member of the firm of E. W. P. & Co., thirty barrels for transportation over its road, delivered to him a bill of lading, certifying that it had received from said firm, consigned to their order, "the following-described packages in apparent good order, contents and value unknown;" this part was printed; following it, and before the signature of defendant's agent, was written, "articles: 30 bbls. eggs." The person receiving the bill indorsed it in blank in the name of E. W. P. & Co. and annexed it to a draft drawn upon plaintiffs, who, upon the faith and security thereof, accepted and paid the draft. The barrels, in fact, were filled with sawdust and contained no eggs. In an action to recover plaintiffs' damages—held, that the description of the articles was not a representation that the barrels contained eggs, but that, taking the whole instrument together, it imported only that defendant had received thirty packages described as containing or purporting to contain eggs, but the actual contents of which were unknown to defendant. *Miller v. Hannibal & St. J. R. Co.*, 12 Am. & Eng. R. Cas. 30, 90 N. Y. 430, 43 Am. Rep. 179; reversing 24 Hun 607.

Where a railroad company issues through bills of lading in exchange for receipts of a compress company for cotton stored with the compress company, the issuance of such bills does not constitute the compress company the agent of the railroad company, nor is it equivalent to a taking possession of the cotton by the railroad company. *St. Louis, I. M. & S. R. Co. v. Commercial U. Ins. Co.*, 49 Am. & Eng. R. Cas. 137, 139 U. S. 223, 11 Sup. Ct. Rep. 554.

\* See post, 40-44.

**15. Carrier when estopped from denying receipt of goods.\***—A company is estopped from denying that it received goods represented by a bill of lading issued by it, as against an indorsee who has made advances on the faith of the bill of lading. *Wichita Sav. Bank v. Atchison, T. & S. F. R. Co.*, 20 Kan. 519, 20 Am. Ry. Rep. 299.—REVIEWED AND QUOTED IN *Sioux City & P. R. Co. v. First Nat. Bank*, 1 Am. & Eng. R. Cas. 278, 10 Neb. 556.

An agent of a company, authorized to issue bills of lading, issued certain bills to a shipper for five cars of wheat. In fact less than one car-load of wheat and about the same quantity of barley were shipped. Drafts were drawn by the shipper against the bills and attached thereto, and were delivered to a bank, which in good faith discounted the same and forwarded them for payment. The drafts being protested and the shipper having absconded, leaving no property in the state—*held*, that as against the bank the railroad company was estopped from denying that it had received the wheat. *Sioux City & P. R. Co. v. First Nat. Bank*, 1 Am. & Eng. R. Cas. 278, 10 Neb. 556, 7 N. W. Rep. 311.—REVIEWING *Armour v. Michigan C. R. Co.*, 65 N. Y. 111. REVIEWING AND QUOTING *Wichita Sav. Bank v. Atchison, T. & S. F. R. Co.*, 20 Kan. 519.—NOT FOLLOWED IN *National Bank v. Chicago, B. & N. R. Co.*, 44 Minn. 224.

A bill of lading was issued by the agent on what turned out to be a forged warehouse receipt—no goods, in fact, being delivered. Plaintiffs paid drafts with the bills of lading attached. It appeared that the issuing of bills of lading was within the scope of the employment of the railroad agent. *Held*, that the company was bound by the agent's act, and was estopped from denying the receipt of the goods. *Armour v. Michigan C. R. Co.*, 65 N. Y. 111, 22 Am. Rep. 603; reversing 3 J. & S. 563.—FOLLOWING *Haille v. Smith*, 1 B. & P. 563. OVERRULING *Grant v. Norway*, 10 C. B. 665.—DISTINGUISHED IN *Dean v. Driggs*, 137 N. Y. 274. EXPLAINED IN *Lake Shore & M. S. R. Co. v. Foster*, 104 Ind. 293, 54 Am. Rep. 319. NOT FOLLOWED IN *National Bank v. Chicago, B. & N. R. Co.*, 44 Minn. 224. REVIEWED IN *Sioux City & P. R. Co.*

\* Whether carrier is estopped from denying receipt of goods as against a *bona-fide* holder, see 45 AM. & ENG. R. CAS. 308 *abstr.*

*v. First Nat. Bank*, 1 Am. & Eng. R. Cas. 278, 10 Neb. 556.

Where a shipping-clerk, in collusion with the consignor, issues a fictitious bill of lading, the goods represented by it not having been received, the railway company is liable to an innocent third person deceived thereby. *Brooke v. New York, L. E. & W. R. Co.*, 21 Am. & Eng. R. Cas. 64, 108 Pa. St. 529, 1 Atl. Rep. 206.—DISAPPROVED IN *National Bank v. Chicago, B. & N. R. Co.*, 44 Minn. 224.

The defendants, having received a consignment of wheat, sent to the consignees an advice note, which described the consignment as "sacks wheat, four trucks," and did not contain any details as to weight, rates, or charges, but across the printed form was written, "account to follow." The consignees gave to B. a delivery order in respect to this wheat, and he obtained an advance from the plaintiffs upon it; the plaintiffs sent this delivery order to the defendants, and they accepted it. On the following day the defendants sent to B. another advice note on a printed form similar to the one already sent, but across the upper part was written the words, "charges only;" the invoice number was different; the consignment was described as 151 sacks of wheat; the weight, the rate, and the amount of charges were filled in. B. filled up the delivery order at the bottom in favor of the plaintiffs, produced it to them, and obtained a second advance from them, as they believed it to relate to a second parcel of wheat. The plaintiffs delivered this order to the defendants, who accepted it, and who allowed the plaintiffs on both occasions to take samples of the wheat. There was, in fact, only one parcel of wheat, and the two advice notes related to the same parcel. B. went into liquidation, and the plaintiffs having lost the amount of one of the advances so made by them, sued the defendants for the amount. *Held*, that the plaintiffs were entitled to recover the amount claimed, for the defendants had so dealt with the wheat and advice notes as to lead the plaintiffs to believe that there were in fact two consignments of wheat, and the defendants were in consequence estopped from afterward alleging that there was in fact but one consignment of wheat. *Coventry v. Great Eastern R. Co.*, 11 Q. B. D. 776, 52 L. J. Q. B. D. (App.) 694, 4 Ry. & C. T. Cas. xiii.

**16. Carrier when not estopped from denying receipt of goods.\***—As a rule bills of lading issued for goods not yet delivered to the carrier are void. *Stone v. Wabash, St. L. & P. R. Co.*, 9 Ill. App. 48.

A carrier, having given a bill of lading for goods, cannot relieve himself from liability on the ground that the goods were never received by him, except by the clearest proof of that fact. *Little Miami, C. & X. R. Co. v. Dodds*, 1 Cin. Super. Ct. 47.

Under the Arkansas act approved March 15, 1887, which prohibits carriers from issuing bills of lading except for goods actually received into their possession, and gives a right of action against the carrier to the party aggrieved, a railway company which has issued bills of lading to the owners of cotton in the hands of a compress company is not estopped, as to third persons, from denying that the cotton was in its possession or control. *Martin v. St. Louis, I. M. & S. R. Co.*, 55 Ark. 510, 19 S. W. Rep. 314.

Carrier is not responsible for the value of goods described in a bill of lading executed by its station agent, when such property was never received by the carrier. *Hunt v. Mississippi C. R. Co.*, 29 La Ann. 446. *Williams v. Wilmington & W. R. Co.*, 93 N. Car. 42.

And in such a case the principal is not estopped thereby from showing, by parol, that no goods were in fact received, although the bill has been transferred to a bona-fide holder for value. *Williams v. Wilmington & W. R. Co.*, 93 N. Car. 42.

A bill of lading issued by a station or shipping agent of a railroad company or other common carrier, without receiving the goods named in it for transportation, imposes no liability upon the carrier, even to an innocent consignee or indorsee for value; and the carrier is not estopped by the statements in the bill from showing that no goods were in fact received for transportation. *National Bank v. Chicago, B. & N. R. Co.*, 44 Minn. 224, 46 N. W. Rep. 342, 560. —NOT FOLLOWING *Armour v. Michigan C. R. Co.*, 65 N. Y. 111; *Bank of Batavia v. New York, L. E. & W. R. Co.*, 106 N. Y. 195; *Sioux City & P. R. Co. v. First Nat. Bank*, 10 Neb. 556; *St. Louis & I. M. R. Co. v. Larned*, 103 Ill. 293; *Brooke v. New York,*

*L. E. & W. R. Co.*, 108 Pa. St. 529; *McCord v. Western Union Tel. Co.*, 39 Minn. 181.

**17. As evidence of quantity of shipment.\***—A bill of lading is a receipt as to the quantity of the articles shipped. *Wolfe v. Myers*, 3 Sandf. (N. Y.) 7.

A bill of lading is not conclusive as to the amount of goods received. *Brouty v. Five Thousand Two Hundred and Fifty-Six Bundles of Elm Staves*, 21 Fed. Rep. 590. *Pereira v. Central Pac. R. Co.*, 18 Am. & Eng. R. Cas. 565, 66 Cal. 92, 4 Pac. Rep. 988. *Meyer v. Peck*, 28 N. Y. 590, 26 How. Pr. 601; *affirming* 33 Barb. 532. *Abbe v. Eaton*, 51 N. Y. 410.

A bill of lading as a receipt is open to explanation or contradiction as to the quantity of the goods specified therein. *Bissel v. Price*, 16 Ill. 408. *Wolfe v. Myers*, 3 Sandf. (N. Y.) 7. *Meyer v. Peck*, 28 N. Y. 590, 26 How. Pr. 601; *affirming* 33 Barb. 532. *Graves v. Harwood*, 9 Barb. (N. Y.) 477. *Abbe v. Eaton*, 51 N. Y. 410.

A bill of lading is not conclusive as between the shipper and carrier as to the quantity represented to be delivered, or as to the goods named; and any fraud or mistake as to either may be shown by outside evidence. *Meyer v. Peck*, 28 N. Y. 590, 26 How. Pr. 601; *affirming* 33 Barb. 532.

A carrier may explain a bill of lading against an assignee thereof for value whenever the bill, taken as a whole, shows that the carrier does not vouch for the correctness of the written statement of quantity received. *Tibbitts v. Rock Island & P. R. Co.*, 49 Ill. App. 567.

The material part of a bill of lading on the subject of the freight rate is that which fixes the rate per one hundred pounds. Weighing the freight is purely a mechanical process, and may be done at the point of shipment or at the point of delivery. Where the weight of the merchandise is uniformly the same, the carrier or the consignee may ask to have the weight verified up to the moment of delivery, and it is the weight disclosed by the scales, and not the weight marked on the bill of lading, that controls. *Baird v. St. Louis, I. M. & S. R. Co.*, 42 Am. & Eng. R. Cas. 281, 41 Fed. Rep. 592.

Notwithstanding the recital of a bill of

\* Company may deny receipt of goods as against bona-fide holder of bill of lading, see note, 53 AM. REP. 453.

\* Bill of lading not conclusive as to quantity, see note, 38 AM. DEC. 413.

Effect of recitals in bill of lading as to quantity of goods received, see note, 30 AM. & ENG. R. CAS. 101.

lading that one hundred and sixty-seven cattle, "more or less," had been received by the carrier, the number of cattle actually shipped may be proved by parol. *Chapin v. Chicago, M. & St. P. R. Co.*, 42 *Am. & Eng. R. Cas.* 542, 79 *Iowa* 582, 44 *N. W. Rep.* 820.

A railway company is not estopped from denying the correctness of the weight of iron bundles mentioned in a bill of lading, and upon proving delivery of all bundles received is discharged from liability. *Horsman v. Grand Trunk R. Co.*, 30 *U. C. Q. B.* 130.

**18. As evidence of quality of shipment.**—A bill of lading, acknowledging the receipt by a carrier of "the following packages, contents unknown, \* \* \* marked and numbered as per margin, to be transported" to the place of destination, is not a warranty, on the part of the carrier, that the goods are of the quality described in the margin. *St. Louis, I. M. & S. R. Co. v. Knight*, 30 *Am. & Eng. R. Cas.* 88, 122 *U. S.* 79, 7 *Sup. Ct. Rep.* 1132.

The statements in a bill of lading referring to the quality of the goods represented by the bill may be explained by parol testimony. *Meyer v. Peck*, 28 *N. Y.* 590, 26 *How. Pr.* 601; *affirming* 33 *Barb.* 532.

**19. As evidence of value of shipment.\***—Where the bill of lading described the freight as one horse and one colt, and the term "value \$100" was so placed that a question arose as to whether it applied to the horse alone or to the horse and colt, it was held that the plaintiff was not entitled to a charge that "the statement of value affected only the horse and had no reference to the colt," but that it was for the jury to say, upon an inspection of the bill of lading, which was meant. *Coupland v. Housatonic R. Co.*, 61 *Conn.* 531, 23 *Atl. Rep.* 870.

**20. As evidence of condition of shipment, generally.**†—A railroad company is not concluded by a receipt stating that goods were received in good order. *Illinois C. R. Co. v. Cowles*, 32 *Ill.* 116.

That part of a bill of lading which relates to the condition of the goods is to be treated

as a mere receipt, and not as a written contract, and may be explained, varied, or even contradicted. *Meyer v. Peck*, 28 *N. Y.* 590, 26 *How. Pr.* 601; *affirming* 33 *Barb.* 532. *Bissel v. Price*, 16 *Ill.* 408. *Hunt v. Mississippi C. R. Co.*, 29 *La. Ann.* 446.

When a receipt is given by a railroad company for goods before they are actually examined, it is *prima-facie* evidence only of what it contains. The receptor is not concluded from showing the actual condition of the property. *Porter v. Chicago & N. W. R. Co.*, 20 *Iowa* 73.—**DISTINGUISHING** *Skinner v. Chicago & R. I. R. Co.*, 12 *Iowa* 192.

A bill of lading for through goods is only *prima-facie* evidence that the last carrier received them in good condition; and it is competent for him to show that they were damaged while in the hands of a previous warehouseman or carrier. *Great Western R. Co. v. McDonald*, 18 *Ill.* 172.—**FOLLOWING** *Bissel v. Price*, 16 *Ill.* 408.

**21. Recital that goods were received "in apparent good order."**—A provision in a bill of lading that the goods were received in "apparent good order" is not conclusive upon the carrier. *Mitchell v. United States Exp. Co.*, 46 *Iowa* 214.

A provision in a bill of lading that the goods were received in "apparent good order," where the goods are boxed, has reference only to the external condition of the boxes, and contains no admission as to the quality or quantity of the contents beyond what is visible to the eye and from handling the boxes. *The California*, 2 *Sawy. (U. S.)* 12.

A recital in a bill of lading that the freight received is in "apparent good order" does not preclude the carrier from showing that the goods were damaged when received, where the injury was invisible or latent, and, as between the original parties, is only *prima-facie* proof of the condition of the goods when received. *St. Louis, A. & T. R. Co. v. Neel*, 55 *Am. & Eng. R. Cas.* 428, 56 *Ark.* 279, 19 *S. W. Rep.* 963.

Where goods are received in a package, a company is not concluded by a receipt or bill of lading stating that the goods were received "in apparent good order;" and parol evidence is admissible to show the actual condition of the contents of the package. *Blade v. Chicago, St. P. & F. du L. R. Co.*, 10 *Wis.* 4.

\* Effect of recitals in a bill of lading as to the value of the goods received by the carrier, see note, 30 *Am. & Eng. R. Cas.* 701; see also *post*, 81-87.

† Bill of lading not conclusive as to condition of goods, see note, 38 *Am. Dec.* 415.



Where a carrier receives goods for shipment, and gives a bill of lading in which the goods are described to be in apparent good order, the bill of lading is *prima-facie* evidence that the goods were in good condition. *Illinois C. R. Co. v. Cobb*, 72 Ill. 148.

A stipulation in a bill of lading to the effect that the carrier received the goods therein mentioned "in good order" is *prima-facie* evidence only, and may be contradicted by parol evidence. *Seller v. Steamship Pacific*, 1 Oreg. 409.

**22. — received "in good order and well conditioned."**—A receipt, "in good order," by a carrier of goods which are boxed, is not conclusive upon the carrier, but he may show by parol evidence that the goods were in fact damaged when shipped. To make such a receipt conclusive upon the carrier would subject him to the necessity of examining and ascertaining the condition of all freight shipped, which would be inconvenient and impracticable. *Gowdy v. Lyon*, 9 B. Mon. (Ky.) 112.—FOLLOWING *Warden v. Greer*, 6 Watts (Pa.) 424.—FOLLOWED IN *Keith v. Amende*, 1 Bush (Ky.) 455.

In bills of lading the expression that the goods were shipped "in good order and well conditioned" should be considered as referring to the exterior and apparent condition of the boxes, and to their internal condition only so far as it might be inferred from appearances. *Keith v. Amende*, 1 Bush (Ky.) 455.—FOLLOWING *Gowdy v. Lyon*, 9 B. Mon. (Ky.) 112.

The acknowledgment in a bill of lading that the goods were shipped "in good order and well conditioned" is conclusive against the master and owner as to the external order and condition of the goods at the time of the shipment, unless there is evidence of fraud or mistake. *Benjamin v. Sinclair*, 1 Bailey (So. Car.) 174.

**23. Burden on receptor to show condition other than that stated in the bill.**—A bill of lading is *prima-facie* evidence that the goods were in the condition at the time of their receipt as described therein, and the burden of proof is on the carrier to show that they were different, or that he was deceived or defrauded when he signed it. *Bissel v. Price*, 16 Ill. 408.—FOLLOWED IN *Great Western R. Co. v. McDonald*, 18 Ill. 172.—*Illinois C. R. Co. v. Cowles*, 32 Ill. 116.

### 3. The Bill Considered as a Contract.

**24. Generally.\***—The contract to carry goods on the part of a carrier may be by parol or in writing, as a bill of lading. *Mobile & M. R. Co. v. Jurey*, 16 Am. & Eng. R. Cas. 132, 111 U. S. 584, 4 Sup. Ct. Rep. 566.

The terms of the contract of shipment between the shipper and carrier are represented by the bill of lading, and a shipper is bound by the terms of the bill given to him at the time of the shipment. *Bishop v. Empire Transp. Co.*, 48 How. Pr. (N. Y.) 119.

Bills of lading are mere contracts between the carrier and shipper, not representations to the public that they may advance their money thereon. (By *BURTON, A.J.*; *contra*, *PATTENSON, A.J.*) *Erb v. Great Western R. Co.*, 3 Ont. App. 446; *affirming* 42 U. C. Q. B. 90.

On its face a bill of lading is but a memorandum, and not in form a complete contract between the parties thereto. *Baltimore & P. S. Co. v. Brown*, 54 Pa. St. 77.

**25. Necessity for assent by shipper.**—A shipper of goods is not bound by a clause in a carrier's bill of lading given on receipt of goods for transportation, limiting the common-law liability of the carrier, unless the shipper assents to the same. *Erie & W. Transp. Co. v. Dater*, 91 Ill. 195. *Merchants' Despatch Transp. Co. v. Theilbar*, 86 Ill. 71.

A company cannot limit its liability by inserting a provision in a through bill of lading providing that in case of loss or damage the remedy should be against the company only in whose hands the goods might be at the time of such loss or injury, and sending it to the shipper after the goods were shipped under a condition making it liable as at common law, and where the bill of lading was neither agreed to nor signed by the shipper. *Central R. Co. v. Dwight Mfg. Co.*, 75 Ga. 609.

**26. What constitutes assent by the shipper.**—(1) *Generally.*—The fact that a shipper sent a freight contract limiting the carrier's liability under a misapprehension of its contents—it having been executed in duplicate, and one copy retained by him—will not in the absence of fraud or undue advantage by the carrier vitiate the limit-

\* See ante, 12.

† See post, 31.

tation after the contract has been acted upon by both parties. *St. Louis, I. M. & S. R. Co. v. Weakly*, 35 Am. & Eng. R. Cas. 635, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. Rep. 134.

Proof that shippers have bills of lading printed according to forms furnished by the carrier, and that they are in the habit of filling them up themselves and sending them to the station with goods, to be signed by the agent and returned, is conclusive that they have not entered into a contract for the shipment of goods under any threat or compulsion. *Lawrence v. New York, P. & B. R. Co.*, 36 Conn. 63.

At a time when a railroad company had but little rolling stock, it refused to ship except upon contracts limiting its liability; and agents of connecting lines, being informed of the facts, used bills of lading containing the same provision. A shipper went to the agents of a connecting road, who were also agents of the shipper, got a blank bill of lading, filled it up himself, and got it signed. Held, that, as both parties had a fair opportunity to understand its terms, the bill of lading constituted an express contract by which the shipper, as well as the road, was bound. *Wallace v. Matthews*, 39 Ga. 617.

Where a carrier attempts to prove that the shipper had knowledge of and assented to the terms of a bill of lading, it is competent to prove all the circumstances surrounding the transaction which have any legitimate tendency to establish such knowledge or assent. *Lake Shore & M. S. R. Co. v. Davis*, 16 Ill. App. 425.

(2) *Acceptance without objection.*—The acceptance of a bill of lading by a shipper, with knowledge of its contents, makes it a binding contract, and defines the rights and liabilities of the parties to it. *Van Etten v. Newton*, 134 N. Y. 143, 31 N. E. Rep. 334, 45 N. Y. S. R. 768.

Where, upon the delivery of goods to a carrier for transportation, and before shipment, a receipt or bill of lading is delivered to the shipper and received by him without objection, he is chargeable with notice of its contents and is bound by its terms; prior parol negotiations cannot be resorted to to vary them. *Hill v. Syracuse, B. & N. Y. R. Co.*, 73 N. Y. 351; reversing 8 Hun 296.—EXPLAINING *Bostwick v. Baltimore & O. R. Co.*, 45 N. Y. 712. FOLLOWING *Germania Fire Ins. Co. v. Memphis & C. R. Co.*, 72 N. Y. 90.

1 D. R. D.—39.

If a shipper accepts a receipt or bill of lading limiting a carrier's liability, with full knowledge of its terms, intending to assent thereto, it becomes his contract as fully as if he had signed it. *Adams Exp. Co. v. Haynes*, 42 Ill. 89.

If a shipper, with full knowledge of the conditions of a bill of lading containing a limitation of liability, assents to and accepts the same as the contract under which the goods are shipped, it will constitute a binding contract which will control the rights and liabilities of the parties. *Merchants' Despatch Transp. Co. v. Leysor*, 89 Ill. 43.

The acceptance of a bill of lading containing a restriction of the carrier's liability and the previous practice of giving and receiving similar bills of lading, are evidence tending to show that the limitation of liability therein was assented to by the shipper, but neither one nor both such facts would be conclusive evidence thereof. *Erie & W. Transp. Co. v. Dater*, 91 Ill. 195.—DISTINGUISHING *Openheimer v. U. S. Express Co.*, 69 Ill. 62; *Field v. Chicago & R. I. R. Co.*, 71 Ill. 458. EXPLAINING *Merchants' D. & T. Co. v. Moore*, 88 Ill. 138.

Where a shipper accepts from a carrier a bill of lading containing a stipulation to the effect that the company should be exempted from injury to the goods occurring beyond the terminus of their own line, assent will be presumed upon the part of the shipper in the absence of fraud or mistake, and he will not be permitted to show that he was ignorant of the contents of the bill. *Mulligan v. Illinois C. R. Co.*, 36 Iowa, 181, 2 Am. Ry. Rep. 322.—FOLLOWING *Muschamp v. Lancaster & P. J. R. Co.*, 8 M. & W. 421; *Angle v. Mississippi M. R. Co.*, 9 Iowa, 487. NOT FOLLOWING *American Merchants' U. Exp. Co. v. Schier*, 55 Ill. 140.—REVIEWED IN *St. Louis, K. C. & N. R. Co. v. Cleary*, 16 Am. & Eng. R. Cas. 122, 77 Mo. 634, 46 Am. Rep. 13.

A through bill of lading, advantageous to both, received by the plaintiff without objection, stipulating that the cotton was to be shipped "at company's convenience," is evidence of plaintiff's assent to the restriction of defendant's common-law liability, equivalent to an express agreement, and affects plaintiff with legal notice of its terms. *Whitehead v. Wilmington & W. R. Co.*, 9 Am. & Eng. R. Cas. 168, 87 N. Car. 255.

(3) *After negotiation or transfer.*—Where

a shipper had ample opportunity to examine bills of lading before accepting them, and could have expressed his consent to their terms if he had so desired, his failure to do so, followed by his delivery of the bills to one from whom he receives advances thereon, is good ground for the conclusion that he fully approved of their terms. *Bishop v. Empire Transp. Co.*, 48 How. Pr. (N. Y.) 119.

Assent to and ratification of the terms of a bill of lading made out after the shipment, which might otherwise not be binding, is shown where it is forwarded to the consignees and indorsed to the shippers, who received it without objection and entered the goods in the custom house thereunder. *Rubens v. Ludgate Hill Steamship Co.*, 20 N. Y. Supp. 481.—QUOTING *Kenney v. New York C. & H. R. R. Co.*, 125 N. Y. 422, 26 N. E. Rep. 626.

The shipper's assent is conclusively presumed to conditions inserted in the body of a bill of lading, when he has had an opportunity to know its contents, has received it at the time of shipment, and the carrier has used no unfair means to deceive. If the conditions are all in small type they are not void for that reason alone. *Ryan v. Missouri, K. & T. R. Co.*, 23 Am. & Eng. R. Cas. 703, 65 Tex. 13.

**27. Assent notwithstanding failure to read bill.\***—When the owner of goods accepts a receipt from the carrier he is conclusively presumed, in the absence of fraud or imposition, to have assented to all the terms and conditions contained in it, and he cannot afterwards be heard to say that he did not read the receipt and did not know its contents. *Tex. & P. R. Co. v. Scrivener*, 2 Tex. App. (Civ. Cas.) 284. *Grace v. Adams*, 100 Mass. 505.—DISTINGUISHING *Brown v. Eastern R. Co.*, 11 Cush. (Mass.) 97; *Malone v. Boston & W. R. Co.*, 12 Gray (Mass.) 388; *Buckland v. Adams Exp. Co.*, 97 Mass. 124; *Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462.—DISAPPROVED IN *American Merchants' U. Exp. Co. v. Schier*, 55 Ill. 140. DISTINGUISHED IN *Blossom v. Dodd*, 43 N. Y. 264; *Madan v. Sherrard*, 10 J. & S. (N. Y.) 353.

In the absence of fraud or mistake a bill of lading containing special stipulations, signed by the shipper, is conclusive as to

\* When shipper bound by conditions in bill of lading limiting carrier's liability, whether he reads them or not, see note, 29 AM. REP. 166.

the terms of the contract, and he cannot invalidate it by showing that he signed it without reading it, and that his animals were already on the cars. *Western R. Co. v. Harwell*, 45 Am. & Eng. R. Cas. 358, 91 Ala. 340, 8 So. Rep. 649.

An express stipulation in a bill of lading, limiting the carrier's liability to loss or injury suffered on his own road, is binding on the consignor notwithstanding his ignorance and inability to read, when it is not shown that the carrier was informed of such ignorance or was asked to read and explain the bill of lading. *Jones v. Cincinnati, S. & M. R. Co.*, 45 Am. & Eng. R. Cas. 321, 89 Ala. 376, 8 So. Rep. 61.

Where goods are delivered to a carrier for transportation, and a bill of lading or receipt is given before the goods are shipped, the shipper is bound to examine it and ascertain its contents, and if he accepts it without objection he is bound by its terms. He cannot set up ignorance of its contents, and resort cannot be had to prior parol evidence to vary them; and to take the case out of this general rule it must appear that before the delivery of the bill of lading the goods had been shipped, so that the shipper could not have reclaimed them if he had objected to the terms of the bill of lading. *Germania Fire Ins. Co. v. Memphis & C. R. Co.*, 72 N. Y. 90, 28 Am. Rep. 115; *affirming 7 Hun* 233.—DISTINGUISHING *Bostwick v. Baltimore & O. R. Co.*, 45 N. Y. 712.—FOLLOWED IN *Hill v. Syracuse, B. & N. Y. R. Co.*, 73 N. Y. 351.

**28. Assent notwithstanding failure to sign bill.\***—A shipper of goods need not necessarily sign a bill of lading in order to assent thereto and be bound by its terms. *Piedmont Mfg. Co. v. Columbia & G. R. Co.*, 16 Am. & Eng. R. Cas. 194, 19 So. Car. 353. *Adams Exp. Co. v. Haynes*, 42 Ill. 89.

The consignor of goods who accepts a bill of lading signed by the carrier's agent is bound by its terms though he does not sign it; and the terms of the bill of lading cannot be contradicted by parol evidence. *Cincinnati, H. & D. R. Co. v. Pontius*, 19 Ohio St. 221.

**29. Acceptance of bill by shipper's agent.**—The agent of a shipper may accept and take a bill of lading limiting carrier's liability when he has authority to ship the

\* See ante, 6.

goods and contract as to the terms and conditions of the shipment. *Foot v. New York & N. E. R. Co.*, 76 *Hun* (N. Y.) 23, 27 *N. Y. Supp.* 611.

**30. What does not constitute assent by shipper.**—The assent of a shipper to the conditions in a bill of lading limiting the carrier's liability will not be inferred from the mere fact of acceptance of the bill without objection, and this without regard to the fact whether the bill of lading is used in trade wholly within this state, or in interstate trade, or in foreign commerce. *Erie & W. Transp. Co. v. Dater*, 91 *Ill.* 195.

By the law of Massachusetts, in order to limit the carrier's common-law liability by a clause in the bill of lading, the bill of lading must be taken by the consignor, without dissent, at the time of the delivery of the property for transportation. When given a few days after the delivery of the goods, and while they are in transit, such a clause, not assented to by the consignee, will not be binding on the latter. *Michigan C. R. Co. v. Boyd*, 91 *Ill.* 268.

Assent by the shipper to a provision in a bill of lading will not be presumed where the bill, being incomplete at the time of the delivery of the goods to the carrier, was not delivered to the consignor at that time, but was subsequently corrected and forwarded by mail to him at the place of destination. *Louisville & N. R. Co. v. Meyer*, 27 *Am. & Eng. R. Cas.* 44, 78 *Ala.* 597.

Mere delivery of a bill of lading with printed conditions thereon, attempting to limit the carrier's liability, raises no presumption that the shipper knew of and assented to such limitation; but in order to establish a special contract such knowledge and assent must be established by additional evidence. *Western Transit Co. v. Hosking*, 19 *Ill. App.* 607.—QUOTED IN *Hartmann v. Louisville & N. R. Co.*, 39 *Mo. App.* 88.

In an action against a carrier to recover for goods lost the evidence for plaintiff tended to prove that the goods were shipped under a previous verbal agreement, without special exemptions in favor of the carrier, and that, after the goods were in transit, the bill of lading containing such exemptions was handed to the shipper, who, without examination or objection, forwarded it to the consignee, who made use of the same to receive and sell the goods not lost, and accounted to the shipper for the proceeds.

*Held*, that it was error to charge the jury that such acts of the consignor and consignee were conclusive on the former, and bound him by the conditions contained in the bill, it appearing that he had no knowledge of such conditions, and never, in fact, assented to them. *Gaines v. Union T. & I. Co.*, 28 *Ohio St.* 418, 14 *Am. Ry. Rep.* 158.—FOLLOWED IN *Baltimore & O. R. Co. v. Campbell*, 36 *Ohio St.* 647.

**31. Presumption of assent by shipper.**\*—Acceptance of a bill of lading by a shipper which contains provisions limiting the carrier's liability, and retaining it without objection, raises a presumption that the shipper knew its contents and assented thereto. *Dillard v. Louisville & N. R. Co.*, 2 *Lea* (Tenn.) 288.—QUOTED IN *Coward v. East Tenn., V. & G. R. Co.* 16 *Lea* (Tenn.) 225, 57 *Am. Rep.* 226.—*Merchants' Dispatch Transp. Co. v. Bloch*, 35 *Am. & Eng. R. Cas.* 579, 86 *Tenn.* 392, 6 *Am. St. Rep.* 847, 6 *S. W. Rep.* 881.

Acceptance of a bill of lading by a shipper containing provisions limiting the carrier's liability authorizes the latter to infer assent thereto by the shipper, and the shipper will be bound by it so far as a loss or injury is not the result of the carrier's negligence. *Hoadley v. Northern Transp. Co.*, 115 *Mass.* 304.—FOLLOWING *Grace v. Adams*, 100 *Mass.* 505. NOT FOLLOWING *Adams Exp. Co. v. Haynes*, 42 *Ill.* 89; *American Merchant's U. Exp. Co. v. Schier*, 55 *Ill.* 140; *Illinois C. R. Co. v. Frankenberg*, 54 *Ill.* 88.

By accepting a bill of lading without reading it or without objection to or protest against a contract therein limiting the liability of the carrier, the shipper will be presumed to have assented to its terms; but the shipper is not bound to accept such a bill of lading. *Louisville & N. R. Co. v. Brownlee*, 14 *Bush* (Ky.) 590.—QUOTING *Mulligan v. Illinois C. R. Co.*, 36 *Iowa*, 181, 2 *Am. Ry. Rep.* 322; *McMillan v. Michigan S. & N. I. R. Co.*, 16 *Mich.* 79.

Acceptance of a bill of lading at the time of delivery of goods to a carrier, containing a stipulation limiting the liability of the company to losses occurring upon its own line, is presumptive evidence that the shipper read the bill and acquiesced therein. *Louisville & N. R. Co. v. Meyer*, 27 *Am. & Eng. R. Cas.* 44, 78 *Ala.* 597.

Where a shipper fills up a blank form for

\* See *ante*, 26.

shipping directions, which contains the same conditions limiting the carrier's liability as a bill of lading which he receives from the carrier, a strong presumption is raised that he has knowledge of, and has assented to, such conditions; and an instruction to the effect that he is not bound by such limitations unless his attention was called to them at the time he received it, is error. *Lake Shore & M. S. R. Co. v. Davis*, 16 Ill. App. 425.

Plaintiff, a shipper of goods, sent a bill of lading made out to be signed and returned, which provided that the goods were to be delivered to the consignee "at Detroit, Mich.," but the company's agent inserted the words "Toledo for," so as to make it read to be delivered "at Toledo, for Detroit, Mich.," which were not observed until after a loss of the property. Held, that the shipper was presumed to have assented to this change by not dissenting within a reasonable time. *Muller v. Cincinnati, H. & D. R. Co.*, 2 Cin. Super. Ct. 280.—DISTINGUISHING *Southern Exp. Co. v. Moon*, 39 Miss. 822; *Adams Exp. Co. v. Nock*, 2 Duv. (Ky.) 562. REVIEWING *Van Toll v. South Eastern R. Co.*, 12 C. B. N. S. (104 E. C. L.) 75; *Grace v. Adams*, 100 Mass. 505.

The assent of the shipper to conditions in a bill of lading or other contract for the carriage of goods, limiting the carrier's liability, is binding upon him when the loss happens without fault or negligence of the carrier; but such assent will not be implied or presumed from facts and circumstances which do not clearly show an assent to such conditions in the contract on which the action is founded. *Pittsburgh, C. & St. L. R. Co. v. Barrett*, 3 Am. & Eng. R. Cas. 256, 36 Ohio St. 448.—FOLLOWED IN *Baltimore & O. R. Co. v. Campbell*, 36 Ohio St. 647.

**32. Shipper's assent is a question of fact for the jury.**—Whether a shipper knew of the conditions of a bill of lading and assented thereto, are questions for the jury. *Lake Shore & M. S. R. Co. v. Davis*, 16 Ill. App. 425. *Merchants' Despatch Transp. Co. v. Leysor*, 89 Ill. 43; *Merchants' Despatch Transp. Co. v. Theilbar*, 86 Ill. 71.

And the question must be determined upon outside evidence, and upon all the facts and circumstances of the case. *Adams Exp. Co. v. Haynes*, 42 Ill. 89.—QUOTING *Michigan C. R. Co. v. Hale*, 6 Mich. 244.—FOLLOWED IN *American Merchants' U. Exp.*

*Co. v. Schier*, 55 Ill. 140; *Anchor Line v. Dater*, 68 Ill. 369. NOT FOLLOWED IN *Hoadley v. Northern Transp. Co.*, 115 Mass. 304.

And this rule applies where a case is tried by the court without a jury. *Field v. Chicago & R. I. R. Co.*, 71 Ill. 458.—DISTINGUISHED IN *Erie & W. Transp. Co. v. Dater*, 91 Ill. 195.

Where a bill of lading is given, limiting the carrier's liability to its own line, the question whether the shipper understood and assented thereto is for the jury. *Ohio & M. R. Co. v. Emrich*, 24 Ill. App. 245.

Where a bill of lading or receipt is given by the carrier, but not signed by the shipper, which contains provisions limiting the carrier's liability, it is a question of fact for the jury whether the shipper had notice of the conditions and assented thereto; but where the goods were shipped under a written contract signed by the shipper also, the contract is to be construed by the court as any other written instrument. *Coles v. Louisville, E. & St. L. R. Co.*, 41 Ill. App. 607.

**33. Burden of proving shipper's assent.**—It is error for the court to charge that the burden is upon a carrier to prove the shipper's knowledge of and assent to the stipulations of the bill of lading which he has accepted without objection; but such error is not material where the stipulation to which the charge applied was void. *Merchants' Despatch Transp. Co. v. Bloch*, 35 Am. & Eng. R. Cas. 579, 86 Tenn. 392, 6 Am. St. Rep. 847, 6 S. W. Rep. 881.

**34. Rules of interpretation, generally.**—(1) *Generally.*—A bill of lading is a contract, the language of which is subject to the rules of construction which govern other contracts. *Logan v. Mobile Trade Co.*, 46 Ala. 514. *Lucisco Oil Co. v. Pennsylvania R. Co.*, 2 Pittsb. (Pa.) 477. *Wayland v. Mosely*, 5 Ala. 430. *Robinson v. Merchants' Despatch Transp. Co.*, 45 Iowa 470.

The whole of a bill of lading, like other written contracts, is to be construed together; and where a bill of lading contains a provision in its caption that the goods were to be sent "through without transfer, in cars owned and controlled by the company," the carrier is not entitled to the benefit of another provision exempting it from liability from loss by fire, where it appears that a loss occurred by fire by reason of a change of cars. *Robinson v. Merchants' De-*

*spatch Transp. Co.*, 45 Iowa 470.—QUOTING *Maghee v. Camden & A. R. Co.*, 45 N. Y. 514.—DISTINGUISHED IN *Stewart v. Merchants' Transp. Co.*, 47 Iowa 229.

(2) *Illustrations*.—The clause "he [consignee] paying freight," in a bill of lading, is introduced for the benefit of the carrier, and does not exempt the consignor from liability. *Layng v. Stewart*, 1 *Watts & S. (Pa.)* 222.

The term "carriage," in a bill of lading, does not include a street-railroad car. *Cream City R. Co. v. Chicago, M. & St. P. R. Co.*, 21 *Am. & Eng. R. Cas.* 70, 63 *Wis.* 93, 23 *N. W. Rep.* 425, 53 *Am. Rep.* 267.

A bill of lading for the transportation of goods from Rotterdam to London, *via* Harwich—held, to be such a special contract as would, under § 6 of the Carrier's Act, deprive the railway company of the protection offered to it by that act, owing to the neglect of the owner to declare the value of the goods. *Baxendale v. Great Eastern R. Co.*, 38 *L. J. Q. B.* 137, *L. R.* 4 *Q. B.* 244, 17 *W. R.* 412.

**35. Construed strictly against the carrier.**—A bill of lading given by a carrier for the safe transportation and delivery of goods will be construed most strongly against him, and in favor of the shipper, in every case of doubt. *Alabama G. S. R. Co. v. Thomas*, 89 *Ala.* 294, 7 *So. Rep.* 762.

If the contract of a railroad company, as expressed in its bill of lading for shipping goods, leaves it in doubt whether the company was exempted from liability for loss happening by fire, the doubt must be resolved against the company. *Little Rock, M. R. & T. R. Co. v. Talbot*, 18 *Am. & Eng. R. Cas.* 598, 39 *Ark.* 523.

**36. Law of place.**—Where goods were received by a railroad company in another state, where it is lawful for carriers to limit their liability, to be shipped to Iowa, where such limitation is not permitted, in case of a loss without the fault of the carrier before the goods reach Iowa, the contract will be held valid. *Talbot v. Merchants' Despatch Transp. Co.*, 41 *Iowa* 247.—REVIEWING *McDaniels v. Chicago & N. W. R. Co.*, 24 *Iowa* 412.—FOLLOWED IN *Hazel v. Chicago, M. & St. P. R. Co.*, 82 *Iowa* 477. REVIEWED IN *Hartmann v. Louisville & N. R. Co.*, 39 *Mo. App.* 88.—*Western & A. R. Co. v. Exposition Cotton Mills*, 35 *Am. & Eng.*

*R. Cas.* 602, 81 *Ga.* 522, 7 *S. E. Rep.* 916, 2 *L. R. A.* 102.

Provisions in a bill of lading which are authorized by the law of a state in which the company is incorporated will, where the bill of lading is accepted by the shipper, constitute a special contract and be valid. *Farnham v. Camden & A. R. Co.*, 55 *Pa. St.* 53.

An action in Pennsylvania brought on a bill of lading issued in New York is governed, as to matters of contract, by the law of the latter state, and, as to the remedy, by the law of the former. *Brooke v. New York, L. E. & W. R. Co.*, 21 *Am. & Eng. R. Cas.* 64, 108 *Pa. St.* 529, 1 *All. Rep.* 206.

A clause in a through bill of lading, exempting the carrier "from damages or loss by fire while in depot," made in the state of Tennessee by a connecting road, being illegal in Texas, will not be passed upon in the absence of allegation and proof that such limitation was legal where executed. *International & G. N. R. Co. v. Moody*, 71 *Tex.* 614, 9 *S. W. Rep.* 465.

It will not be presumed that the parties to a bill of lading intended to have their contract governed by different laws, according as a loss might occur in one or in another state, unless circumstances were proved showing such an intention. *Ryan v. Missouri, K. & T. R. Co.*, 23 *Am. & Eng. R. Cas.* 703, 65 *Tex.* 13.

When there are no circumstances attending the transaction, except the mere execution, delivery, and acceptance of a bill of lading, the safest rule to arrive at the intention of the parties is that which upholds, rather than that which defeats, the contract; and the laws of the state under which the contract is valid should be applied. *Ryan v. Missouri, K. & T. R. Co.*, 23 *Am. & Eng. R. Cas.* 703, 65 *Tex.* 13.

If a bill of lading is given in one state for the transportation of goods from a point in that state to a place in another state, and the *lex loci contractus* is that a provision contained in a bill of lading and limiting the common-law liability of the carrier is illegal unless the shipper knew of and assented to such provision, and that the mere acceptance of the bill of lading is not, of itself, evidence of such assent, the sufficiency of the assent is a matter appertaining to the validity and effect of the contract, and is to be adjudged in a foreign tribunal in accordance with the law of the place of

\* See *post*, 88-107.



contract, and not the law of the forum. *Hartmann v. Louisville & N. R. Co.*, 39 Mo. App. 88.

Where a party claims to recover on a bill of lading issued in another state, the burden is on him to show its validity. *International & G. N. R. Co. v. Moody*, 71 Tex. 614, 9 S. W. Rep. 465.

**37. Construction of the bill a question of law.**—Where goods are received by a carrier for transportation, and a bill of lading is given to the shipper showing the contract, it is error for the court, by an instruction, to leave it to the jury to say what the contract was. The court should tell the jury what, by the bill of lading, the contract was. *Wabash, St. L. & P. R. Co. v. Jaggerman*, 23 Am. & Eng. R. Cas. 680, 115 Ill. 407, 4 N. E. Rep. 641. Compare *Coles v. Louisville, E. & St. L. R. Co.*, 41 Ill. App. 607. *Halff v. Allyn*, 60 Tex. 278.

**38. Construction as to point of destination, route, etc.**—A bill of lading for goods to a railroad depot, the shipping point for a neighboring town for which they were destined, cannot determine that depot as the destination contemplated between the buyer and seller. Were it otherwise, the legal effect of the bill of lading would be for the court and not for the jury. *Halff v. Allyn*, 60 Tex. 278.

Goods were received in New York marked to a consignee in Memphis, Tenn., but the bill of lading given recited that they were to be transported to Philadelphia and there delivered to the Pennsylvania Railroad, "all rail to Cincinnati, Ohio." The goods were duly received in Cincinnati, and forwarded by water to Memphis, but were lost on the voyage. Held, that *prima facie* the ultimate destination of the goods was Memphis and not Cincinnati; and that, in the absence of evidence to the contrary, the agents were justified in forwarding them to Memphis, and were not liable to the owners for their loss. *Brown v. Mott*, 22 Ohio St. 149.

Apples were shipped at Staunton, under a bill of lading, by which the company acknowledged their receipt, "to be forwarded to East St. Louis station, on its line," and under the heading "Marks and Destination," in the bill of lading, was written, "G. A. B., St. Louis, Mo." Held, that the words in the bill of lading, "to be forwarded to East St. Louis station, on its line," were not sufficient to overcome the implied undertaking, arising from the "marks and destination," to carry

to St. Louis, Mo. *Wabash, St. L. & P. R. Co. v. Jaggerman*, 23 Am. & Eng. R. Cas. 680, 115 Ill. 407, 4 N. E. Rep. 641.

In case of a shipment of goods, the route and point of delivery called for by the bill of lading must control, though differing from the marks on the boxes of goods shipped, and must be taken to be the contract between the parties and the shipper. *Moore v. Henry*, 18 Mo. App. 35.

**39. As showing who is consignee.—Demurrage.**—The master of a vessel gave a bill of lading for coal, reciting that it was to be carried to a certain point and there delivered to a railroad company, or order, "they paying freight for the same at \$1.40 per ton; account J. P. S. Fitchburgh." Held, that the railroad company was not liable as consignee for demurrage charges. *Miner v. Norwich & W. R. Co.*, 32 Conn. 91.

**40. Parol evidence to contradict or vary, generally.**\*—(1) *Statement of the rule.*—Where there is no evidence of a special contract, a bill of lading will be held to constitute the whole contract between the shipper and the carrier. *Giles v. Fargo*, 28 J. & S. (N. Y.) 117.—FOLLOWING *Falkenau v. Fargo*, 3 J. & S. 332; affirmed in 55 N. Y. 642.

Where, in an action to recover for goods lost by the carrier, a bill of lading is produced, such production is an admission that the undertaking of the carrier is in writing; and parol proof that the goods carried were shipped by the shipper, as the agent of the plaintiff, is not admissible. *Peck v. Dinsmore*, 4 Port. (Ala.) 212.

A bill of lading, when executed and delivered, becomes the sole expositor of the terms of the contract between the parties, and its terms cannot be varied by proof of a verbal agreement to allow or refund a rebate; but a modification of this principle gives effect to a general order published and posted by the carrier, allowing reduced rates for certain classes of freight to be used for particular purposes, directing the regular rates to be first paid, and promising to refund the overcharge on application. *Louisville & N. R. Co. v. Fulgham*, 91 Ala. 555, 8 So. Rep. 803.

The bills of lading being silent as to the

\* See ante, 13.

Effect of bill of lading as evidence, and how far may be varied or contradicted by parol, see note, 38 AM. DEC. 409; note, 40 AM. & ENG. R. CAS. 90.

time within which delivery was to be made at New York and Philadelphia, the law presumes it was to be made in a reasonable time, and parol evidence is not admissible to negative this presumption by showing that a definite and specific time was agreed upon either expressly or by implication. *Central R. & B. Co. v. Hasselkus*, (Ga.) 55 Am. & Eng. R. Cas. 586, 17 S. E. Rep. 838.

Where a bill of lading contains a stipulation as to the amount to be charged for transportation, it is conclusive upon the shipper; and where the amount to be charged is not stated in the bill of lading, the law implies that the carrier shall have a reasonable compensation, such as is commonly or customarily charged others for like services under like conditions, and evidence of a previous oral contract fixing the charge is not admissible. *Louisville, E. & St. L. R. Co. v. Wilson*, 40 Am. & Eng. R. Cas. 85, 119 Ind. 352, 21 N. E. Rep. 341.

If a bill of lading does not stipulate the price to be paid for the carriage of the goods, the law imports into it the agreement that the compensation shall be reasonable, and such as is customarily charged others for like service under like conditions, and parol testimony is not admissible to prove a verbal agreement as to the rate. *Louisville, E. & St. L. R. Co. v. Wilson*, 40 Am. & Eng. R. Cas. 85, 119 Ind. 352, 21 N. E. Rep. 341.

A carrier and his customer do not stand on the same plane, or footing of equality, and in many cases the latter has no alternative as to the kind of bill he will receive, and cannot be estopped by its contents. *Lallande v. His Creditors*, 45 Am. & Eng. R. Cas. 301, 42 La. Ann. 705, 7 So. Rep. 895.

Parol evidence is inadmissible to show that a company was not a common carrier for the whole distance stated in the bill of lading, as the distance of carriage mentioned therein. *Chouteaux v. Leech*, 18 Pa. St. 224.

(2) *Illustrations*.—Where a shipper accepts a bill of lading which designates no route by which the consignment is to be forwarded after reaching the terminus of the contracting company's line, it is not competent to prove a prior parol agreement to forward by a particular line. *Snow v. Indiana, B. & W. R. Co.*, 28 Am. & Eng. R. Cas. 77, 109 Ind. 422, 9 N. E. Rep. 702.—**DISTINGUISHING** *Guillaume v. General Transp. Co.*, 100 N. Y. 491.—**REVIEWED IN**

*McAbsher v. Richmond & D. R. Co.*, 108 N. Car. 344.

The shipper, in such case, authorizes the first carrier to select any usual or reasonably direct and safe route by which to forward the consignment beyond its line, and this provision, being imported into the contract by law, is as unassailable by parol as the express terms of the contract. *Snow v. Indiana, B. & W. R. Co.*, 28 Am. & Eng. R. Cas. 77, 109 Ind. 422, 9 N. E. Rep. 702.

Where a bill of lading is given to a shipper showing that the goods are to be transported to the end of the carrier's line, the shipper will not be permitted to testify to an oral contract with the company's agent at the place of shipment by which the goods were to be transported to a point beyond the terminus of the carrier's line. *Hewett v. Chicago, B. & Q. R. Co.*, 18 Am. & Eng. R. Cas. 568, 63 Iowa 611, 19 N. W. Rep. 790.

Where a shipper of property takes from the carrier a bill of lading, receipt, or other voucher expressing the terms and conditions upon which the property is to be transported, the writing, in the absence of proof of fraud or mistake, must be taken as the evidence, and the sole evidence, of the final agreement of the parties, and by it their duties and liabilities must be regulated. Resort cannot be had to prior parol negotiations to vary its terms. *Long v. New York C. R. Co.*, 50 N. Y. 76, 3 Am. Ry. Rep. 350.—**DISTINGUISHING** *Bostwick v. Baltimore & O. R. Co.*, 45 N. Y. 712.—**FOLLOWED IN** *Hinckley v. New York C. & H. R. R. Co.*, 56 N. Y. 429; *Dana v. New York C. & H. R. R. Co.*, 50 How. Pr. (N. Y.) 428.

A bill of lading stated an agreement to transport lumber from P. to C. for specified rates per thousand feet. *Held*, that parol evidence was inadmissible to prove that these rates were to be demanded if the sale of the lumber should produce so much; but, if not, that the charge for freight should not exceed the sum realized from the sale. *Gardner v. Chace*, 2 R. I. 112.

A bill of lading imported on its face an absolute undertaking. On the back thereof were printed rules and regulations that modified such undertaking, but it did not appear that the shippers had knowledge thereof. *Held*, that evidence modifying such undertaking should come from the party apparently bound thereby. *Newell v. Smith*, 49 Vt. 255, 17 Am. Ry. Rep. 100.

Where a freight bill is signed by certain

persons with the word "agents" after their names, and contains nothing on its face to show that it is the contract of a railroad company, parol evidence is inadmissible to show it to be such. *Dixon v. Columbus & I. R. Co.*, 4 Biss. (U. S.) 137.

A railroad company received wheat, and gave a bill of lading reciting that it was to be carried to the seacoast, and from there to a foreign port "upon the vessel called the 'Argosy,' or other vessel of equal class for marine insurance." Held, that the bill of lading constituted the contract, and that the railroad company had a right to ship by any vessel of equal class as to insurance with the "Argosy," and that it was not competent to prove by parol that the shipment was to be in the "Argosy" only. *Helliwell v. Grand Trunk R. Co.*, 10 Biss. (U. S.) 170, 7 Fed. Rep. 68.

Parol testimony is inadmissible in the following instances:

To vary the terms of that portion of a bill of lading which constitutes the contract part as distinguished from the bill as a receipt. *Van Etten v. Newton*, 134 N. Y. 143, 45 N. Y. S. R. 768, 31 N. E. Rep. 334. *Germania Fire Ins. Co. v. Memphis & C. R. Co.*, 72 N. Y. 90, 28 Am. Rep. 115; affirming 7 Hun 233. *Louisville & N. R. Co. v. Fulgham*, 91 Ala. 555, 8 So. Rep. 803. *Grace v. Adams*, 100 Mass. 505. *Cox v. Peterson*, 30 Ala. 608.

To contradict what a bill of lading clearly expresses. *Baltimore & P. Steamboat Co. v. Brown*, 54 Pa. St. 77.

To contradict or vary a bill of lading so far as it relates to the carrier's liability for loss. *Arnold v. Jones*, 26 Tex. 335.

To contradict or vary the terms of a bill of lading when one accepts it as embracing the terms of the contract. *Cincinnati, U. & Ft. W. R. Co. v. Pearce*, 28 Ind. 502.

To show that a shipper did not read the provisions in a bill of lading delivered to him. *Grace v. Adams*, 100 Mass. 505.

To add to or vary, in behalf of the shipper, the terms of a special contract contained in a bill of lading accepted and signed by him before the goods were shipped, it not appearing that his signing was the result of fraud or mistake. *Richmond & D. R. Co. v. Shomo*, 90 Ga. 496.—DISTINGUISHING *Purcell v. Southern Exp. Co.*, 34 Ga. 315; *Bostwick v. Baltimore & O. R. Co.*, 45 N. Y. 712; *Hamilton v. Western N. C. R. Co.*, 96 N. Car. 398.

**41. Parol evidence to vary in cases of fraud or mistake.**—In cases of fraud or mistake in bills of lading, parol evidence is admissible to contradict or vary the terms of the instrument, just as in other written contracts. *Long v. New York C. R. Co.*, 50 N. Y. 76, 3 Am. Ry. Rep. 350. *Baltimore & P. Steamboat Co. v. Brown*, 54 Pa. St. 77. *Louisville, E. & St. L. R. Co. v. Wilson*, 40 Am. & Eng. R. Cas. 85, 119 Ind. 352, 21 N. E. Rep. 341. *Grace v. Adams*, 100 Mass. 505. *Richmond & D. R. Co. v. Shomo*, 90 Ga. 496.

That a clause in the bill of lading, limiting the responsibility of the carrier, was inserted or left in the printed bill of lading by mistake may be proved by circumstantial as well as positive evidence. The question as to mistake was for the jury; the burden of proof as to it was on plaintiffs who alleged it. *Chouteaux v. Leech*, 18 Pa. St. 224.

Where the Columbus & Indianapolis Railway is sued for the loss of goods, a bill of lading which contains nothing to indicate that the defendant road constituted a part of the route, except the initials and words "I. & C. Central R. R.," is not sufficient to show *prima facie* that the contract was made by the defendant company, in the absence of any allegation of a misnomer, or an offer to prove that the initials used meant the defendant company. *Dixon v. Columbus & I. R. Co.*, 4 Biss. (U. S.) 137.

**42. Parol evidence to explain.\***—Parol testimony may be received to explain a bill of lading. *Baltimore & P. Steamboat Co. v. Brown*, 54 Pa. St. 77. *Chapin v. Siger*, 4 McLean (U. S.) 37.

Evidence is competent to show that after a bill of lading had been issued the consignee had notice that the goods belonged to another and that a corrected bill of lading had been sent. *Chapin v. Siger*, 4 McLean (U. S.) 378.

Viewed as a contract a bill of lading cannot be varied or contradicted by parol evidence; but this principle does not apply to parol testimony which shows that it is the contract of other persons than him in whose name it is executed. *McTyer v. Steele*, 26 Ala. 487.

A bill of lading was issued by a common carrier for live stock received at Covington, Ky., and consigned to East St. Louis.

\* See ante, 13.

Bills of lading, as contracts, evidence to explain terms, see note, 40 Am. & Eng. R. Cas. 90.

It recited that the stock were thus consigned, and guaranteed that the through rate of freight would not exceed a specified amount. It was made out on a blank form used for ordinary merchandise, and was inappropriate for the shipment of live stock. Among its provisions was one that the packages received should be transported "to the company's freight station at \_\_\_\_\_," and that the responsibility of the company should cease at that station. *Held*, that the bill of lading was so ambiguous as to render parol evidence admissible to establish an undertaking by the company to carry the stock through to East St. Louis. *Wolfert v. Pittsburgh, C. & St. L. R. Co.*, 44 Mo. App. 330.

**43. Showing real agreement by extrinsic evidence.**—(1) *Generally.*—A bill of lading is not such a complete contract as to exclude all testimony of what is not expressed necessary to a complete contract. *Baltimore & P. Steamboat Co. v. Brown*, 54 Pa. St. 77.—FOLLOWED IN PENNSYLVANIA *R. Co. v. Berry*, 68 Pa. St. 272.

Parol testimony may be admitted to show what the real contract is, of which the bill of lading is merely a memorandum. *Baltimore & P. Steamboat Co. v. Brown*, 54 Pa. St. 77.

Parol evidence is admissible to show that a company's freight agent agreed to transport goods free from a restriction as to liability contained in the bill of lading. *Baker v. Michigan S. & N. I. R. Co.*, 42 Ill. 73.

If it appears to the court that the parties did not intend that a bill of lading should be a complete and final statement of the whole contract, then parol evidence is admissible to vary the terms of the bill of lading as to matters on which it is silent. *Merchants' Dispatch Transp. Co. v. Furthmann*, 47 Ill. App. 561.

A statement in the body of a bill of lading showing that goods were to be transported between certain points, is not conclusive when the heading of the bill shows that the goods were to be transported to another point; and acceptance of the bill of lading does not prevent the shipper from proving what the real contract was. *Saltsman v. New York, L. E. & W. R. Co.*, 65 Hun (N. Y.) 448, 48 N. Y. S. R. 55, 20 N. Y. Supp. 361.

Where goods have actually been shipped under an oral contract, the subsequent receipt of a bill of lading and the neglect of the

shipper to point out errors therein do not preclude him from showing the oral contract. *Guillaume v. General Transp. Co.*, 100 N. Y. 491, 3 N. E. Rep. 489.—DISTINGUISHED IN *Snow v. Indiana, B. & W. R. Co.*, 28 Am. & Eng. R. Cas. 77, 109 Ind. 422.

(2) *Illustrations.*—Where the shipper is impliedly bound, from the face of the bill, to pay the freight on goods, it is allowable to show that the carrier received them under an agreement with a third person to pay the freight if the latter has not paid it. *Wayland v. Mosely*, 5 Ala. 430.

Where a shipper marks goods to a certain point, and makes an oral agreement with the carrier for a shipment to that point, and a bill of lading is afterward forwarded to him containing a provision that they are not to be carried to the point agreed upon, but to a point less distant, the shipper may show by parol evidence the oral contract, and that when delivered he did not observe the change from the oral agreement; and when such oral agreement is established, the rights of the parties will be determined thereby, and not by the written bill of lading. *Missouri Pac. R. Co. v. Beeson*, 12 Am. & Eng. R. Cas. 52, 30 Kan. 298, 2 Pac. Rep. 496.—FOLLOWED IN ST. LOUIS & S. F. R. Co. v. Clark, 48 Kan. 321.

By the common law carriers are exempt from "inevitable accidents," and where no such exemption is provided for in a bill of lading, the law implies it in favor of the carrier; but such implication may be repelled by parol evidence, showing a contract on the part of the carriers guaranteeing absolutely the safe delivery of the goods. *Morrison v. Davis*, 20 Pa. St. 171.

Where goods are received marked "in cabin state-room," and receipted for as such, and an extra price is paid for being carried in the cabin, the owner may recover from the vessel for damages to the goods by reason of not being so carried, though the bill of lading was in the usual form, and the goods were not placed in the cabin. *The Star of Hope*, 2 Sawy. (U. S.) 15.

Where a bill of lading to carry cotton excepted the company's liability for loss by fire—*held*, that the shippers might show that the true contract was by parol, and contained no such exception. *Mobile & M. R. Co. v. Jurey*, 16 Am. & Eng. R. Cas. 132, 111 U. S. 584, 4 Sup. Ct. Rep. 566.

In a suit against a railroad to recover for

goods destroyed by fire, the bill of lading in evidence showed that the company was not liable for such loss, but the uncontradicted evidence showed an independent oral contract containing no exemption from liability. The rate paid was also higher than when the carrier was relieved from loss by fire. The court charged the jury that the paper read as a bill of lading contained no restriction upon the liability of the carrier. *Held*, that the instruction must be understood to mean that the bill of lading, as modified by the oral contract, and considered in connection with surrounding circumstances, contained no such restriction. *Mobile & M. R. Co. v. Jurey*, 16 *Am. & Eng. R. Cas.* 132, 111 *U. S.* 584, 4 *Sup. Ct. Rep.* 566.

The respondents sued the appellants for breach of contract to carry petroleum in covered cars from L. to H., alleging that they negligently carried the same upon open platform cars, whereby the barrels containing the oil were exposed to the sun and weather, and were destroyed. At the trial a verbal contract between plaintiffs and defendants' agent at L. was proved, by which the defendants agreed to carry the oil in covered cars with despatch. The oil was forwarded in open cars and delayed in different places, and in consequence a large quantity was lost. On the shipment of the oil a receipt note had been given which said nothing about covered cars, and which stated that the goods were subject to the conditions endorsed thereon, one of which was "that the defendants would not be liable for leakage or delays, and that the oil was carried at the owner's risk." *Held*, per Sir W. J. RITCHIE, C. J., and FOURNIER and HENRY, J. J., that the loss resulted not from any risks by the contract imposed on the owners, but from the wrongful act of the carrier in placing the oil on open cars, which act was inconsistent with the contract they had entered into, and in contravention as well of the undertaking as of their duty as carriers. Per STRONG, FOURNIER, HENRY and GWYNNE, J. J.: The evidence was admissible to prove a verbal contract to carry in covered cars, which contract the agent at L. was authorized to enter into, and the non-compliance with the provisions of that contract prevented the appellants from setting up the condition that "oil was carried at owner's risk," as exempting them from liability. *Grand Trunk R. Co. v. Fitzgerald*, 5 *Can.*

*Sup. Ct.* 204.—APPLYING *Malpas v. London & S. W. R. Co.*, L. R. 1. C. P. 336. QUOTING *Robinson v. Great Western R. Co.*, 35 L. J. C. P. 123; *Lewis v. Great Western R. Co.*, 3 Q. B. D. 195.

**44. Merger of previous negotiations, etc., in subsequent bill of lading.\***—(1) *Merger effected*.—All previous parol agreements or negotiations touching the shipment of goods are merged in a written bill of lading, made out by the carrier, delivered to the shipper, and accepted by him. *Bostwick v. Baltimore & O. R. Co.*, 55 *Barb. (N. Y.)* 137; *reversed*, it seems, in 45 *N. Y.* 712.

A bill of lading, so far as it is a contract, merges all prior and contemporaneous agreements, and, in the absence of fraud, concealment, or mistake, and when free from ambiguity, its terms or legal import cannot be explained or added to by parol. *Louisville, E. & St. L. R. Co. v. Wilson*, 40 *Am. & Eng. R. Cas.* 85, 119 *Ind.* 352, 21 *N. E. Rep.* 341.

Where a shipper's receipt, delivered to the consignor at the time of shipment, states that upon application a bill of lading will be issued at a place designated, and that the shipment will be made subject to conditions therein, the bill of lading and not the shipping receipt will embody the contract of the parties, and the consignee will be bound by the conditions of the bill. *Wilde v. Merchants' Despatch Transp. Co.*, 47 *Iowa* 272.—DISTINGUISHING *Bostwick v. Baltimore & O. R. Co.*, 45 *N. Y.* 712.

(2) *No merger*.—The rule that prior negotiations are merged in a subsequent written contract does not apply where goods have been shipped under a verbal contract, and afterward a bill of lading is given containing limitations of the carrier's liability, which is not examined by the shipper. In such case the shipper may show the actual agreement. *Bostwick v. Baltimore & O. R. Co.*, 45 *N. Y.* 712; *reversing* 55 *Barb.* 137.—FOLLOWING *Corey v. New York C. R. Co.*, April 1871 (not reported).—APPLIED in *Magnin v. Dinsmore*, 56 *N. Y.* 168, APPROVED IN *Pruitt v. Hannibal & St. J. R. Co.*, 62 *Mo.* 527. DISTINGUISHED in *Richmond & D. R. Co. v. Shomo*, 90 *Ga.* 496; *Wilde v. Merchants' Despatch Transp. Co.*, 47 *Iowa* 272; *Long v. New York C. R. Co.*, 50

\* Merger of previous parol agreement in subsequent bill of lading, see note, 30 *Am. & Eng. R. Cas.* 7.

N. Y. 76; *Germania Fire Ins. Co. v. Memphis & C. R. Co.*, 72 N. Y. 90. EXPLAINED IN *Hill v. Syracuse, B. & N. Y. R. Co.*, 73 N. Y. 351. FOLLOWED IN *Condit v. Grand Trunk R. Co.*, 54 N. Y. 500; *Lamb v. Camden & A. R. Co.*, 4 Daly (N. Y.) 483.

Where goods are shipped under a verbal agreement, such agreement is not merged in a subsequent bill of lading given, partly written and partly printed, which contains conditions limiting the carrier's liability, with a statement that by accepting it the shipper agrees to its terms; and mere acceptance of such bill of lading does not prevent the shipper from proving the actual verbal agreement under which the goods were shipped. *Schiff v. New York C. & H. R. R. Co.*, 52 How. Pr. (N. Y.) 91.

A verbal agreement to send peaches to Olean without changing the cars is not merged in a shipping bill subsequently executed, when there is no reference to such agreement in the bill. *Riley v. New York, L. E. & W. R. Co.*, 34 Hun (N. Y.) 97.

A failure to object to limitations in a bill of lading delivered in New York two days after the goods had been shipped will not, in a suit in Illinois, be held to be a waiver of a prior oral contract containing different terms. *Merchants' Despatch Transp. Co. v. Furthmann*, 47 Ill. App. 561.

A bill of lading issued by a common carrier only determines the conditions upon which the freight is to be transported after it passes under its control; it does not abrogate or annul any contract made by the common carrier before it was issued, in regard to receiving and forwarding the freight. *Hamilton v. Western N. C. R. Co.*, 30 Am. & Eng. R. Cas. 1, 96 N. Car. 398, 3 S. E. Rep. 164.—DISTINGUISHED IN *Richmond & D. R. Co. v. Shomo*, 90 Ga. 496.

The agent of a railroad company agreed to have cars ready to forward freight on a certain day. The cars were not ready on that day. Held, that the contract was not abrogated by the terms of a bill of lading issued when the freight was shipped on a subsequent day. *Hamilton v. Western N. C. R. Co.*, 30 Am. & Eng. R. Cas. 1, 96 N. Car. 398, 3 S. E. Rep. 164.—FOLLOWED IN *McAbsher v. Richmond & D. R. Co.*, 108 N. Car. 344.

The plaintiffs made an oral contract with a carrier by which the latter agreed to furnish cars for the transportation of plaintiffs' property on a certain day, but failed to

do so; a short time thereafter the carrier did ship the goods, for which it gave a bill of lading. Held, that the prior oral contract was not merged in the latter, and that the plaintiffs could maintain an action for damages for a breach thereof. *McAbsher v. Richmond & D. R. Co.*, 108 N. Car. 344, 12 S. E. Rep. 892.—FOLLOWING *Hamilton v. Western N. C. R. Co.*, 96 N. Car. 398. REVIEWING *Hopkins v. St. Louis & S. F. R. Co.*, 16 Am. & Eng. R. Cas. 126, 29 Kan. 544; *Snow v. Indiana, B. & W. V. Co.*, 28 Am. & Eng. R. Cas. 77, 109 Ind. 422.

**45. Effect of notices printed on the bill.**—In America it is generally held that a mere notice printed on the bill of lading will not bind the owner, though brought to his knowledge. *Ryan v. Missouri, K. & T. R. Co.*, 23 Am. & Eng. R. Cas. 703, 65 Tex. 13.

The liability of the carrier cannot be limited by a mere notice in the bill of lading; but if a special contract be incorporated in the bill of lading and signed by both parties, it is sufficient. *Georgia R. Co. v. Spears*, 66 Ga. 485.—QUOTED IN *Mitchell v. Georgia R. Co.*, 68 Ga. 644.

**46. Effect of memoranda in the margin of bill.**—A memorandum written on the margin of a bill of lading requiring claims for loss or damage to be presented to the delivering line within thirty-six hours after the arrival of freight is as valid as if it had been in the body of the bill of lading, and if found to be reasonable will be held binding; but such provisions are not as a matter of law held reasonable, and when set up as a defense the company must allege and prove facts which show them to be reasonable. *Brown v. Adams*, 3 Tex. App. (Civ. Cas.) 462.

**47. Effect of bill upon the manner and validity of the delivery by the carrier.**—(1) *Generally.*—A bill of lading is a contract to deliver the goods therein specified at a certain point of destination to a certain person as consignee. *Wolfe v. Myers*, 3 Sandf. (N. Y.) 7.

As between the owner and shipper of the goods and the common carrier, the bill of lading fixes and determines the duty of the latter as to the person to whom it is (at the time) the pleasure of the former that the goods shall be delivered; but there is noth-

\* Delivery of goods without requiring presentation of bill of lading, see note, 32 Am. & Eng. R. Cas. 508.



ing final or irrevocable in its nature. *Halsey v. Warden*, 25 Kan. 128.

A railroad company has no right to make a delivery of freight otherwise than in strict accordance with the bill of lading. *Pennsylvania R. Co. v. Stern*, 35 Am. & Eng. R. Cas. 551, 119 Pa. St. 24, 12 Atl. Rep. 756.

Where the space for consignee's name in a bill of lading is left blank the contract is to deliver to consignor or his assigns, and a verbal agreement between consignor and railroad company to ship goods to a third party will not authorize or excuse the delivery by the company to such person, as against an assignee of the bill of lading without notice. *Garden Grove Bank v. Humeston & S. R. Co.*, 23 Am. & Eng. R. Cas. 695, 67 Iowa 526, 25 N. W. Rep. 761.

The fact that a bill of lading contains a direction to notify a person named, on the arrival of the goods, is no indication that he has any interest therein; nor is it authority to deliver the goods to the person named, nor enough to put a person dealing with the bill of lading on inquiry. *Illinois C. R. Co. v. Southern Bank*, 41 Ill. App. 287.

Where a railroad company, following the usual custom, has issued a bill of lading for goods upon delivery to it of a warehouse receipt for them, it is a good defense to an action against it for a failure to deliver part of the goods that it delivered the whole of the goods which it received from the warehouseman; and the fact that the action is brought by an assignee of the bill of lading does not affect the company's right to plead such defense. *Hazard v. Illinois C. R. Co.*, 42 Am. & Eng. R. Cas. 455, 67 Miss. 32, 7 So. Rep. 280.

(2) *Illustrations*.—Cotton was shipped over a railroad to a seaport town, whence it was to go to a foreign country by vessel, the through bill of lading reciting that it was to be delivered in port "to the ship T. or to some other steamship company or line, or vessels chartered thereby." *Held*, that, in the absence of actual notice that the vessel T. was under a charter-party, the second railroad company was not bound to accept from that vessel a bill of lading with qualifications, as the bill of lading given by the first railroad company was not sufficient notice, either to the second railroad company or to the owner, that the vessel was under charter. *Held*, also, that the second

railroad company could maintain a libel against the vessel T. to recover the cotton, upon the master's refusal to sign a bill of lading, without adding the additional qualification, "other conditions as per charter-party." *The Torgorm*, 48 Fed. Rep. 584.

F. & Co., carriers, delivered to a railway at their station goods for conveyance addressed to the consignees. With such goods a consignment note was handed to the railway containing, in addition to the names and addresses of the consignee, the words "To the care of F. & Co." The company refused to recognize the latter words, and delivered the goods to the consignees by their own agents or other carriers. *Held*, that the words "To the care of F. & Co." imported that the goods on their arrival at the terminal stations were to be given to F. & Co. or their agents for delivery to the consignees; that as between the railway and F. & Co. the latter were the consignors; and that the company accepted the goods upon the terms stated in the consignment note and were precluded from delivering them to the consignees, and should have delivered them to F. & Co. or their agents. *Fishbourne v. Great Southern & W. R. Co.*, 2 Ry. & C. T. Cas. 224.

Cotton was shipped, and the consignors took a bill of lading, making the cotton deliverable to their order, and forwarded it with a draft to a bank for collection, with a notice to notify certain parties who appeared to be the consignees. *Held*, that it was the duty of the carrier to deliver the cotton only upon the order of the consignors, and that there was nothing in the notice to require the bank to notify the carrier not to deliver to the consignees, nor to inquire whether the cotton would be so delivered. *National Bank v. Atlanta & C. A. L. R. Co.*, 25 So. Car. 216.

A bill of lading recited that the goods were "to be delivered without delay at a certain port to a certain person named or his assigns, he or they paying freight for said goods at the rate of \$274.40, charges payable when collected by boat; charges to be collected," the value of the goods being stated. *Held*, that if the carrier delivered the goods without collecting such charges he is liable therefor to the shipper. *Meyer v. Lemcke*, 31 Ind. 208. See also *Canfield v. Northern R. Co.*, 18 Barb. (N. Y.) 586.

#### 48. Delivery by carrier without demanding presentation of the bill.\*

—(1) *Generally*.—Where a carrier delivers goods without the production of the bill of lading he takes upon himself the burden of showing that the delivery was made to the proper person. *National Bank v. Atlanta & C. A. L. R. Co.*, 25 So. Car. 216.

Where a bill of lading is indorsed in blank and negotiated for value as security for a draft drawn on a third person by the consignor, to whose order the goods are consigned, the carrier cannot deliver the goods to such third person without production of the bill of lading or authority from the holder thereof. *Boatmen's Sav. Bank v. Western & A. R. Co.*, 81 Ga. 221, 7 S. E. Rep. 125.

The effect of New York laws 1058, ch. 326, as amended in 1859, ch. 353, prohibiting the delivery by a common carrier of property covered by a bill of lading, except upon surrender and cancellation of the bill, and authorizing the transfer of the property by indorsement of the bill, is to incorporate into every instrument the statutory condition and make it an element of the contract, unless the case is within the exception contained in sec. 5 of the act, by having the words "not negotiable" written or stamped on the face of the bills. *Colgate v. Pennsylvania Co.*, 102 N. Y. 120, 6 N. E. Rep. 114, 1 N. Y. S. R. 166; *affirming* 31 Hun 297.

Where goods are shipped to the order of the consignor, the railroad company is not justified in delivering them to a third person without the bill of lading, and merely upon the production of an invoice and a letter from the consignor giving him notice of a draft, which is to accompany the bill of lading, drawn upon him by the consignor and which he is required to protect. *Pennsylvania R. Co. v. Stern*, 35 Am. & Eng. R. Cas. 551, 119 Pa. St. 24, 12 Atl. Rep. 756.

(2) *Illustrations*.—Plaintiff shipped hay to his broker and telegraphed him: "Do the best you can. Whatever you do will be satisfactory." *Held*, that the telegram was a waiver of the necessity of a bill of lading in the hands of the broker as a condition precedent to his right to obtain possession of the hay, and the carriers were not liable as for a wrongful conversion by delivering

the hay to the broker. *Mitchell v. Chesapeake & O. R. Co.*, 17 Ill. App. 231.

A bill of lading containing a provision that the goods are to be delivered on "presentation of duplicate thereof," establishes the fact that the consignor is the owner of the goods, and if the carrier delivers the goods to the consignee without the presentation of any bill of lading the carrier becomes liable to the consignor. *Jeffersonville, M. & I. R. Co. v. Irvin*, 46 Ind. 180.

If such condition had not been in the bill of lading the title to the goods would have vested in the consignee on their delivery to the carrier, but being there, the property remained in the consignor until the goods were paid for by the consignee. *Jeffersonville, M. & I. R. Co. v. Irvin*, 46 Ind. 180.

In an action against a railroad company for damages consequent upon the loss of merchandise consigned to plaintiff, occasioned by its improper delivery by defendant to a third person before the production by such person of the bill of lading, and before the acceptance by him of a draft attached thereto, the fact that defendant had several times previously delivered freight, so consigned, to such third party before the acceptance of like drafts, such drafts, however, having always been paid, will not justify a finding that there was a course of dealing between the parties which would take the case out of the rule requiring that the delivery must be in accordance with the bill of lading and justify defendant in delivering the goods before payment of the draft. *Pennsylvania R. Co. v. Stern*, 35 Am. & Eng. R. Cas. 551, 119 Pa. St. 24, 12 Atl. Rep. 756.

Plaintiff's assignees delivered to the B. S. P. Co., at Norfolk, Va., 100 bags of peanuts, marked "Y," for shipment to Denver, receiving a bill of lading, in which, after specifying the property, the weight, and freight, was the following: "Marked Y, order notify Zucca Bros." In the course of transportation the peanuts were delivered to defendant. It received no bill of lading or copy thereof from the preceding carrier, and it was not notified that any had been issued. It received a "transfer sheet" which contained this entry, "Consignee 'Y,' Hup Zucca Bros." The same entry was made in the way-bill made up by defendant's agents at the forwarding station, but under a column therein headed "consignee and destination," the destination but no consignee was given. Defendant received no other

\* See post, §4.

Delivery of goods without requiring presentation of bill of lading, see note, 32 AM. & ENG. R. CAS. 508.

notification as to the ownership or disposition of the goods. It delivered them at Denver to Zucca Bros. without the production or surrender of the bill of lading. That firm had no title to or interest in the goods and had refused to pay a draft drawn upon them by the shippers, forwarded for collection, which was attached to the bill of lading; these papers had, in consequence, been returned to the shippers. *Held*, that defendant, upon failure to deliver to plaintiff on demand, became liable for a conversion of the goods; that the use of the word "notify" in the bill of lading showed that Zucca Bros. were not intended as the consignees, and as none were named no delivery could be safely made without production of the bill. *Furman v. Union Pac. R. Co.*, 32 *Am. & Eng. R. Cas.* 500, 106 *N. Y.* 579, 13 *N. E. Rep.* 587, 11 *N. Y. S. R.* 192; *reversing* 35 *Hun* 669, *mem.*

**40. Delivery where goods are in excess of amount specified in bill.**—Grain was shipped and a bill of lading given containing a provision that the full quantity mentioned should be delivered, and that if a deficiency occurred it should be paid for by the carrier, but that any excess should be paid for to the carrier by the consignee. *Held*, that in case of an excess the carrier was not entitled to the excess, but that the consignee was bound to pay freight on it. *Ford v. Head*, 34 *Hun* (N. Y.) 146.

Two railroad companies shipped on plaintiff's vessel a quantity of wheat consigned to a bank in care of defendants. The bills of lading contained the following provision: "All deficiency in cargo to be paid for by the carrier, and deducted from the freight and any excess in the cargo to be paid for to the carrier by the consignee." The quantity described in the bills of lading was 15,338 bushels, while the actual quantity shipped was 15,838 bushels, and the discrepancy was shown to have occurred by the omission by mistake to include 500 bushels. Plaintiff claimed that he was entitled to the 500 bushels for his own use. *Held*, that the provision in the bill of lading did not give it to him, and that no custom or usage was proved giving the provision such meaning, and that defendants, who had accounted for such excess to the shipper, were therefore held not liable to plaintiff. *Murton v. Kingston & M. Forwarding Co.*, 32 *U. C. C. P.* 366.

**50. Shipper's right to substitute**

**consignee.**—The owner of goods shipped may change his purpose before the delivery of the goods or the bill of lading to the party named as consignee in the bill, and order the delivery to be made to some other person. *Halsey v. Warden*, 25 *Kan.* 128.

A debtor shipped goods by a carrier to his creditor to sell and apply the proceeds on his debt, and forwarded a bill of lading. *Held*, that he could afterward change the shipment to another person without making the carrier liable to the first consignee. *Chaffe v. Mississippi & T. R. Co.*, 9 *Am. & Eng. R. Cas.* 426, 59 *Miss.* 182.

**51. Two bills issued for one shipment.\***—When the bill of lading has been executed and issued in duplicate, one signed by the shipper and the other by the carrier, the two papers must be treated as one document and construed together in determining the correct interpretation to be put upon the bill. *Richmond & D. R. Co. v. Shomo*, 90 *Ga.* 496.

Where two bills of lading are issued and there is a variance between them, the one given to the shipper will control. *Ontario Bank v. Hanlon*, 23 *Hun* (N. Y.) 283.

**52. How long the bill remains in force.†**—A bill of lading issued by a steamship company in England, and headed "Montreal Ocean Steamship Company, Allan Line, and Grand Trunk Railway of Canada," stated that the goods were to be delivered at Portland "unto the Grand Trunk R. W. Co., and by them to be forwarded thence by railway to the station nearest to Hamilton," etc. *Held*, not having been superseded by any other document, to be in force up to the time of its indorsement by the consignee over to a third party. *Clementson v. Grand Trunk R. Co.*, 42 *U. C. Q. B.* 263. Compare also *Forbes v. Boston & L. R. Co.*, 9 *Am. & Eng. R. Cas.* 76, 80, 133 *Mass.* 154. *Merchants' D. & T. Co. v. Merriam*, 31 *Am. & Eng. R. Cas.* 78, 111 *Ind.* 5, 11 *N. E. Rep.* 954. *Rawson v. Holland*, 59 *N. Y.* 611; *affirming* 5 *Daly* 155, 47 *How. Pr.* 292.

**53. Through bills of lading.‡**—Where a bill of lading specifies a rate for freight to one point and is for the delivery of the goods at a point less distant, it will be taken to be a through contract, which will bind the carrier to deliver at the more

\* See *ante*, 9.

† See *post*, 110.

‡ See *ante*, 4, 36; *post*, 65-68.

distant point. *Woodward v. Illinois C. R. Co.*, 1 Biss. (U. S.) 403.

A bill of lading held to be a through bill where it contains among other provisions one for a continuous shipment between points that require it to pass over different lines, and that the conditions of the contract should apply to and govern the transportation over any and all roads which form a part of the route, and where the last carrier receives the whole of the freight charges. *Missouri Pac. R. Co. v. Ryan*, 2 Tex App. (Civ. Cas.) 378.

A bill of lading acknowledging the receipt of goods to be carried to the consignee at a designated point, with the provision that "this receipt can be exchanged for a through bill of lading," renders the carrier liable for the transportation of the goods to the place of destination, though that be beyond its own line. *Myrick v. Michigan C. R. Co.*, 9 Biss. (U. S.) 44.

The question whether a common carrier agrees to transport beyond its own line is to be determined from the bill of lading, as it regulates and determines the duties and obligations of both shipper and carrier. *Piedmont Mfg. Co. v. Columbia & G. R. Co.*, 16 Am. & Eng. R. Cas. 194, 19 So. Car. 353.

The recitals and stipulations of a bill of lading were as follows: "Shipped in good order and condition by Jewett, Hall & Co. .... (on account and risk of whom it may concern) on board the good steamboat called the Virginia and Mobile Trade Company, whereof ..... is master for the present voyage, now lying at the port of St. Louis, Mo., and bound for Montgomery, Ala., the following packages or articles marked and numbered as below, which are to be delivered, without delay, in like good order and condition at the aforesaid port (the damages of the river, fire, and unavoidable accident only excepted), unto Rufus L. Logan or his or their assigns, he or they paying freight for said goods at the rate of 30 cents per 100 lbs. to New Orleans, \$1.78 per bbl. flour (through), and \$6.35 per cask, \$3.15 per tierce bacon, and 93 cents per box crackers, thence to Montgomery. In witness whereof the owner, master, or clerk of said steamboat subscribes to four bills of lading, all of this tenor and date, one of which being accomplished, the others stand void. Dated at St. Louis, Mo., this 2d day of October, 1866." (Here follows a description and weight of the goods.)

"Privilege of re-shipping at New Orleans and Mobile." (Signed) "Jewett, Hall & Co., Agt's M. T. Co." "It is understood and agreed that the above goods are to be sent through at above rates, if any boats are going through to Wetumpka." (Signed) "Jewett, Hall & Co., Agt's, Mobile Trade Co." Held, that it imposed an obligation on the party making it to send the goods therein named "through to Wetumpka," either from Mobile or Montgomery, "if any boats are going through to Wetumpka," when the goods are delivered either at Mobile or Montgomery. *Logan v. Mobile Trade Co.*, 46 Ala. 514.

According to *Central R. Co. v. Dwight Manuf'g Co.*, 75 Ga. 609, and *Falvey v. Georgia Railroad Co.*, 76 Ga. 597, the valid contracts embraced in the bills of lading involved in the present case were through contracts for shipment from Griffin, Ga., to New York and Philadelphia, and the company with whom they were made was responsible for performance both to and beyond the terminus of its own road. The first of these authorities cuts off the company from availing itself of any limitations or restrictions of its general liability expressed in the bills of lading, the shipper not having expressly assented thereto, and there being no evidence to prove his assent, save the mere acceptance by him of the bills of lading. *Central R. & B. Co. v. Hasselkus*, (Ga.) 55 Am. & Eng. R. Cas. 586, 17 S. E. Rep. 838.

A bill of lading for transportation of goods from Hillsboro, Texas, to Galveston, in the same state, and for the delivery at the latter place to the consignee or a connecting carrier, is not a contract for carriage beyond that place, notwithstanding it guarantees a through rate to a town in another state, named as the ultimate point of destination. *Bennett v. Missouri Pac. R. Co.*, 46 Mo. App. 656.—REVIEWING COATES *v.* United States Exp. Co., 45 Mo. 238, 241; *Snider v. Adams Exp. Co.*, 63 Mo. 376.—QUOTING *Wheeler v. St. Louis & S. E. R. Co.*, 3 Mo. App. 359.

A bill of lading is a through contract of carriage where, containing no limitation of liability to the initial carrier's line only, it in effect provides for the shipment of goods by the "C. Line of Propellers," to be delivered "as addressed on the margin, or to his or their consignees, upon paying freight and charges, etc.," and on the margin are these

words, "G. F. W., Providence, . . . Care A. T. Co., Buffalo. . . Rate to Providence per 100 lbs., 45 cents, . . . to be landed at India Wharf," and is duly signed by the agent of the initial line. *Wahl v. Holt*, 26 Wis. 703.—FOLLOWING PEET *v. Chicago & N. W. R. Co.*, 19 Wis. 118.—DISTINGUISHED IN *Tolman v. Abbot*, 78 Wis. 192.

Evidence is sufficient to show a through contract where the bill of lading stipulates that in case of loss or injury to the merchandise named therein, for which any carrier under the same might be liable, such carrier might have the benefit of any insurance taken out by or for the benefit of the owner. *Wahl v. Holt*, 26 Wis. 703.

#### 54. Guaranteed bills of lading.\*—

Where a carrier in a bill of lading guarantees a certain rate over connecting lines, it is liable to refund the excess if its charges exceed those guaranteed. *Little Rock & Ft. S. R. Co. v. Daniels*, 49 Ark. 352, 32 Am. & Eng. R. Cas. 479, 5 S. W. Rep. 584. Compare also *Fry v. Louisville, N. A. & C. R. Co.*, 22 Am. & Eng. R. Cas. 442, 103 Ind. 265, 2 N. E. Rep. 744.

The guarantee by an association of companies of its bills of lading simply meant that each company of the association stipulated that it would be bound by a bill of lading issued by any one of them for freight to be transported over each and all of the roads constituting the line, in the same manner as if the transportation was only over its own road. *Baltimore & O. R. Co. v. Wilkens*, 44 Md. 11.—QUOTED IN *Erb v. Great Western R. Co.*, 3 Ont. App. 466.

Where several railroad companies form an association for the through transportation of freight, by the guarantee of a bill of lading by such association, the shipper, besides other benefits and conveniences, derives the advantage of the responsibility of each and all the associated companies for loss or damage to goods occurring on any part of the entire line, and the further advantage of suing the company nearest his home for such loss. *Baltimore & O. R. Co. v. Wilkens*, 44 Md. 11.

A carrier issued a through bill of lading limiting its liability to the safe carriage of the goods over its own road, and delivery to the next connecting carrier, with the guarantee of a through rate, as stipulated in the

bill. The next connecting carrier refused to accept the goods at the stipulated rate. *Held*, that the initial carrier, as guarantor, was entitled to notice of such refusal, and that, in the absence of such notice, it was liable in damages only for the difference between the rate agreed and the rate demanded by the connecting carrier. *Tardos v. Chicago, St. L. & N. O. R. Co.*, 35 La. Ann. 15.

55. Domestic and interstate bills of lading.—Where a railroad company in Texas receives cotton to be carried beyond the state line, it is not a domestic shipment because the bill of lading contains a clause limiting the company's liability to a certain point within the state, but the bill of lading is interstate. *Missouri Pac. R. Co. v. Sherwood*, 55 Am. & Eng. R. Cas. 478, 84 Tex. 125, 19 S. W. Rep. 455.

Where the bill of lading described in the petition provided for a transportation of cotton from a point in Texas to New Orleans, by way of connecting lines, thence to Liverpool, at an agreed rate of freight for the whole distance, a stipulation that the liability of the company was limited to its own line of railway did not so affect the character of the instrument as to make it a domestic bill of lading, and make the company liable under the statute regulating shipments within the state. *Missouri Pac. R. Co. v. Sherwood*, 55 Am. & Eng. R. Cas. 478, 84 Tex. 125, 19 S. W. Rep. 455.

#### 4. The Bill Considered as a Muniment of Title.\*

56. The bill a symbol of the property therein described.†—A bill of lading, by commercial law, is regarded as a symbol of the property therein described. *Dodge v. Meyer*, 61 Cal. 405. *Pennsylvania R. Co. v. Stern*, 35 Am. & Eng. R. Cas. 551, 119 Pa. St. 24, 12 Atl. Rep. 756. *Missouri Pac. R. Co. v. McLiney*, 32 Mo. App. 166. *Dickson v. Merchants' Elevator Co.*, 44 Mo. App. 498. *Evansville & T. H. R. Co. v. Erwin*, 9 Am. & Eng. R. Cas. 252, 84 Ind. 457. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. Rep. 608.

Bills of lading stand in the place of the goods they represent. *Baltimore & O. R. Co. v. Wilkens*, 44 Md. 11. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. Rep. 608. *Dodge v. Meyer*, 61 Cal. 405.

\* See also, generally, *post*, 108-128.

† Bill of lading is a symbol of property, see note, 23 AM. & ENG. R. CAS. 702.

\* See *post*, 80.

**57. Effect as evidence of delivery to holder.\***—A bill of lading is not conclusive proof of the change of the property, like a bill of sale; it is a question of evidence whether such an operation should be given to it. *Kyle v. Buffalo & L. H. R. Co.*, 16 U. C. C. P., 76.

The presentation of a draft drawn by the seller of goods upon the purchaser, with a bill of lading attached, is sufficient to show that the goods are in the hands of the carrier, and amounts to delivery to the purchaser. *Illinois C. R. Co. v. Miller*, 32 Ill. App. 259.

**58. Effect to pass title by mere delivery.†**—The delivery of a bill of lading by one having an interest in or a right to control the property is equivalent to a delivery of the property itself. A consignor who has reserved the *jus disponendi* may effectuate a sale or pledge of the property consigned, by delivery of the bill of lading to the purchaser or pledgee, as completely as if the property were in fact delivered. *Dodge v. Meyer*, 61 Cal. 405.

The delivery of an undorsed bill of lading to the acceptor of a draft is sufficient to transfer the title to the property covered thereby. In such case the carrier is not liable to the shipper for the value of the goods should the acceptor fail to pay the draft. *Jordan v. Pennsylvania Co.*, (Ind.) 18 Am. & Eng. R. Cas. 647.

**59. Effect to pass title to consignee.**—A bill of lading raises a presumption that the title in the property represented by it is in the consignee, but this presumption may be rebutted by outside or parol evidence. *Hoober v. Chicago & N. W. R. Co.*, 27 Wis. 81, 5 Am. Ry. Rep. 302.

The shipper, when he actually owns the goods, does not lose title thereto by inserting the name of the consignee in the bill of lading when he ships the property, but the title remains in him unaffected, and the consignee becomes the agent, factor, or commission merchant of the shipper. *Michigan C. R. Co. v. Phillips*, 60 Ill. 190.

**60. Effect to pass title to indorsee.‡**—The indorsement of a bill of lading by the

owner of the goods passes the property in the goods to the indorsee. *Union R. & T. Co. v. Yeager*, 34 Ind. 1.

When property is in the hands of the carrier the bill of lading shows to whom, he is to deliver it. The delivery of the bill of lading, properly indorsed, is tantamount to the actual delivery of the goods described in it. *Illinois C. R. Co. v. Southern Bank*, 41 Ill. App. 287.

Bills of lading, when properly indorsed, operate as a delivery of the property itself, investing the indorsees with a constructive custody which serves all the purposes of actual possession, and so continues until there is a valid and complete delivery of the property, under and in pursuance of the bill of lading, to the person entitled to receive the same. *Pennsylvania R. Co. v. Stern*, 35 Am. & Eng. R. Cas. 551, 119 Pa. St. 24, 12 Atl. Rep. 756. *Heiskell v. Farmers' & M. Nat. Bank*, 89 Pa. St. 155.

**61. Delivery of bill upon acceptance of draft thereto attached.**—Where a bill of lading, making goods deliverable to the order of the shipper, is sent to a bank with a draft attached marked "for acceptance and collection," without other instructions, it is rightly delivered to the purchaser upon acceptance of the draft, without waiting for payment. *St. Paul R. M. Co. v. Great Western Despatch Co.*, 27 Fed. Rep. 434.—FOLLOWING Brooklyn City & N. R. Co. v. National Bank, 102 U. S. 14.

And such a delivery is sufficient to transfer the title to the property covered by the bill, and the carrier's liability is not affected by the failure of the acceptor to pay the draft. *Jordan v. Pennsylvania Co.*, (Ind.) 18 Am. & Eng. R. Cas. 647.

## II. CONDITIONS, LIMITATIONS, EXCEPTIONS, Etc.

### 1. In General.

**62. Limiting liability for negligence.\***—It is well settled that common carriers cannot stipulate in a bill of lading for exemption from responsibility for losses occasioned by the negligence of themselves or their servants. *Willis v. Grand Trunk R. Co.*, 62 Me. 488.—FOLLOWING *Sager v. Portsmouth, S. & P. & E. R. Co.*, 31 Me. 228; *New York C. R. Co. v. Lockwood*, 17

\* See post, 112-113.

Effect of bill of lading as evidence of title and parol evidence, see note, 38 AM. DEC. 417.

Bill of lading as evidence of ownership of property. Delivery without presenting. Custom. See 35 AM. & ENG. R. CAS. 554, abstr.

† See post, 113.

‡ See post, 112.

1 D. R. D.—40.

\* New York law as to clauses in bills of lading exempting carrier from liability for loss occurring through negligence, see note, 21 AM. & ENG. R. CAS. 150.



Wall. (U. S.) 337.—APPROVED IN *Runt v. Herring*, 21 N. Y. Supp. 244.—*Southern Exp. Co. v. Seide*, 42 Am. & Eng. R. Cas. 398, 67 Miss. 609, 7 So. Rep. 547.

In New York a carrier may, by proper stipulations in a bill of lading, limit its liability for the negligence or wilful and criminal conduct of its servants, agents, and officers, other than the directors of the corporation itself. *Knell v. United States & B. Steamship Co.*, 1 J. & S. (N. Y.) 423.

The terms of a bill of lading will not be construed to exempt a carrier from liability for negligence unless there be an express stipulation to that effect. *McKinney v. Jewett*, 9 Am. & Eng. R. Cas. 209, 90 N. Y. 267; affirming 24 Hun 19.

The mere occurrence of general words in a printed bill of lading or receipt will not operate as a special contract limiting a carrier's liability for the negligence or wilful and criminal acts of its servants. *Knell v. United States & B. Steamship Co.*, 1 J. & S. (N. Y.) 423.

**63. Limiting liability for gross negligence.**—A railroad cannot contract against the gross negligence of its servants, nor limit its liability in this regard in a bill of lading or shippers' receipt. *Illinois C. R. Co. v. Adams*, 42 Ill. 474.—FOLLOWING *Illinois C. R. Co. v. Morrison*, 19 Ill. 139.

Where a bill of lading provided that the carrier should only be liable for loss in transit from gross negligence, in an action for loss it was error to instruct the jury that "negligence would be the omission of such reasonable and ordinary care and precaution as would have averted the loss." *Adams Exp. Co. v. Sharpless*, 77 Pa. St. 516.

**64. Limiting common-law liability.**—(1) *Generally.*—At common law a carrier can limit its liability by contract. *Dymock v. Missouri, K. & T. R. Co.*, 54 Mo. App. 400. Carriers may obviate the rigor of the law applicable to them by inserting the proper exceptions in the bill of lading. *Gilmore v. Carman*, 9 Miss. 279.

A stipulation in a bill of lading to the effect that the carrier shall not be responsible for loss or injury to goods from any peril or accident not resulting from its negligence or the negligence of its servants is valid. *Camp v. Hartford & N. Y. S. Co.*, 43 Conn. 333.

\* Right of carrier to limit common-law liability. Effect of particular stipulations in bill of lading, see note, 38 Am. Dec. 424.

Where a written contract is entered into and signed by both the shipper and the carrier, it is competent for the latter to limit its liability so far as consistent with public policy; and the shipper is bound by the contract whether he knew of its terms or not, except so far as it was entered into through fraud or misapprehension. *Coles v. Louisville, E. & St. L. R. Co.*, 41 Ill. App. 607.

By the common law a carrier is an insurer of the goods intrusted to him, except so far as they are damaged by the act of God or the public enemy. By a contract limiting his liability he is an insurer by agreement and according to its terms. If there is a loss, the agreement furnishes the extent of liability and is confined to that, unless the owner can show that the loss occurred from the wilfulness or negligence of the carrier. *Farnham v. Camden & A. R. Co.*, 55 Pa. St. 53.

Bills of lading exempting a carrier from his common-law liability, even when valid, are not favored, and should be strictly construed. Cases not in terms included by the exemption should be excluded from its operation. *Deming v. Merchants' C. P. & S. Co.*, 90 Tenn. 306, 17 S. W. Rep. 89.

Slight evidence should be sufficient to set aside a provision in a bill of lading which is designed to relieve the carrier from the ordinary legal responsibility. *Chouteaux v. Leech*, 18 Pa. St. 224.

Where the bill of lading excepted only certain dangers, gross negligence or misconduct was not necessary to the carrier's liability, though the goods were to be carried free of charge. *McCauley v. Davidson*, 13 Minn. 162 (Gil. 150).

Although in an action against a carrier for damages to goods it is shown that the carrier issued to the shipper a bill of lading embodying a limitation of his common-law liability, that does not authorize the court to take the case from the jury. *Heil v. St. Louis, I. M. & S. R. Co.*, 16 Mo. App. 363.

A clause in a bill of lading providing that the "carrier shall not be liable for loss or damage by causes beyond its reasonable control, by riots, or any other reason not directly traceable to the negligence of the carrier's servants," will not relieve the carrier from liability for the loss of goods stolen in open daylight in the presence of the carrier's employes, who make no offer to resist the thieves and protect the

goods. *Lang v. Pennsylvania R. Co.*, 154 Pa. St. 342, 26 Atl. Rep. 370.

A bill of lading provided that the carrier should not be liable for injury or loss from certain specified causes, "however these or any of them may be brought about, whether any of the perils, causes, or things above mentioned, or the loss or injury arising therefrom, or from any other specified cause, be occasioned by or from any act of omission, negligence, default, or error in judgment of the pilot, master, mariners, engineers, stevedores, or other persons in the service of the ship's owner"—held, that under this provision the carrier was not liable for damage to the goods caused by improperly stowing oil too near them. *Rubens v. Ludgate Hill Steamship Co.*, 20 N. Y. Supp. 481.

(2) *Must be by express contract.*—A general stipulation or notice in a bill of lading will not limit the liability of a carrier. An express contract is necessary for that purpose, but an express contract will not protect a common carrier from the results of its own negligence. *Georgia R. Co. v. Gann*, 68 Ga. 350.

A bill of lading containing provisions limiting the extraordinary liability of the carrier, and accepted by the shipper, with knowledge of its contents, or under such circumstances that a reasonably prudent person would have had knowledge, will be deemed a special contract and binding. *Alabama G. S. R. Co. v. Little*, 12 Am. & Eng. R. Cas. 37, 71 Ala. 611.

(3) *Shipper's right of choice between bills of lading.*—A provision in a bill of lading limiting the carrier's liability is void where the carrier gives the shipper no opportunity to ship under the common-law liability of carriers; and this is so where the shipper enters into the contract knowingly and without demanding different terms. *Little Rock & Ft. S. R. Co. v. Cravens*, (Ark.) 20 S. W. Rep. 803.—APPROVING *Louisville & N. R. Co. v. Gilbert*, 88 Tenn. 430, 12 S. W. Rep. 1018. QUOTING *New York C. R. Co. v. Lockwood*, 17 Wall. (U. S.) 379; *Michigan C. R. Co. v. Hale*, 6 Mich. 258; *Little Rock & Ft. S. R. Co. v. Eubanks*, 48 Ark. 460, 3 S. W. Rep. 808.

Where shippers are not given the choice between bills of lading, both with and without provisions limiting the carrier's liability, mere acceptance of a bill of lading limiting the carrier's liability is not enough to show

the reasonableness of the limitations and to make them valid. *Louisville & N. R. Co. v. Gilbert*, 42 Am. & Eng. R. Cas. 372, 88 Tenn. 430, 12 S. W. Rep. 1018, 7 L. R. A. 162.

(3) *Invalid limitations.*—It is questioned whether, even in the absence of a prohibitive statute, an agreement in a bill of lading exempting the carrier from his liability at common law is binding, unless it is supported by a special consideration. *Bennett v. Missouri Pac. R. Co.*, 46 Mo. App. 656.

A bill of lading providing that the corporation should not be held liable for wrong carriage or wrong delivery of goods that were marked with initials, numbered, or imperfectly marked, does not cover a failure to duly forward goods only marked with an initial. *McGowan v. Wilmington & W. R. Co.*, 27 Am. & Eng. R. Cas. 64, 95 N. Car. 417.

The courts will not enforce a provision in a bill of lading for an interstate shipment of live stock which contains a provision releasing the company from any damages that the shipper may have already sustained by reason of the company having failed to furnish cars as it agreed. *Cross v. Graves*, 4 Tex. App. (Civ. Cas.) 149, 16 S. W. Rep. 102.

Under Texas Rev. St. art. 278, providing that common carriers within the state shall not limit or restrict their liability, as it exists at common law, by any general or special notice, or by inserting exceptions in a bill of lading or memorandum given upon the receipt of goods for transportation, or in any other manner whatever, a common carrier cannot relieve itself from liability as to shipments within the state by any provision in the bill of lading. *Houston & T. C. R. Co. v. Burke*, 9 Am. & Eng. R. Cas. 59, 55 Tex. 323, 40 Am. Rep. 808.

**65. Limiting statutory liability for connecting carrier's negligence.\***—The statutory liability of a carrier for damages to goods by the negligence of connecting carriers cannot be evaded by issuing a bill of lading expressing an exemption from such liability. *Heil v. St. Louis, I. M. & S. R. Co.*, 16 Mo. App. 363.—FOLLOWED IN *Witting v. St. Louis & S. F. R. Co.*, 28 Mo. App. 103; *Watkins v. St. Louis, I. M. & S. R. Co.*, 44 Mo. App. 245. LIMITED IN *Drew Glass Co. v. Ohio & M. R. Co.*, 44 Mo. App. 416. OVERRULED IN *Hill v. Missouri Pac.*

\* See ante, 4, 36, 54; post, 89.

R. Co., 46 Mo. App. 517. REVIEWED IN *Orr v. Chicago & A. R. Co.*, 21 Mo. App. 333.

**66. Limiting liability to one only of several connecting carriers.**—

(1) *Generally*.—Where a bill of lading is given for a through transportation of goods, a provision in it to the effect that the company alone shall be liable in whose custody the property is at the time of loss or injury, is binding, and an intermediate carrier is not liable after the goods have been delivered by it in good condition to the next connecting line. *Ricketts v. Baltimore & O. R. Co.*, 4 *Lans. (N. Y.)* 446; *affirmed in 59 N. Y. 637, mem. Schiff v. New York C. & H. R. R. Co.*, 52 *How. Pr. (N. Y.)* 91. —FOLLOWING *Ricketts v. Baltimore & O. R. Co.*, 59 *N. Y. 637*.

Under the law in force in Texas, a clause in the bill of lading limiting the liability of each carrier to damage done to the goods while in transit on its own line is invalid. Even assuming the validity of such a clause, the defendant, to escape liability, must prove that the damage to the goods was not done while they were in transit on its line. *Gulf, C. & S. F. R. Co. v. Golding*, (*Tex.*) 23 *Am. & Eng. R. Cas.* 732.

But where goods are shipped from another state to be delivered at a point in Texas, a provision in the bill of lading limiting the liability of each carrier to loss or damage on its own line is valid; and while it is a presumption of law that the injury or loss was occasioned by the delivering carrier, this presumption may be rebutted. *Texas & P. R. Co. v. Adams*, 78 *Tex.* 372, 14 *S. W. Rep.* 666.—DISTINGUISHED IN *International & G. N. R. Co. v. Wolf*, 3 *Tex. Civ. App.* 383. FOLLOWED IN *McCarn v. International & G. N. R. Co.*, 84 *Tex.* 352; *International & G. N. R. Co. v. Thornton*, 3 *Tex. Civ. App.* 197; *International & G. N. R. Co. v. Foltz*, 3 *Tex. Civ. App.* 644. QUOTED IN *Missouri Pac. R. Co. v. Childers*, 1 *Tex. Civ. App.* 302.

A provision in a bill of lading for the through carriage of freight, that each carrier will be liable only for injuries to or loss of the freight while on its own line is not binding, each carrier being held liable for its own negligence and that of the connecting lines. *Gulf, C. & S. F. R. Co. v. Golding*, 3 *Tex. App. (Civ. Cas.)* 60.—APPROVING

*Bank of Ky. v. Adams Exp. Co.*, 93 *U. S.* 174; *Cincinnati, H. & D. R. Co. v. Pontius*, 19 *Ohio St.* 221; *Condict v. Grand Trunk R. Co.*, 54 *N. Y.* 500. CRITICISING *Houston & T. C. R. Co. v. Park*, 1 *Tex. App. (Civ. Cas.)* 142.

Even if it be conceded that a provision in a through bill of lading, to the effect that each carrier shall only be liable for damages while the goods are in its hands, is binding, still when one of the carriers is sued for a loss the law presumed that a delivery to the first carrier was a delivery to all the carriers over whose lines it should pass, and proof of loss *en route* establishes *prima facie* the liability of the carrier sued; and to avoid liability the burden is upon it to prove such facts as would constitute a valid defense. *Gulf, C. & S. F. R. Co. v. Golding*, 3 *Tex. App. (Civ. Cas.)* 60.

(2) *Illustrations*.—A stipulation in a bill of lading given by one of an associated through line of common carriers to transport goods beyond its own line, to the effect that if damage to the goods be sustained by the shipper that company alone in whose custody the goods were at the time of the loss shall be answerable, is a reasonable one and consistent with public policy; and the shipper who accepts it is bound by its terms and conditions, whether he reads it or not. *Phifer v. Carolina C. R. Co.*, 89 *N. Car.* 311, 45 *Am. Rep.* 687.—QUOTING *York Mfg. Co. v. Illinois C. R. R. Co.*, 3 *Wall. (U. S.)* 113; *Michigan C. R. Co. v. Mineral Springs Mfg. Co.*, 16 *Wall. (U. S.)* 328. REVIEWING *Myrick v. Michigan C. R. Co.*, 107 *U. S.* 102.—DISTINGUISHED IN *Knott v. Raleigh & G. R. Co.*, 98 *N. Car.* 73.—FOLLOWED IN *Weinberg v. Albemarle & R. R. Co.*, 18 *Am. & Eng. R. Cas.* 597, 91 *N. Car.* 31.

Where goods were received by what is called a dispatch company, to be transported to a place which necessarily requires them to pass over several lines, and a bill of lading is given which does not disclose the names of the several companies forming the dispatch company, but does contain a provision that "the company shall alone be held answerable therefor in whose actual custody the same may be at the time" of loss or damage, the owner need not sue the road on which the loss actually occurs, but may sue the dispatch company. *Block v. Fitchburg R. Co.*, 21 *Am. & Eng. R. Cas.* 1, 139 *Mass.* 308, 1 *N. E. Rep.* 348.

**67. Limiting liability to loss occurring on initial carrier's line.—**

A provision in a bill of lading that the carrier shall not be held liable for damage to goods after they have left its own line has no relation to that part of the contract which fixes and guarantees the rate of carriage. *Little Rock & Ft. S. R. Co. v. Daniels*, 32 Am. & Eng. R. Cas. 479, 49 Ark. 352, 5 S. W. Rep. 584.

At common law carriers are not required to transport goods beyond their own lines. The obligation to so carry is a matter of contract, but the receipt of goods marked to a point beyond the initial carrier's line is *prima-facie* evidence of such a contract; but a provision in the bill of lading limiting the carrier's liability to its own line, which is known to the shipper, is sufficient to rebut such *prima-facie* evidence. *Chicago & N. W. R. Co. v. Church*, 12 Ill. App. 17.—FOLLOWING Illinois C. R. Co. v. Frankenberg, 54 Ill. 88.

When the receipt on a bill of lading of goods marked to New York recited that the goods were to be transported over defendant's road to a certain station and there delivered in good order to another company whose line was a part of the route to the place of destination, and that the liability of defendant, as a common carrier should cease when the goods were so delivered, and the shipper accepted such receipt with knowledge of its contents, the responsibility of the company ended with the delivery of the goods at the station named. *Field v. Chicago & R. I. R. Co.*, 71 Ill. 458.

A condition on the back of a through bill of lading relieving a railway company from responsibility as soon as goods entrusted to them for carriage have been delivered to the next succeeding carrier at the extremity of the line of the railway company issuing said bill of lading, is a legal and reasonable condition, and is binding on the shipper who either has, or from the circumstances is presumed to have, knowledge thereof, and to have accepted the contract subject to such condition. *Beaumont v. Canadian Pac. R. Co.*, 5 Montr. L. R. (Sup. Ct.) 255.

It is competent for a railway company which undertakes to carry goods over their line destined for a point beyond their own line, and receives the freight for the whole distance, to stipulate by an express condition in the bill of lading that they will not

be responsible for any loss or damage to the goods other than that which may occur while the goods are being carried on their line; and where such condition exists and the defendants prove that the goods were carried safely over their line and delivered in good order to the connecting company, they will be relieved from responsibility for any damage sustained thereafter. *Canadian Pac. R. Co. v. Charbonneau*, 6. Montr. L. R. (Q. B.) 287.

**68. Connecting carrier's right to claim benefit of limitations.—**Where a bill of lading furnishes upon its face evidence of the invalidity of the clauses limiting the carrier's liability, a connecting carrier can claim no more under it than the carrier who issued it. *St. Louis, I. M. & S. R. Co. v. Spann*, 57 Ark. 127.

A bill of lading issued by a steamboat, agreeing to carry goods to a certain point by water and specifying a through rate to a point beyond on a connecting railroad, will, where it is signed by the railroad agents, be regarded as a through shipment, entitling the railroad company to the benefit of any limitation as to the carrier's liability contained therein. *Woodward v. Illinois C. R. Co.*, 1 Biss. (U. S.) 447.

Where a railroad company issues a through bill of lading, in which its liability is limited to an agreed valuation, and which contains a clause declaring that this carrier's responsibility is to cease upon delivery in good order to a connecting carrier, and an accident results while the property is in the hands of the connecting carrier, the limitation of liability applies in favor of such carrier. *Fairchild v. Philadelphia, W. & B. R. Co.*, 148 Pa. St. 527, 24 Atl. Rep. 79.

A bill of lading provided: "This oil is carried only on open cars and entirely at the owner's risk from fire and leakage while in possession of the railroad company or carriers." The oil in transit was to pass over more than one line. *Held*, that the limitation of liability applied only to the road first receiving the goods. *Camden & A. R. Co. v. Forsyth*, 61 Pa. St. 81.—APPLIED IN *Aetna Ins. Co. v. Wheeler*, 49 N. Y. 616. APPROVED IN *Hinkley v. New York C. & H. R. R. Co.*, 3 T. & C. (N. Y.) 281. NOT FOLLOWED IN *Babcock v. Lake Shore & M. S. R. Co.*, 43 How. Pr. (N. Y.) 317.

**69. Excepting liability for misconduct of subordinate employees.—**A

provision in a bill of lading exempting the carriers from liability for loss resulting from the misconduct of its subordinate employes is valid. *McMillan v. Michigan S. & N. I. R. Co.*, 16 *Mich.* 79.

**70. Exception of loss caused by "act of God."**—A loss, occasioned by accidental fire, not arising from negligence or carelessness, is not within the exemption of a loss caused by "act of God." *Gilmore v. Carman*, 9 *Miss.* 279.

**71. Necessity of charging a lower rate.**—A provision in a bill of lading limiting the carrier's liability, which is not made in consideration of a lower rate of freight, is not valid as against a loss or injury resulting from the carrier's negligence. *Adams Express Co. v. Harris*, 40 *Am. & Eng. R. Cas.* 151, 120 *Ind.* 73, 21 *N. E. Rep.* 340.

To make valid a provision in a bill of lading exempting the shipowners from liability for loss through "any act or omission, negligence, default, or error in judgment" of employes, it is not necessary that there be a stipulation for a lower rate of freight. *Rubens v. Ludgate Hill Steamship Co.*, 20 *N. Y. Supp.* 481.

Where no reduction in freight is made upon goods shipped under bills of lading containing a fire clause, there is no consideration for the stipulation, and it is invalid. *Louisville & N. R. Co. v. Gilbert*, 42 *Am. & Eng. R. Cas.* 372, 88 *Tenn.* 430, 12 *S. W. Rep.* 1018, 7 *L. R. A.* 162.

**72. Showing loss or injury to be within the limitations or exceptions.**—As it is not competent for carriers to limit their liability for their own negligence, where goods are shipped under a bill of lading attempting to limit the carrier's liability, the burden of proof, in case of injury or loss, is upon the carrier to show that the injury or loss was without its fault or negligence. *Southern Exp. Co. v. Seide*, 42 *Am. & Eng. R. Cas.* 398, 67 *Miss.* 609, 7 *So. Rep.* 547. See also *Little Rock, M. R. & T. R. Co. v. Talbot*, 18 *Am. & Eng. R. Cas.* 598, 39 *Ark.* 523.

Where goods are shipped under a bill of lading containing exceptions as to the carrier's liability, in order to relieve it in case of loss or damage, it must clearly appear that the excepted causes were the proximate and sole cause of the loss or injury; and if it appears that the carrier's negligence contributed to the injury or loss as an active cause, the carrier is liable. *Read v. St.*

*Louis, K. C. & N. R. Co.*, 60 *Mo.* 199.—QUOTED IN *Davis v. Wabash, St. L. & P. R. Co.*, 26 *Am. & Eng. R. Cas.* 315, 89 *Mo.* 340. RECONCILED IN *Drew v. Red Line Transit Co.*, 3 *Mo. App.* 495.

Where the bill of lading exempts the carrier from liability for breakage of the goods carried, it is the duty of the carrier, in an action for damages for such breakage, to bring himself in the first instance within the exemption; the burden of proof is then upon plaintiff to prove the carrier's negligence. *Witting v. St. Louis, & S. F. R. Co.*, 45 *Am. & Eng. R. Cas.* 369, 101 *Mo.* 631, 14 *S. W. Rep.* 743.—APPROVING *Read v. St. Louis, K. C. & N. R. Co.*, 60 *Mo.* 199. FOLLOWING *Lamb v. Camden & A. R. & F. Co.*, 46 *N. Y.* 271; *Whitworth v. Erie R. Co.*, 87 *N. Y.* 413; *Farnham v. Camden & A. R. Co.*, 55 *Pa. St.* 53; *Patterson v. Clyde*, 67 *Pa. St.* 500; *Little Rock, M. R. & T. R. Co. v. Talbot*, 39 *Ark.* 526; *Memphis & C. R. Co. v. Reeves*, 10 *Wall. (U. S.)* 176. NOT FOLLOWING *Brown v. Adams Exp. Co.*, 15 *W. Va.* 812; *Berry v. Cooper*, 28 *Ga.* 543; *Chicago, St. L. & N. O. R. Co. v. Moss*, 45 *Am. Rep.* 428, 60 *Miss.* 1003; *Graham v. Davis*, 4 *Ohio St.* 362; *Union Express Co. v. Graham*, 26 *Ohio St.* 595. OVERRULING *Levering v. Union Tp. & I. Co.*, 42 *Mo.* 89; *Ketchum v. American Merchant's U. Exp. Co.*, 52 *Mo.* 390. REVIEWED IN *Hance v. Pacific Exp. Co.*, 48 *Mo. App.* 179.

In an action against a carrier upon a bill of lading containing an exception of the dangers of the river navigation and inevitable accidents, after the non-delivery of the goods is shown, the burden of proof is upon the carrier to show not only a loss within the terms of the exception, but also that proper care and skill were exercised to prevent it. *Graham v. Davis*, 4 *Ohio St.* 362.—NOT FOLLOWED IN *Witting v. St. Louis & S. F. R. Co.*, 101 *Mo.* 638.

Goods were shipped by a carrier under a bill of lading stipulating that they were carried at the owner's risk of breakage, chafing, etc., and under a standing release of all damage "from any cause not the result of collision of trains, or of cars being thrown from the track while in transit." There was evidence tending to show that the goods were carefully packed when shipped, that plaintiff's goods so packed uniformly reached the place of delivery in good condition, and that the goods in controversy were injured when at their destina-

tion. *Held*, that it was for the jury to say whether the injury was not the result of defendant's negligence; that, to entitle the plaintiff to recover, under the terms of the release, he was not restricted to proof of such gross negligence as would result in collision or derailment; and that, in the absence of such proof, the question whether the carrier was guilty of negligence in the transportation of the goods was a question of fact for the jury. *Phoenix Pot Works v. Pittsburgh & L. E. R. Co.*, 139 Pa. St. 284, 20 Atl. Rep. 1058.

## 2. Limiting Liability for Loss by Fire.

### 73. Validity and effect, generally.

—A provision in a bill of lading exempting the carrier from liability for loss by fire is valid if the loss does not occur through the carrier's negligence. *Little Rock, M. R. & T. R. Co. v. Talbot*, 18 Am. & Eng. R. Cas. 598, 39 Ark. 523. *Germania Fire Ins. Co. v. Memphis & C. R. Co.*, 72 N. Y. 90, 28 Am. Rep. 115; *affirming 7 Hun* 233.—APPLIED IN *Platt v. Richmond, Y. R. & C. R. Co.*, 32 Am. & Eng. R. Cas. 517, 108 N. Y. 358, 11 Cent. Rep. 101, 15 N. E. Rep. 393, 13 N. Y. S. R. 660.

If a shipper receives a bill of lading, without dissent, containing a provision exempting the carrier from liability for loss by fire, he cannot recover for such loss unless it be due to the carrier's negligence. *Grace v. Adams*, 100 Mass. 505.—FOLLOWED IN *Hoadley v. Northern Transp. Co.*, 115 Mass. 304. REVIEWED IN *Muller v. Cincinnati, H. & D. R. Co.*, 2 Cin. Super. Ct. 280.

A condition in the bill of lading of an express company exempted it from liability for loss by fire in transit unless from the gross negligence of the company or its servants. *Held*, that it was not responsible to owner of goods for loss by fire unless occasioned by negligence. *Adams Exp. Co. v. Sharpless*, 77 Pa. St. 516.

*Prima facie* a fire clause exemption is valid and supported by sufficient consideration when it is found in a through bill of lading wherein through freight rates are granted over two or more distinct carrier lines. *Lancaster Mills v. Merchants' Cotton-Press Co.*, 45 Am. & Eng. R. Cas. 423, 89 Tenn. 1, 14 S. W. Rep. 317.

A provision in a bill of lading relieving the carrier from liability for loss of goods caused by fire is binding, if the loss is not occasioned by any want of due care on the

part of the carrier. *York Mfg. Co. v. Illinois C. R. Co.*, 3 Wall. (U. S.) 107.—APPROVED IN *Dillard v. Louisville & N. R. Co.*, 2 Lea (Tenn.) 288. FOLLOWED IN *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 10 Biss. (U. S.) 18; *Eells v. St. Louis, K. & N. W. R. Co.*, 52 Fed. Rep. 903; *Levy v. Southern Exp. Co.*, 4 So. Car. 234. QUOTED IN *Chicago, St. L. & N. O. R. Co. v. Moss*, 21 Am. & Eng. R. Cas. 98, 60 Miss. 1003; *Craycroft v. Atchison, T. & S. F. R. Co.*, 18 Mo. App. 487; *Phifer v. Carolina C. R. Co.*, 89 N. Car. 311, 45 Am. Rep. 687.

If otherwise free from objection, a fire-clause exemption contained in a through bill of lading, stipulating for shipment at special rates over several distinct, independent connecting lines, is not void for want of consideration because the contracting carrier charged and received, in addition to usual rates for transportation with restricted liability, reasonable compensation for effecting insurance upon the goods and for procuring carriage beyond his own line. *Deming v. Merchants' C. P. & S. Co.*, 90 Tenn. 306, 17 S. W. Rep. 89.

A special and mutual contract between a shipper and a carrier, limiting the liability of the latter, is shown by evidence that under the usual course of business for the shipper to send his goods by a teamster to the depot and for the carrier to give in return to the teamster a bill of lading, a bill was so obtained and delivered to the shipper and by him retained, containing a limitation of liability for loss by fire. *Van Schaach v. Northern Transp. Co.*, 3 Biss. (U. S.) 394.

Such a fire-clause exemption is not void because the several carriers had no arrangement *inter sese* whereby the shipper could, upon demand, have obtained continuous through transportation over all their lines upon terms of unrestricted liability of the carriers. *Deming v. Merchants' C. P. & S. Co.*, 90 Tenn. 306, 17 S. W. Rep. 89.

The several distinct, independent connecting lines are not, for this purpose, treated as constituting a single carrier. And it is wholly immaterial, in this regard, whether the contracting carrier be an initial or other carrier in the line, or a mere transportation company owning no part of the line. *Deming v. Merchants' C. P. & S. Co.*, 90 Tenn. 306, 17 S. W. Rep. 89.

74. What losses are included within the limitation, generally.—Where cotton is shipped under a bill of lad-



ing exempting the carrier from liability for loss or damage by fire or water, the company is liable for the loss of the cotton by fire while upon flat cars, though other cotton in box-cars was not burned. *New Orleans, S. L. & C. R. Co. v. Faler*, 9 Am. & Eng. R. Cas. 96, 58 Miss. 911.—FOLLOWING *Mobile & G. R. Co. v. Weiner*, 49 Miss. 732.

Where a railroad company receives cotton to be shipped and gives a bill of lading with the clause that it is at the "owner's risk of fire," it is not rendered liable for a loss by fire by proof that an officer of the company had said to the shipper, in a prior conversation, that he did not like the exemption clause contained in their bills of lading, where there was nothing to show that the conversation was intended to vary the legal effects of any provisions or subsequent contracts for transportation. *Pemberton Co. v. New York C. R. Co.*, 104 Mass. 144.—FOLLOWING *Squire v. New York C. R. Co.*, 98 Mass. 239; *Judson v. Western R. Co.*, 6 Allen (Mass.) 486.—FOLLOWED IN *Armstrong v. Grand Trunk R. Co.*, 18 New Brun. 445.

Defendant received a case of goods from the plaintiff's agent at W. consigned to the plaintiff at M., and issued a bill of lading, among the conditions of which were that the company would not be responsible for loss by fire, or while the goods were not on the defendant's railway. The plaintiff's agent at W. signed a shipping bill requesting the company to receive the goods on these conditions. The goods were destroyed by fire on a steamer running from A. through Lake Superior—a route connecting two portions of the defendant's railway, but the steamer was not under the defendant's control. *Held*, that the conditions were reasonable, that the plaintiff had sufficient notice and was bound thereby, and that the company were relieved from responsibility, in the absence of any averment or proof that the loss was caused by the fault of the defendant or of those for whom it was responsible. *Dionne v. Canadian Pac. R. Co.*, 1 Montr. L. R. (Sup. Ct.) 168.

**75. Goods burned in depot awaiting shipment.**—The railroad company was exonerated from liability for three hogsheads of tobacco, destroyed by the burning of the depot at which they were received for shipment, by the stipulation inserted in the bills of lading that the company "shall not be liable for loss or damage by fire or other

casualty while in transit, or while in depots or landings at points of delivery, etc." The shipper received and retained the bills of lading until after the tobacco was destroyed by the burning of the depot, though he might have returned them before the burning. *Louisville & N. R. Co. v. Brownlee*, 14 Bush (Ky.) 590.—QUOTED AND APPLIED IN *Little Rock, M. R. & T. R. Co. v. Talbot*, 47 Ark. 97.

Plaintiff directed C. & Co. to ship to him, at J., certain goods by defendant's line. The goods were marked with plaintiff's address and delivered at defendant's depot, and receipts were taken in a book kept for that purpose by C. & Co. No special contract for transportation was made at the time. After shipment of the packages, C. & Co., who had been large shippers by defendant's line, in accordance with an habitual course of business between them, sent the receipts to defendant's office and received bills of lading, the giving of which was entered upon the receipts. The bills of lading limited defendant's liability to its own line, which terminated at C., and also excepted them from liability for loss by fire. The goods arrived safely at C., and were there destroyed by fire. Upon trial before a referee, these facts appearing, he refused to find the facts as to the usual course of business, or that defendant's route terminated at C., and did not extend to J., on the ground that they were immaterial. *Held*, error; that it was within the authority of C. & Co. to contract in this case in accordance with their usual method of business, and that they having so done made the findings refused essential to the disclosure of the actual contract. *Shelton v. Merchants' Despatch Transp. Co.*, 59 N. Y. 258, 48 How. Pr. 257; reversing 4 J. & S. 527.

The bills of lading, being taken as above stated by C. & Co. in the exercise of their original authority to contract, displaced the common-law relation between the parties and controlled their rights. *Shelton v. Merchants' Despatch Transp. Co.*, 59 N. Y. 258, 48 How. Pr. 257; reversing 4 J. & S. 527.

A carrier is released from liability for loss of goods by fire while awaiting transshipment in the company's depot under a bill of lading issued in another state, stipulating that no carrier shall be liable for loss by fire from any cause, or that no carrier shall be liable for loss by fire while goods are awaiting transshipment to any point. *Brown*

*v. Louisville & N. R. Co.*, 36 Ill. App. 140.

**76. Cotton burned in warehouse of a compress company.**—A carrier is excused where his bill of lading contained a valid fire-clause exempting him from liability for loss "by fire or other casualty in or at any cotton press or during transportation to or from press." *Deming v. Merchants' C. P. & S. Co.*, 90 Tenn. 306, 17 S. W. Rep. 89.

A valid stipulation in a bill of lading exempting the carrier from liability for loss of cotton by fire "while at depots, stations, yards, landings, warehouses, or in transit," exempts him from liability for loss thereof by fire occurring without fault of himself or agent, while the cotton is in the warehouse for compression by his agent—the warehouseman. *Lancaster Mills v. Merchants' Cotton-Press Co.*, 45 Am. & Eng. R. Cas. 423, 89 Tenn. 1, 14 S. W. Rep. 317.

Carriers are not excused, however, from liability for loss of cotton by fire, caused without their negligence, after its delivery to the carrier and while it remained in the warehouse of a compress company for compression for shipment, although their respective bills of lading contained valid fire-clauses, providing for exemption from liability for loss by fire, in general terms, or "while in depots or places of transshipment," or "while in transit or at stations." The warehouse of a compress company is not included in any of said clause. *Deming v. Merchants' C. P. & S. Co.*, 90 Tenn. 306, 17 S. W. Rep. 89.

**77. Goods burned by a lawless mob.**—A provision in a bill of lading exempting the carrier from liability for "loss or damage of any article or property whatever by fire or other casualty while in transit or while in depots or places of transshipment," applies to a case where a lawless mob takes the goods while in transit and burns them, where the negligence of the carrier does not contribute to such loss. *Hall v. Pennsylvania R. Co.*, 3 Am. & Eng. R. Cas. 274, 1 Fed. Rep. 226.

Goods were shipped under a provision in a bill of lading that the carrier should not be liable for "loss or damage by fire, unless it could be shown that such loss or damage occurred through negligence or default of the agents of the company." Upon the arrival of the goods at their place of destination, the car in which they were stored was

taken possession of by a mob of strikers against the military power of the state, and was burned. *Held*, that the owner must prove that the loss was the result of the negligence or default of the company's agents, and that without such proof the company was not liable. *Wertheimer v. Pennsylvania R. Co.*, 17 Blatchf. (U. S.) 421, 1 Fed. Rep. 232.—DISTINGUISHING *Ayres v. Western R. Corp.* 14 Blatchf. (U. S.) 9.

**78. What losses are not included within the limitation, generally.**—Where a bill of lading contains a provision in its caption that the goods are to be sent "through without transfer, in cars owned and controlled by the company," the carrier is not entitled to the benefit of another provision exempting it from liability from loss occasioned by fire by reason of a change of cars. *Robinson v. Merchants' Despatch Transp. Co.* 45 Iowa 470.—QUOTING *Maghee v. Camden & A. R. Co.*, 45 N. Y. 514.—DISTINGUISHED IN *Stewart v. Merchants' Despatch Transp. Co.*, 47 Iowa 229.

A provision in a bill of lading that goods are to be carried through without a change of cars binds the carrier, and upon a failure to so carry them, in the event of loss the carrier cannot avail itself of any limitation upon its common-law liability contained in the bill of lading. So *held*, where goods were shipped from Massachusetts to a point in Iowa and were detained in Chicago by reason of a Sunday law, while waiting to be transferred from one station to another, and were there destroyed by fire. *Stewart v. Merchants' Despatch Transp. Co.*, 47 Iowa 229.—DISTINGUISHING *Robinson v. Merchants' Despatch Transp. Co.*, 45 Iowa 470.—REVIEWED IN *Galveston, H. & H. R. Co. v. Allison*, 59 Tex. 193; *McCarn v. International & G. N. R. Co.*, 84 Tex. 352.

Where carriers by water receive goods and issue a through bill of lading, including, in addition to their vessels, transportation over a railroad, a provision in the bill of lading to the effect that the goods were to be delivered at the place of destination, "the damages of navigation, fire, and collisions on the lakes and rivers and the Welland canal excepted"—*held*, not to include loss by fire while on the railroad. *Barter v. Wheeler*, 49 N. H. 9.

A provision in a bill of lading guaranteeing a delivery of the goods in good order, "the dangers of the railroad, fire, leakage, and unavoidable accidents excepted," only

relates to the condition of the goods, and does not affect the liability of the carrier for a failure to deliver within the time specified in another provision of the bill of lading. *Harmony v. Bingham*, 1 *Duer* (N. Y.) 209.

A bill of lading issued by a railroad company contained a clause exempting the company from liability "for damage or loss to any article from or by fire or explosion of any kind." Held, not to apply to a loss by fire started by sparks from the company's locomotive, through a failure to provide the locomotive with spark-arresters, which were known and in actual use; but the company was not bound to resort to the use of all the contrivances known to science to prevent the escape of sparks. *Steinweg v. Erie R. Co.*, 43 N. Y. 123.—REVIEWING *Ford v. London & S. W. R. Co.*, 2 F. & F. 730; *Hege-man v. Western R. Co.*, 13 N. Y. 9.—APPLIED IN *Magnin v. Dinsmore*, 56 N. Y. 168; *Mynard v. Syracuse, B. & N. Y. R. Co.*, 71 N. Y. 180. DISTINGUISHED IN *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 27 Fla. 1. QUOTED IN *Bevier v. Delaware & H. C. Co.*, 13 Hun (N. Y.) 254; *Manson v. Manhattan R. Co.*, 23 J. & S. (N. Y.) 18; *Babcock v. Fitchburg R. Co.*, 46 N. Y. S. R. 796. REVIEWED IN *Caldwell v. New Jersey Steamboat Co.*, 47 N. Y. 282.

The bill of lading contained a clause exempting defendant from liability for loss by fire. Held, that, if the exemption applied to the goods after their arrival at Detroit, the violation of duty in not delivering them to the next carrier deprived defendant of the benefit of it. *Rawson v. Holland*, 59 N. Y. 611; affirming 5 *Daly* 155, 47 *How. Pr.* 292.

**79. Loss by fire occasioned by the carrier's own negligence.**—A provision in a bill of lading exempting the carrier from liability for loss "by fire or other casualty," does not relieve it from liability for a loss that is the result of a want of care or of negligence. *Rintoul v. New York C. & H. R. R. Co.*, 21 *Blatchf.* (U. S.) 439, 17 *Fed. Rep.* 905.—FOLLOWING *New York C. R. Co. v. Lockwood*, 17. *Wall.* (U. S.) 357. *North American Ins. Co. v. St. Louis, I. M. & S. R. Co.*, 3 *McCrary* (U. S.) 233, 11 *Fed. Rep.* 380. *Little Rock, M. R. & T. R. Co. v. Talbot*, 18 *Am. & Eng. R. Cas.* 598, 39 *Ark.* 523. *Germania Fire Ins. Co. v. Memphis & C. R. Co.*, 72 N. Y. 90, 28 *Am. Rep.* 115; affirming 7 *Hun* 233. *Grace v. Adams*, 100 *Mass.* 505. *Adams Exp. Co. v. Sharpless*, 77 *Pa. St.* 516. *York Mfg. Co. v. Illinois*

*C. R. Co.*, 3 *Wall.* (U. S.) 107. See also *Levering v. Union T. & I. Co.* 42 *Mo.* 88.

A provision in a bill of lading exempting the carrier from liability for loss by fire is not absolute even where valid. It is the carrier's duty to exercise reasonable care to prevent fires, and if a fire occurs it is bound to do all that prudent men would do under the same circumstances to stop it, so as to prevent an entire loss; and if it fails to do so it is liable to the extent that goods might have been saved. *Woodward v. Illinois C. R. Co.*, 1 *Biss.* (U. S.) 403.

A provision in a bill of lading issued by an express company to the effect that the company is not to be liable "in any manner, or to any extent, for any loss or damage or detention of such package or its contents, or of any portion thereof, occasioned by fire," does not relieve the company from liability if the goods be destroyed by fire caused by its negligence or the negligence of a railroad company to which the express company had delivered the goods to be carried over part of the route. Public policy demands that the right of owners to absolute security against the negligence of carriers, and of all persons engaged in performing the carrier's duty, shall not be taken away by any reservation in the carrier's receipt or by any arrangement between him and the performing company. *Bank of Ky. v. Adams Exp. Co.*, 93 *U. S.* 174.

**80. Burden of showing that carrier's negligence caused the loss.**—Where bills of lading contain a general exemption from liability for loss by fire it is incumbent on the owner of the property, in order to avoid the effect of the exemption, to show that the loss resulted from the carrier's negligence or some breach of duty which contributed to the loss. *Whitworth v. Erie R. Co.*, 6 *Am. & Eng. R. Cas.* 349, 87 *N. Y.* 413; affirming 13 *J. & S.* 602.—FOLLOWED IN *Witting v. St. Louis & S. F. R. Co.*, 101 *Mo.* 638.—*Little Rock, M. R. & T. R. Co. v. Talbot*, 18 *Am. & Eng. R. Cas.* 598, 39 *Ark.* 523.

Where a bill of lading exempts from liability from loss by fire, unless caused by the carrier's fraud or gross negligence, the burden is on the plaintiff to show that the fire was occasioned by the carrier's fraud or gross negligence. *Platt v. Richmond, Y. R. & C. R. Co.*, 32 *Am. & Eng. R. Cas.* 517, 108 *N. Y.* 358, 11 *Cent. Rep.* 101, 15 *N. E. Rep.* 393, 13 *N. Y. S. R.* 660; affirming 20 *J. & S.*

496.—**APPLYING** *Lamb v. Camden & A. R. & T. Co.*, 46 N. Y. 271; *Cochran v. Dinsmore*, 49 N. Y. 249; *Germania Fire Ins. Co. v. Memphis & C. R. Co.*, 72 N. Y. 90.

Where a bill of lading relieves the carrier from liability for loss by fire, in case of a loss by fire the burden is on the owner to show fault on the part of the carrier. *Colton v. Cleveland & P. R. Co.*, 67 Pa. St. 211.—**FOLLOWING** *Farnham v. Camden & A. R. Co.*, 55 Pa. St. 55.—*Indianapolis, D. & W. R. Co. v. Forsythe*, 4 Ind. App. 326, 29 N. E. Rep. 1138.—**QUOTING** *Hall v. Pennsylvania R. Co.*, 90 Ind. 459.

Where the action against a carrier is to recover on its common-law liability for losses occurring to goods by fire, and it claims exemption from liability for such loss by virtue of a condition in the bill of lading to that effect, it must aver and prove that the loss happened without any fault or neglect on its part; and failure to show due and proper care to prevent the loss entitles the plaintiff to recover. *Gaines v. Union T. & I. Co.*, 28 Ohio St. 418, 14 Am. Ry. Rep. 158.—**QUOTING** *President, etc., v. Adams Exp. Co.*, Sup. Ct. U. S. Oct. Term, 1876.—**FOLLOWED IN** *Erie R. Co. v. Lockwood*, 28 Ohio St. 358.

Where cotton was shipped under a bill of lading upon which was stamped the words "at owner's risk of fire," the burden is upon the carrier to show that the cotton was not lost by want of care upon its part or by fire occasioned through the negligence of the company. *Levering v. Union T. & I. Co.*, 42 Mo. 88.

Where a railroad company by the bill of lading reserved to itself the privilege of compressing the cotton which it contracted to transport, such reservation being evidently for its own convenience, the placing of the cotton in the hands of the compress company to be compressed made that company the carrier's agent, for whose negligence the carrier was liable the same as for its own negligence; so it was proper to refuse an instruction which asserted that it was incumbent on the plaintiff, in order to avoid the exception in the bill of lading as to loss by fire, to show that the fire was the result of the defendant's negligence, because this instruction excluded a liability for the negligence of the compress company. *Otis Co. v. Missouri Pac. R. Co.*, 55 Am. & Eng. R. Cas. 636, 112 Mo. 622, 20 S. W. Rep. 676.

### 3. Stipulations as to Amount of Recovery in Case of Loss.

#### 81. Validity and effect, generally.\*

—A stipulation in a bill of lading that when a valuation as agreed upon shall be named in it, such valuation shall cover loss or damage for any cause whatever, is invalid in so far as it exempts the carrier from liability for his own negligence or limits his liability therefor. *Weiller v. Pennsylvania R. Co.*, 42 Am. & Eng. R. Cas. 390, 134 Pa. St. 310, 19 Atl. Rep. 702.—**DISTINGUISHING** *Elkins v. Erie Transp. Co.*, 81\* Pa. St. 315.—**FOLLOWING** *Grogan v. Adams Exp. Co.*, 114 Pa. St. 523.

A shipper accepting a bill of lading containing a provision limiting the carrier's liability to \$50, which was below the actual value of the goods, is bound thereby where he accepts it without objection and without making known the actual value of the goods; and where he did not apply for any information as to the contents of the bill of lading, the fact that he could not read, which was not known to the carrier, will not affect the carrier's liability. *Fibel v. Livingston*, 64 Barb. (N. Y.) 179.

In a bill of lading for the transportation of a car-load of mules by railroad, a stipulation limiting the carrier's liability, in the event of injury, to \$100 for a mule is just and reasonable, especially when the shipper agrees to accompany and care for the animals, and is allowed reduced rates on that account. *Western R. Co. v. Harwell*, 45 Am. & Eng. R. Cas. 358, 91 Ala. 340, 8 So. Rep. 649.

A railroad company received certain wines for transportation, giving a bill of lading in which it was stated that the wines were "shipped at an agreement valuation of \$20 per barrel." The wines were lost in transit by the negligence of the company's servant. *Held*, that the company was liable only in the sum of \$20 per barrel. *Graves v. Lake Shore & M. S. R. Co.*, 16 Am. & Eng. R. Cas. 108, 137 Mass. 33, 50 Am. Rep. 282.—**APPROVED IN** *Hart v. Pennsylvania R. Co.*, 112 U. S. 331. **DISTINGUISHED IN** *Louisville & N. R. Co. v. Wynn*, 45 Am. & Eng.

\* Validity of stipulations limiting carrier's liability to particular amount, agreed valuations, see note, 45 AM. & ENG. R. CAS. 319, 21 Id. 91, 18 Id. 613.

Effect upon carrier's liability of statements in bill of lading as to value of goods, see note, 30 AM. & ENG. R. CAS. 12.

R. Cas. 312, 88 Tenn. 320, 14 S. W. Rep. 311. FOLLOWED IN *Hill v. Boston, H. T. & W. R. Co.*, 28 Am. & Eng. R. Cas. 87, 144 Mass. 284.

A shipper entered into a contract with the carrier by which the latter agreed to carry all goods of the former at a specified rate, regardless of value. While this agreement was in force a package was shipped and a bill of lading issued limiting the carrier's liability to \$50, unless the shipper had the true value inserted in the bill of lading; but no value was asked for and none inserted. *Held*, in case of loss, that the carrier was liable for the full value of the goods. *Scruggs v. Baltimore & O. R. Co.*, 5 *McCrary* (U. S.) 590, 18 *Fed. Rep.* 318.

**82. Rule where value fixed is less than actual worth.**—A stipulation in the bill of lading that the measure of damages for loss or injury to live stock shipped shall not exceed \$50 per head, when based upon the consideration of a reduction from the ordinary freight road to a lower one is reasonable, and will be maintained, although an animal killed may have been more valuable. *St. Louis, I. M. & S. R. Co. v. Weakly*, 35 *Am. & Eng. R. Cas.* 635, 50 *Ark.* 397, 7 *Am. St. Rep.* 104, 8 *S. W. Rep.* 134.—QUOTING AND FOLLOWING *Hart v. Pennsylvania R. Co.*, 112 U. S. 331. REVIEWING *New York C. R. Co. v. Lockwood*, 17 *Wall.* (U. S.) 357; *South & N. Ala. R. Co. v. Henlein*, 52 *Ala.* 606.

A stipulation in a bill of lading, for the shipment of live stock fixing values of the animals delivered for transportation is valid, if fair and reasonable in itself, based upon a sufficient consideration, and freely and understandingly assented to by the shipper, although the values thus fixed are materially less than those shown by the proof. *Starnes v. Louisville & N. R. Co.*, 91 *Tenn.* 516, 19 *S. W. Rep.*, 675.

**83. — or less than market value at destination.**—If a bill of lading is issued containing a provision limiting the carrier's liability to a certain amount for damages for loss or injury, the damages are limited to such amount, regardless of the market value of the goods at the place of destination. *Brown v. Cunard Steamship Co.*, 147 *Mass.* 58, 16 *N. E. Rep.* 717.—CRITICISING *The Lydian Monarch*, 23 *Fed. Rep.* 298; *Pearse v. Quebec Steamship Co.*, 24 *Fed. Rep.* 285.

**84. Limiting amount to value at**

**point and time of shipment.**—A provision in a bill of lading that in the event of a loss of any property for which the carrier might be responsible the value and cost of the same at the point and time of shipment should govern in the settlement for the same is not inoperative as an attempt to limit a common-law liability. *Tibbits v. Rock Island & P. R. Co.*, 49 *Ill. App.* 567.

A stipulation in a bill of lading that the cost of property at the point of shipment shall govern in the case of loss does not refer to damage or deterioration while in transit. *Heil v. St. Louis, I. M. & S. R. Co.*, 16 *Mo. App.* 363.

The bill of lading stipulated that "in the event of the loss of any property," etc., "the value or cost of the same at the point and time of the shipment is to govern," and that the company in such case was to have the benefit of any insurance on the property lost. *Held*, that the delivery of the flour at the point of destination to a wrong person was not a loss within the intent of the bill of lading, and that the proof of value was not, therefore, limited to the point of shipment. *Baltimore & O. R. Co. v. McWhinney*, 36 *Ind.* 436, 5 *Am. Ky. Rep.* 312.

By a bill of lading, loss occurring during the transportation was to be "computed at the value of the cost of the goods at the time and place of shipment." A tariff of rates of freight put "high wines" in the first class, and in the fourth class "high wines \* \* \* at an agreed valuation not exceeding \$20 per barrel;" the freight for first class was \$1.60, for fourth class 50 cents per 100 pounds. The rate of freight written in the bill was "50 cents per 100 pounds," and valuation \$20 per barrel." *Held*, that this valuation and rate were controlling parts of the bill, and that loss to the goods was to be estimated at \$20 per barrel. *Elkins v. Empire Transp. Co.*, 81 *Pa. St.* 315.—APPROVED IN *Hart v. Pennsylvania R. Co.*, 112 U. S. 331. DISTINGUISHED IN *Weiller v. Pennsylvania R. Co.*, 42 *Am. & Eng. R. Cas.* 390, 134 *Pa. St.* 310.

S. shipped at special rates four horses under bill of lading containing this clause: "And it is further agreed that should damages occur for which the railroad company may be liable, the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall

not exceed for a stallion or jack, 200; for a horse or mule, \$100; \* \* \* which amounts, it is agreed, are as much as such stock as are herein agreed to be transported are reasonably worth." S. sued for injury to one of the horses and recovered \$550. *Held*, that the clause quoted fixes the value of each animal separately, and is in form a valid contract. *Louisville & N. R. Co. v. Sowell*, 49 *Am. & Eng. R. Cas.* 166, 90 *Tenn.* 17, 15 *S. W. Rep.* 837.

Such contract is valid, although the carrier did not actually tender another without the clause as to value of animals, if he offered to ship, upon reasonable terms, under a bill of lading containing no limitation as to value, or was ready to do so upon demand being made by the shipper. *Louisville & N. R. Co. v. Sowell*, 49 *Am. & Eng. R. Cas.* 166, 90 *Tenn.* 17, 15 *S. W. Rep.* 837.

Where goods were shipped with a provision in the bill of lading that the value or cost of the property at the point of shipment should govern in the settlement of any claim for loss or damage, a judgment, where suit is brought for a loss, in accordance with such provision is proper. *Missouri Pac. R. Co. v. Barnes*, 2 *Tex. App. (Civ. Cas.)* 507.

Where it is expressly stipulated in a bill of lading that in the event of loss or damage, the value or cost at the point of shipment shall govern the settlement of the same, the insertion by the carrier, without the knowledge or consent of the shipper, of almost illegible abbreviations, which are interpreted by the carrier to mean "Leaks and outs excepted, \$20 railroad valuation," will not bind the shipper, and he may recover the actual value. *Rosenfeld v. Peoria, D. & E. R. Co.*, 21 *Am. & Eng. R. Cas.* 87, 103 *Ind.* 121, 53 *Am. Rep.* 500, 2 *N. E. Rep.* 344.—QUOTED IN *Leonard v. Chicago & A. R. Co.*, 54 *Mo. App.* 293.

A bill of lading for shipment of live stock provided that in case damage should occur for which the carrier would be liable, "the value at the place and date of shipment shall govern the settlement, in which the amount claimed shall not exceed for a stallion or jack, \$200; for a horse or mule, \$100; \* \* \* which amounts, it is agreed, are as much as such stock as are herein agreed to be transported are reasonably worth." The proof showed that the thirteen horses shipped were worth, at date and place of shipment, from \$130 to \$235 each; and that nine of these were injured in

course of transportation. Of the injured horses one died and the value of the other eight was impaired from \$25 to \$100 each. All the injured horses brought over \$100, except one that brought \$90. The court instructed the jury that the shipper could recover only \$100 for the dead horse, and \$10 for the injured horse that brought only \$90. *Held*, error, and that under said contract the carrier was liable for damage done to each horse to the extent of \$100, without regard to his value after receiving the injury. *Starnes v. Louisville & N. R. Co.*, 91 *Tenn.* 516, 19 *S. W. Rep.* 675.

**85. Effect of loss caused by carrier's actual negligence.**—A provision in a bill of lading issued by an express company providing that the liability of the company should be limited to a certain amount, unless the true value of the property should be stated and inserted in the bill of lading at the time of shipment, is valid only so far as a loss or injury occurs without the fault or negligence of the carrier. *Southern Exp. Co. v. Seide*, 42 *Am. & Eng. R. Cas.* 398, 67 *Miss.* 609, 7 *So. Rep.* 547.

A carrier is not exempted from paying full value for goods lost through its own negligence, although the bill of lading stipulates that "in consideration of rates inserted it is agreed that, in case of loss or damage, the same shall be adjusted at a valuation of \$20 per barrel." *Alabama G. S. R. Co. v. Little*, 12 *Am. & Eng. R. Cas.* 37, 71 *Ala.* 611.

A common carrier is liable for the value of the goods lost through his negligence, notwithstanding the bill of lading provides that the carrier shall not be liable beyond an amount named therein, when it is understood by the parties that the sum so agreed on is less than the value of the goods. Such an agreement can, at most, cover a loss arising from some cause other than the negligence or default of the carrier or his servants, and the rule of damages is the same, although less is charged and paid for the transportation than when the exempting clause is omitted. *United States Exp. Co. v. Backman*, 28 *Ohio St.* 144, 14 *Am. Ry. Rep.* 82.—REVIEWING *Beck v. Evans*, 16 *East* 243.—DISAPPROVED IN *Hart v. Pennsylvania R. Co.*, 112 *U. S.* 331. FOLLOWED IN *Baltimore & O. R. Co. v. Campbell*, 36 *Ohio St.* 647.

**86. Effect of the stipulation where carrier is guilty of conversion.**—Al-



though a bill of lading contains a stipulation that in case of loss the measure of damages shall be the value of the goods at the place of shipment, such stipulation does not limit the liability of the carrier for the wrongful conversion of the goods, and he is liable for their value at the place of destination. *Erie Dispatch v. Johnson*, 40 *Am. & Eng. R. Cas.* 113, 87 *Tenn.* 490, 11 *S. W. Rep.* 441.

**87. Waiver of limitation by payment of larger sum.**—A provision in a bill of lading limiting the carrier's liability with respect to the amount of damages in case of loss or injury to a horse is waived by the carrier taking the horse after he is injured, and paying a larger sum than the limit fixed in the bill of lading. *Chicago & E. I. R. Co. v. Katzenbach*, 38 *Am. & Eng. R. Cas.* 375, 118 *Ind.* 174, 20 *N. E. Rep.* 709.

#### 4. Particular Stipulations and Clauses.\*

**88. Fixing rates.**—Where a shipper is familiar with the published tariff rates of a railroad company, a bill of lading containing the provision that it was issued "subject to the published tariff of said company and its connections," the rates specified in the tariff schedule relating to the kind of goods shipped forms part of the contract. *Atchison, T. & S. F. R. Co. v. Roberts*, 3 *Tex. Civ. App.* 370, 22 *S. W. Rep.* 183.

**89. Guaranteeing Rates.**†—A provision in a through bill of lading guaranteeing a certain rate of carriage is not affected by a provision limiting the issuing carrier's liability for damage to that which occurs while the goods are in transit over its own line. *Little Rock & Ft. S. R. Co. v. Daniels*, 32 *Am. & Eng. R. Cas.* 479, 49 *Ark.* 352, 5 *S. W. Rep.* 584. See also *Baltimore & O. R. Co. v. Wilkens*, 44 *Md.* 11. *Tardos v. Chicago, St. L. & N. O. R. Co.*, 35 *La. Ann.* 15.

A bill of lading for a carload of freight guaranteed that the rate should not exceed \$120 per car, and contained a provision that the goods shipped were for "farm purposes." The goods passed over more than one line, and the delivery carrier charged \$235 per car, which was paid under protest, and the initial carrier was sued to recover back the overcharge. *Held*, that an answer by the company, showing that the rate of \$120 per

car was a special rate upon goods "for farm purposes" only, and that the shipper falsely represented the goods shipped to be for such purpose, states a good defense, and a recovery cannot be had. *Fry v. Louisville, N. A. & C. R. Co.*, 22 *Am. & Eng. R. Cas.* 442, 103 *Ind.* 265, 2 *N. E. Rep.* 744.

**90. Limiting duration of liability as carrier—Warehouseman.**—The liability of a railroad company as a common carrier continues after the goods have been carried to the place of destination and stored in the depot until the consignee has had notice and a reasonable time to remove them, after which it is only liable as warehouseman; yet it may stipulate by contract that its liability as carrier shall cease when the goods have been stored in its depot at the place of destination, when it shall be liable as warehouseman. *Western R. Co. v. Little*, 37 *Am. & Eng. R. Cas.* 659, 86 *Ala.* 159, 5 *So. Rep.* 563.—*APPLYING* *South & N. Ala. R. Co. v. Wood*, 66 *Ala.* 167; *Buckley v. Great Western R. Co.*, 18 *Mich.* 121. *APPROVING* *Alabama & T. R. R. Co. v. Kidd*, 35 *Ala.* 209. *FOLLOWING* *Louisville & N. R. Co. v. Oden*, 80 *Ala.* 38. *NOT FOLLOWING* *Rice v. Hart*, 118 *Mass.* 201; *Gashweiler v. Wabash, St. L. & P. R. Co.*, 83 *Mo.* 112; *Rothschild v. Michigan C. R. Co.*, 69 *Ill.* 164; *McCarty v. New York & E. R. Co.*, 30 *Pa. St.* 247; *Mohr v. Chicago and N. W. R. Co.*, 40 *Iowa* 580; *Butler v. East Tenn. & V. R. Co.*, 8 *Lea (Tenn.)* 32.

A stipulation in a bill of lading issued by a transportation company that goods received for shipment at Boston are "to be forwarded to Louisville depot only," does not relieve the carrier from its duty to properly care for them after their arrival at the latter place. *Merchants' D & T. Co. v. Merriam*, 31 *Am. & Eng. R. Cas.* 78, 111 *Ind.* 5, 11 *N. E. Rep.* 954.

**91. Limiting liability for loss from delays.**—A stipulation in a bill of lading of non-liability for loss from delays for any cause is unreasonable and will not relieve the carrier from liability for losses caused by negligence. *Berje v. Texas & P. R. Co.*, 37 *La. Ann.* 468.

A provision in a bill of lading that the carrier shall not be liable for delays in the transportation occasioned by over-pressure of freight, gives him no greater exemption than he is entitled to by law. *Hellmell v. Grand Trunk R. Co.*, 10 *Biss. (U. S.)* 170, 7 *Fed. Rep.* 68.—*DISTINGUISHED* in *Petersen*

\* See ante, 21, 22, 34.

† See ante, 54.

*v. Case*, 18 Am. & Eng. R. Cas. 578, 21 Fed. Rep. 885.

In an action by the shipper of apples under a bill of lading exempting the carrier from liability for damage to perishable property from delay, it is competent for the defendant to prove that prior to such shipment the plaintiff had filled up similar blank bills for shipments, which contained the same stipulation in regard to perishable property, as going to show plaintiff's knowledge of and assent to such provision. *Wabash, St. L. & P. R. Co. v. Jaggerman*, 23 Am. & Eng. R. Cas. 680, 115 Ill. 407, 4 N. E. Rep. 641.

Notwithstanding a provision in a bill of lading that the carrier should not be responsible for "damage to perishable property of any kind occasioned by delays from any cause," he may and will become liable for delay as the result of actual negligence. But proof of delay, merely, is not sufficient to show negligence in transporting the goods. *Wabash, St. L. & P. R. Co. v. Jaggerman*, 23 Am. & Eng. R. Cas. 680, 115 Ill. 407, 4 N. E. Rep. 641.

A provision in a bill of lading providing that the carrier shall not be liable for loss of perishable goods caused by delay does not apply to a loss through delay which is caused by the negligence of the carrier, where there is no provision in the bill of lading exempting the carrier from liability for such negligence. *McKay v. New York C. & H. R. R. Co.*, 50 Hun (N. Y.) 563, 20 N. Y. S. R. 816, 3 N. Y. Supp. 708.—*APPLYING* *Conduct v. Grand Trunk R. Co.*, 54 N. Y. 500; *Lamb v. Camden & A. R. & T. Co.*, 46 N. Y. 271; *Mynard v. Syracuse, B. & N. Y. R. Co.*, 71 N. Y. 180.

**92. Limiting liability for loss by freezing.**—Where a carrier agrees to transport perishable fruits through, in refrigerator cars, without a change, it is liable for a loss occurring by the fruit freezing by reason of being transferred to common box cars, notwithstanding the delivery of a bill of lading after the shipment containing a provision that the carrier would not be liable for injury or loss occasioned by the weather. *Merchants' D. & T. Co. v. Cornforth*, 3 Colo. 280.

A provision in a bill of lading providing that potatoes were to be carried at the owner's risk of freezing does not relieve the carrier from liability for a loss caused by a failure to carry them promptly. *Read v. St.*

*Louis, K. C. & N. R. Co.*, 60 Mo. 199, 9 Am. Ry. Rep. 201.

**93. Limiting liability for injuries to stock while being loaded.**—A provision in a bill of lading exempting the carrier from liability for injuries to live stock while being loaded does not relieve it from liability for an injury caused by a failure to provide safe and sufficient accommodations for loading it. *Potter v. Sharp*, 24 Hun (N. Y.) 179.

**94. Requiring bill to be presented indorsed.**—A provision in a bill of lading requiring the bill of lading to be presented indorsed as a condition precedent to the right to demand delivery of the goods is valid, but a provision requiring it to be indorsed and presented before the goods reached their place of destination is not valid. *Bishop v. Empire Transp. Co.*, 1 J. & S. (N. Y.) 99.

**95. Restricting liability for loss of packages.**—Seventy thousand pounds of corn in bulk is not a "package" within the meaning of a printed clause in a bill of lading restricting the carrier's liability for the loss of packages. *Rosenstein v. Missouri Pac. R. Co.*, 16 Mo. App. 225.

**96. Stipulation as to place of presenting claim for loss.**—The "place of delivery" within the meaning of a bill of lading issued by the first of a line of through carriers and requiring notice of a claim for damages for loss or delay to be made to the agent "at the place of delivery" is the place of ultimate destination and not the place where the carrier issuing the bill of lading turns the goods over to a connecting line. *Mason v. Grand Trunk R. Co.*, 37 U. C. Q. B. 163.

**97. As to the time within which to present such claim.**—A provision in a bill of lading requiring a claim for loss or damage to be presented within thirty days is valid and binding. *Kaiser v. Hoey*, 16 N. Y. S. R. 803, 1 N. Y. Supp. 429.

A provision in a bill of lading that a claim for loss or damage should be presented within forty days does not apply to damages resulting from a failure of the carrier to furnish cars. *Gulf, C. & S. F. R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. Rep. 716.—*FOLLOWING* *McCarty v. Gulf, C. & S. F. R. Co.*, 79 Tex. 33.

Stipulation in bill of lading as to notice

\* See ante, 48.

of claim for damage done to goods while *in transitu*, and before delivery, held not to apply where owner refused to receive goods. *Gulf, C. & S. F. R. Co. v. Golding*, 23 *Am. & Eng. R. Cas.* 732, 3 *Tex. App. (Civ. Cas.)* 60.

A carrier cannot require a shipper who sustains a loss to give notice of his claim within a short period of the date of the bill of lading without reference to the time of the loss. *Pacific Exp. Co. v. Darnell*, (Tex.) 32 *Am. & Eng. R. Cas.* 543, 6 *S. W. Rep.* 765.

A stipulation in a bill of lading as to notice of a claim for damages to the goods shipped is valid and binding, and must be complied with by the shipper before he has a right of action for damages. *Texas & P. R. Co. v. Jackson*, 3 *Tex. App. (Civ. Cas.)* 65.

A stipulation in a bill of lading which exempts the carrier from liability unless notice is given of the damage within a specified time is one of the matters forbidden by § 2068 of the Georgia Code, and is not effectual without proof of assent thereto by the shipper. *Central R. & B. Co. v. Hasselkus* (Ga.), 55 *Am. & Eng. R. Cas.* 586, 17 *S. E. Rep.* 838.

Provisions requiring claims for loss or damage to be presented within thirty-six hours after the arrival of the goods are not as a matter of law reasonable. *Brown v. Adams*, 3 *Tex. App. (Civ. Cas.)* 462.

Five barrels of whiskey were shipped, and a bill of lading was taken containing the provision: "Claims for loss or damage must be presented to the delivering line within thirty-six hours after the arrival of the freight." One of the barrels was never delivered. Held, in an action for failure to deliver the one barrel, that the provision did not apply; and that an assurance by the local agent, upon delivering the four barrels, that the other would be delivered in a few days was a waiver of such notice. *Galveston, H. & S. A. R. Co. v. Ball*, 80 *Tex.* 602, 16 *S. W. Rep.* 441.

An express company undertook to carry C. O. D. goods under a bill of lading stipulating that in no event should the company be liable for loss or damage unless the claim should be presented in writing within thirty days after the date of the bill of lading, with a further provision that "if any sum of money besides the charge of transportation is to be collected from the consignee on

delivery of the property, and the sum is not paid within thirty days from the date of the bill of lading, the shipper agrees that this company may return such property to him at the expiration of that time, subject to the conditions of its receipt, and that he would pay the charges for transportation both ways, and that the liability of the company while in this position, for the purpose of making such collection, should be that of warehouseman only." The company failed to collect the amount or to return the property. Held, that the owner of the property was not restricted to thirty days in the presentation of his claim, but was entitled to a reasonable time in which to do so. *Smith v. Dinsmore*, 9 *Daly (N. Y.)* 188. —APPLIED IN *Hirshberg v. Dinsmore*, 12 *Daly (N. Y.)* 429, 67 *How. Pr.* 103.

A stipulation in a bill of lading that in case any claim for damage should arise for the loss of articles mentioned in the receipt, while *in transitu* or before delivery, the extent of such damage or loss shall be adjusted before removal from the station, and the claim therefor made in thirty days to a "trace agent" of the carrier, is an unreasonable provision which the courts will not uphold. *Capehart v. Seaboard & R. R. Co.*, 81 *N. Car.* 438.—FOLLOWING *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 *How. (U. S.)* 344; *Bank of Ky. v. Adams Exp. Co.*, 93 *U. S.* 174.

A provision in a bill of lading that any claim for injury thereto shall be adjusted in the presence of an officer before the goods are removed from the station, and requiring notice to be given within ten days from the time the goods are delivered, has no application where the goods are so damaged as to be entirely worthless and the consignee refuses to receive them. *Gulf, C. & S. F. R. Co. v. Golding*, 23 *Am. & Eng. R. Cas.* 732, 3 *Tex. App. (Civ. Cas.)* 60.

The carrier must allege and prove the reasonableness of a provision requiring claims for loss or damage to be presented within thirty-six hours after the arrival of the goods. *Brown v. Adam*, 3 *Tex. App. (Civ. Cas.)* 462.

A condition in a bill of lading that no claim for damages for loss or detention of goods will be allowed "unless notice in writing and the particulars of the claim for said loss, damage, or detention" are given within thirty-six hours, is not complied with by writing to the agent "that the delay has

been unreasonable and loss suffered through the detention, that plaintiff has been compelled to reorder goods, and will hold the company accountable," such notice containing no particulars of the loss. *Mason v. Grand Trunk R. Co.*, 37 U. C. Q. B. 163.

**98. Condition as to payment of freight charges by consignees before delivery.**\*—A clause in a bill of lading making the payment of freight by the consignee a condition of the delivery of the goods is inserted for the benefit of the carrier. It is regarded as a letter of request from the consignor, and the reception of the property causes an implication that the consignees intend to comply with the request, and the law implies a promise upon which the carrier may found an action for the freight; and this rule applies to every consignee named in the bill of lading, whether final or intermediate. *Canfield v. Northern R. Co.*, 18 Barb. (N. Y.) 586. Compare also *Meyer v. Lemcke*, 31 Ind. 208.

**99. Stipulation for benefit of insurance.**†—A carrier may stipulate in his contract of shipment for the benefit of any insurance that may have been effected upon the goods to be transported, and, in the absence of notice to the contrary, a carrier has the right to presume that an agent of the shipper has authority to contract for such a stipulation; and such an agreement by the agent defeats the insurer's right of subrogation. Furthermore, the subrogation clause in the bill of lading cannot be held invalid on account of lack of consideration, simply because there was no corresponding reduction of the freight-charges. *Missouri Pac. R. Co. v. International Marine Ins. Co.*, 55 Am. & Eng. R. Cas. 548, 84 Tex. 149, 19 S. W. Rep. 459.

A bill of lading contained a provision that the carrier should have the benefit of insurance effected by the insurers in case of liability for loss, but provided that the carrier should not be liable for loss by perils of navigation. A loss occurred through the perils of navigation as the proximate cause, but to which the negligence of the carrier remotely contributed, and the insurers paid the loss to the shippers. Held, that the insurers were not subrogated to the rights of the shippers, and could not maintain an

action against the carrier. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 10 Biss. (U. S.) 18.

**100. Stipulation that shipper accepts car as sufficient.**—A carrier is not protected against liability for loss of goods resulting from defects in a car, the existence of which affords evidence of negligence, by a stipulation in the bill of lading, accepted by the shipper, to the effect that he had examined the car for himself, had found it in good order, and had accepted it as "suitable and sufficient" for the purpose of his shipment. *Louisville & N. R. Co. v. Dies*, 91 Tenn. 177, 18 S. W. Rep. 266.

**101. Waiving necessity of notice of arrival to consignee.**—Carriers are not by law required to give notice to the consignee of the arrival of goods; but, even if they should be so required, a provision in a bill of lading providing that goods should be removed the same day of their arrival, or stored at owner's risk, would be a waiver of the duty to give notice. *Gashweiler v. Wabash, St. L. & P. R. Co.*, 25 Am. & Eng. R. Cas. 403, 83 Mo. 112, 53 Am. Rep. 558.—QUOTING *Rankin v. Pacific R. Co.*, 55 Mo. 168; *Buckley v. Great Western R. Co.*, 18 Mich. 131; *Huston v. Peters*, 1 Met. (Ky.) 561.

**102. Excepting loss or damage on water—"Perils of the sea."**\*—Where goods will be carried both by land and water, a provision in a through bill of lading, exempting the railroad company from liability for damages "by fire or collision on the rivers and sea, or for loss or damage by storm or accident on water," limits the railroad carrier's exemption only to loss or damage on the water, and not to any loss occurring on their own roads or in their stations. *Little Rock, M. R. & T. R. Co. v. Talbot*, 18 Am. & Eng. R. Cas. 598, 39 Ark. 523.

Under a bill of lading excepting loss by "unavoidable dangers of the river navigation," a loss by collision occurring without default of the vessel containing the goods is within the exception, notwithstanding that the collision was caused by the negligence of the persons operating the other boat. *Hayes v. Kennedy*, 2 Pittsb. (Pa.) 262.

Where a railroad company received freight

\* See ante, 47.

† Subrogation of insurer to insured's right to action: effect of stipulation for benefit of insurance, see 42 AM. & ENG. R. CAS. 344 abstr.

1 D. R. D.—41.

\* "Perils of the sea," meaning of, generally, see note, 41 AM. DEC. 281.

to be transported partly by rail and partly by water, and it was stipulated in the bill of lading that "it is especially agreed and understood that the company is not responsible for loss or damage on the lakes or rivers, unless it can be shown that such damage or loss occurred through the negligence or default of the agents of the company;" and the freight, after being carried by the defendant, was placed upon a wharf-boat, awaiting the arrival of a packet, wherein to ship it, and the wharf-boat sank without the fault of the railroad company, and the freight was lost—*held*, that the loss was not one occurring on the lakes and rivers within the meaning of the bill of lading, and that the bill of lading should be construed to mean that, in the absence of negligence, the carrier was not to be responsible for loss or damage occurring in the navigation of the lakes or rivers. *St. Louis & S. E. R. Co. v. Smuck*, 49 Ind. 302, 8 Am. Ry. Rep. 209.

Where a bill of lading, issued by a steamship company, contains a provision exempting it from injury resulting from "blowing of bilge-water upon the goods, and from the perils of the sea," a verdict in favor of the owner of the goods for an injury caused thereby, in the absence of evidence of negligence, is error. *East Tenn., V. & G. R. Co. v. Wright*, 76 Ga. 532.

**103. Effect of clause "at company's convenience."**—The clause in a bill of lading, that the goods will be shipped "at the convenience of the company," will not protect the company from liability for unreasonable delay. *Branch v. Wilmington & W. R. Co.*, 18 Am. & Eng. R. Cas. 621, 88 N. Car. 573.

Ordinarily, a stipulation to ship "at company's convenience" is too indefinite, and therefore unreasonable; but under the circumstances in this case, the defendant is entitled to set up the agreement as a defense to the action for the penalty. *Whitehead v. Wilmington & W. R. Co.*, 9 Am. & Eng. R. Cas. 168, 87 N. Car. 255.

A railroad company accustomed to transport cotton owned 120 flat cars which were usually ample to carry on all its business in that line. In the autumn of 1881 the cotton crop was very heavy, and there were many delays in consequence. At the same time a connecting line, over which much of the cotton was forwarded, gave notice that it would thereafter transport cotton only in

box-cars and not in flat cars. The company first above-named had not sufficient box-cars to carry on its business and was wholly unable at once to obtain more. At this juncture, A. & Co. delivered certain cotton to the railroad for transportation, receiving a through bill of lading over the connecting line, which bill contained a clause providing that the cotton was received for transportation "at the company's convenience." A. & Co., although well able to read, did not notice said clause until after the bringing of the suit hereinafter mentioned. The cotton was not shipped for more than five days, owing to the circumstances above mentioned. In a suit by A. & Co. against the railroad company to recover the statutory penalty—*held*, that under the circumstances of the case the clause above cited in the bill of lading was a valid one, and might be taken advantage of by the company, and that therefore plaintiffs could not recover. *Whitehead v. Wilmington & W. R. Co.*, 9 Am. & Eng. R. Cas. 168, 87 N. Car. 255.

**104. Effect of the clause "at owner's risk."**—The term "at the owner's risk" in bills of lading which are declared to be special contracts, taken in connection with the other stipulations therein, is held to limit the carrier to such loss and damage only as might result from *ordinary* neglect; which is defined to mean that want of care and diligence which prudent men usually bestow on their own concerns. *Baltimore & O. R. Co. v. Rathbone*, 1 W. Va. 87.

Where by the bill of lading the goods are received "at owners' risk of loss or damage," any damage to the goods must be proved to have been caused by the fault of the carrier before he can be held liable. *Mississippi Valley Transp. Co. v. Fostick, Mann*. (La.) 3.

Even if verbal evidence was admissible to prove a contract to carry oil in covered cars, defendants were not liable thereon, as the agent had no authority to make such a contract; but, *held*, that they were not guilty of negligence, liability for which, the condition that "oil will under no circumstances be carried save at the risk of the owners" did not exempt them. *Fitzgerald v. Grand Trunk R. Co.*, 4 Ont. App. 601; *affirming* 28 U. C. C. P. 586.—REVIEWING Peek v. North Staffordshire R. Co., 10 H. L. 473; *Shaw v. York & N. M. R. Co.*, 13 Q. B. 347; *Carr v. Lancashire & Y. R. Co.*, 7 Ex. 707;

*Allday v. Great Western R. Co.*, 5 B. & S. 903. DISTINGUISHING *D'Arc v. London & N.W. R. Co.*, L. R. 9 C. P. 325.

In a bill of lading given by a railroad company, an exception or stipulation in the words "taken at owner's risk" does not change the character of the employment, but only exempts the company from its liability as insurer, and the company when sued for a failure to deliver the goods is not relieved from the onus of making at least a *prima-facie* showing that the loss was not caused by its neglect; and the showing that the transaction occurred during the war, and that the railroad was frequently used by the military authorities, and there was a great want of safety and certainty in the transportation of freight, does not make out such *prima-facie* case. *Mobile & O. R. Co. v. Jarboe*, 41 Ala. 644.—REVIEWED IN *Mobile & O. R. Co. v. Thomas*, 42 Ala. 672.

**105. Effect of clause "privilege of reshipping."**—The words "privilege of reshipping" in a bill of lading are intended for the benefit of the carrier, but do not limit his responsibility. He is bound for the safe delivery of the property precisely as if such words were not in the bill of lading. *Broadwell v. Butler*, 6 McLean (U. S.) 296.

**106. Effect of clause "unavoidable accidents," etc.**—An exception contained in a bill of lading of a common carrier by land "of unavoidable dangers and accidents of the road," is not a restriction of his general liability. *Walpole v. Bridges*, 5 Blackf. (Ind.) 222.

The use of the words "unavoidable accidents" in a bill of lading, instead of the usual ones, "inevitable accidents," does not vary the meaning of the instrument or change the liability of the carriers. *Fowler v. Davenport*, 21 Tex. 626. See also *Harmony v. Bingham*, 1 Duer (N. Y.) 209.

**107. Meaning of the terms "breaking" and "chafing."**—In respect to every injury except those specially excepted the defendant was subject to all the responsibilities of a common carrier. Among the exceptions were "breaking" and "chafing." Held not to have been intended to apply to live stock, and that the breaking of the leg of a mare was not covered by them. *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. Rep. 870.—DISTINGUISHING *Camp v. Hartford & N. Y. Steamboat Co.*, 43 Conn. 333.

### III. NEGOTIABILITY AND TRANSFER.\*

#### 1. Negotiability and Mode of Transfer.

**108. Negotiability of the bill, generally.**†—Bills of lading are not negotiable in the same sense in which bills of exchange or promissory notes are. *Baltimore & O. R. Co. v. Wilkens*, 44 Md. 11. *Douglas v. People's Bank*, 86 Ky. 176, 5 S. W. Rep. 420. *Batavia Bank v. New York, L. E. & W. R. Co.*, 32 Am. & Eng. R. Cas. 497, 106 N. Y. 195, 8 N. Y. S. R. 209, 7 Cent. Rep. 822, 12 N. E. Rep. 433; affirming 33 Hun 589. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. Rep. 608. *Stone v. Washash, St. L. & P. R. Co.*, 9 Ill. App. 48. *National Bank v. Atlanta & C. A. L. R. Co.*, 25 So. Car. 216. *Shaw v. Merchants' Nat. Bank*, 101 U. S. 557. *Lehman v. Central R. & B. Co.*, 4 Woods (U. S.) 560, 12 Fed. Rep. 595.

A bill of lading is to be regarded as a quasi-negotiable instrument. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. Rep. 608.

When it is said that a bill of lading is negotiable, it is only meant that its true owner may transfer it by indorsement or assignment, so as to vest the legal title in the assignee. *Douglas v. People's Bank*, 86 Ky. 176, 5 S. W. Rep. 420.

**109. Negotiability under statutory provisions.**‡—Minnesota Gen. St. 1878, ch. 124, § 17, does not put bills of lading on the same footing as bills of exchange. *National Bank v. Chicago, B. & N. R. Co.*, 44 Minn. 224, 46 N. W. Rep. 342, 560.

A statute making bills of lading negotiable by indorsement and delivery, without defining the effect of the transfer, must not be construed as making such instruments negotiable in the full sense of bills of exchange and promissory notes. *Shaw v. Merchants' Nat. Bank*, 101 U. S. 557.

**110. Duration of negotiability of bill.**§—In shipping goods from Chicago to Boston the usual course of trade is to forward the goods by vessel on the Great Lakes as far as Buffalo, and thence by rail to

\* See ante, 26, 50-61.

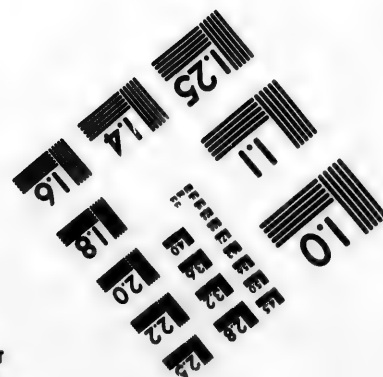
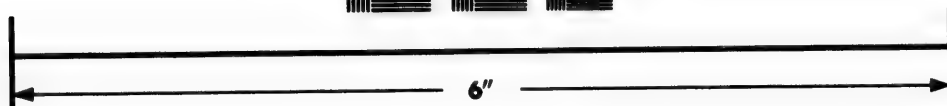
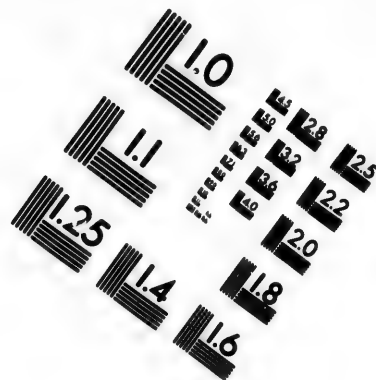
† Negotiation of "duplicate" bill of lading, see note, 21 AM. & ENG. R. CAS. 78.

‡ Statutory provisions respecting negotiability of bills of lading and rights of action, see note, 38 AM. DEC. 423.

§ See ante, 52.

Duration of negotiability of bill of lading, see note, 38 AM. DEC. 422.





# Photographic Sciences Corporation

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Boston. A bill of lading is given to the consignor at Chicago by the owners of the vessel, drawn to the consignor's order at Buffalo. At Buffalo, when the goods are put in the cars, the railroad company gives a memorandum receipt reciting that the vessel's bill of lading is still outstanding, that it is to be regarded as transferring the property, and is alone to be used in procuring the goods from the railway company. Goods being forwarded in accordance with the above-mentioned course of trade, the vessel's bill of lading was transferred by the consignee, to whom it had been indorsed prior to the arrival of the goods in Boston. The goods were, however, delivered to the consignee by the railway company without surrendering the bill of lading. In an action by the transferee of the bill against the company for the misdelivery—held, that said bill was not *functus officio* at Buffalo, but was effectual to transfer the property in the goods to plaintiff, and that therefore he was entitled to recover. *Forbes v. Boston & L. R. Co.*, 9 Am. & Eng. R. Cas. 76, 80, 133 Mass. 154.—Compare also *Clementson v. Grand Trunk R. Co.*, 42 U. C. Q. B. 263.

**111. Transfer of the bill, generally.**—Though a bill of lading is not negotiable in the ordinary sense of the term, it is assignable to the same extent as the property that it represents, and the rights of innocent holders should be protected the same as if they were in possession of the property itself. *Stone v. Wabash, St. L. & P. R. Co.*, 9 Ill. App. 48.

The right of property in goods may be transferred by delivery or indorsement of the bill of lading. *Baltimore & O. R. Co. v. Wilkens*, 44 Md. 11.

Gen. St. Minnesota 1878, ch. 124, § 17, merely makes a transfer and delivery of bills of lading symbols of property, in the mode therein prescribed, equivalent, for certain purposes, to a transfer and delivery of the property itself. *National Bank v. Chicago, B. & N. R. Co.*, 44 Minn. 224, 46 N. W. Rep. 342, 560.

It is not absolutely necessary that a bill of lading should be actually indorsed or even delivered to the buyer to make him the assignee thereof. Other circumstances may be shown equally sufficient to show the real relationship of a party to the cargo. *Philadelphia & R. R. Co. v. Barnard*, 3 Ben. (U. S.) 39.

**112. Transfer by indorsement and delivery.\***—By indorsement of a bill of lading or its delivery without indorsement, the property in the goods may be transferred where such is the intent with which the indorsement or delivery is made. *Dodge v. Meyer*, 61 Cal. 405.

Section 744 of the Missouri Rev. St. prescribes that the manner of negotiation of bills of lading shall be by indorsement and delivery in the same manner as bills of exchange and promissory notes. *Dymock v. Missouri, K. & T. R. Co.*, 54 Mo. App. 400.

A bill of lading, though not negotiable in the full sense of that term, is negotiable so far that by indorsement the right to the possession of the goods mentioned in it passes. *National Bank v. Atlanta & C. A. L. R. Co.*, 25 So. Car. 216.

A bill of lading may be transferred by indorsement and transfer, and passes a good title to the assignee in the goods represented by the bill. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 17 S. W. Rep. 608.

**113. Transfer by delivery without indorsement.†**—A formal assignment of a bill of lading is not essential to transfer title to the goods therein mentioned. *Jeffersonville, M. & I. R. Co. v. Irvin*, 46 Ind. 180.

The transfer of a bill of lading by the shipper, on a sale or pledge of the property shipped, is a symbolical delivery of the property, without any indorsement on the bill. *Michigan C. R. Co. v. Phillips*, 60 Ill. 190.

In such a case the same rule applies to the shipper who is not the owner, but has been put in possession of the property under such circumstances as to sell and pass the title to an innocent purchaser. Such a pledge and transfer of the bill of lading transfers a legal and not a mere equitable title in the pledge. *Michigan C. R. Co. v. Phillips*, 60 Ill. 190.—REVIEWED IN *Illinois C. R. Co. v. Southern Bank*, 41 Ill. App. 287.

Goods shipped under bill of lading drawn

\* See ante, 60.

† See ante, 57, 58.

Transfer of bill of lading without indorsement, see note, 30 AM. & ENG. R. CAS. 105.

Delivery of unindorsed bill of lading, see note, 18 AM. & ENG. R. CAS. 651.

Delivery of goods by carrier on unindorsed bill of lading, fictitious name, see 45 AM. & ENG. R. CAS. 384, *abstr.*

to order of the shipper may be transferred by delivery of the bill of lading without indorsement. *Merchants' Bank v. Union R. & T. Co.*, 69 N. Y. 373; *affirming* 8 Hun 249. — FOLLOWING *Bank of Rochester v. Jones*, 4 N. Y. 497; *City Bank v. Rome, W. & O. R. Co.*, 44 N. Y. 136.

The mere delivery of a bill of lading transfers the title to the property. *Jeffersonville, M. & I. R. Co. v. Irvin*, 46 Ind. 180.

Where a bill of lading requires freight to be delivered to the order of the consignor, the deposit in the post of the bill of lading, unindorsed, attached to a draft drawn upon a third person for the purchase-price of the freight, and directed to such third person, does not necessarily raise a conclusive presumption that such third person was thereby vested with the title to the freight; but it may be shown that it was vendor's intention to retain the title in himself until after the acceptance or payment of the draft. *Alabama G. S. R. Co. v. Mt. Vernon Co.*, 35 Am. & Eng. R. Cas. 657, 84 Ala. 173, 4 So. Rep. 356.

**114. Effect of words "non-negotiable" written in the bill.**—At common law a carrier can limit its liability, and the statute relating to bills of lading is in derogation of the common law, and the object of the statute in requiring the insertion of the words "not negotiable" in bills of lading was not to affect any transfer of the title with notice that the shipper's vendor had not been paid the purchase-price, etc., but to notify the shipper himself that the bill of lading was not subject to the operation of the statute. *Dymock v. Missouri, K. & T. R. Co.*, 54 Mo. App. 400.

Bills of lading are not negotiable in the fullest sense of the term, but they are transferable, and carry with them the ownership, either general or special, of the property described; and unless the carrier has limited its liability by stamping them as "not negotiable," it is bound to know that their office and effect is not limited to the person to whom they are first issued, and to deliver the property only on production of the bills. *Bank of Batavia v. New York, L. E. & W. R. Co.*, 32 Am. & Eng. R. Cas. 497, 106 N. Y. 195, 8 N. Y. S. R. 209, 7 Cent. Rep. 822, 12 N. E. Rep. 433; *affirming* 33 Hun 589. Compare also *Colgate v. Pennsylvania Co.*, 102 N. Y. 120, 1 N. Y. S. R. 166, 6 N. E. Rep. 114; *affirming* 31 Hun 297.

## 2. Rights of Transferee.

**115. Generally.**\*—A bill of lading is not such a negotiable instrument as to give to the assignee any other or greater rights than the assignor had. *Haas v. Kansas City, Ft. S. & G. R. Co.*, 35 Am. & Eng. R. Cas. 572, 81 Ga. 792, 7 S. E. Rep. 629.

A delivery by the consignor to the consignee of a bill of lading vests title in the goods therein mentioned so far as the consignor had title thereto. *Ela v. American Merchants' U. Exp. Co.*, 29 Wis. 611.

The transfer of a bill of lading, for value, by indorsement and delivery, passes to the transferee whatever title the transferor had to the property at the time. *Held*, accordingly, that such transferee's title is superior to the lien claim of a person, to whom the carrier delivered the property, for charges against the transferor on prior consignments. *Dickson v. Merchants' Elevator Co.*, 44 Mo. App. 498.

The holder of a railway receipt or bill of lading can acquire no greater rights under it than were possessed by the original consignee. *Hunt v. Mississippi C. R. Co.*, 29 La. Ann. 446.

The transfer of a bill of lading operates only as a transfer of whatever title the transferor has at the time to the goods covered by it. And if a shipper takes a bill of lading to himself as consignee, and the carrier delivers the goods to another with the consent of the shipper, but without surrender of the bill of lading, a subsequent consignee of the bill of lading, though acquiring it without notice and for value, has no recourse against the carrier. *Alabama Nat. Bank v. Mobile & O. R. Co.*, 42 Mo. App. 284.

**116. Rights of bona-fide holders, generally.**†—Where one of two innocent parties must suffer from wrongful or tortious acts of a third party the law casts the burden or loss upon him by whose act, omission, or negligence such third party was enabled to commit the wrong which occasioned the loss. So *held*, where a carrier negligently issued two original bills of lading for the same goods. *Wichita Sav. Bank v. Atchi-*

\* Indorsement and transfer of bill of lading, title of holder, see note, 38 AM. DEC. 419.

† See ante, 15, 16.

Indorsee for value, when without notice, of a bill of lading, not bound by terms of extrinsic collateral agreements, see note, 23 AM. & ENG. R. CAS. 701.

son, T. & S. F. R. Co., 20 Kan. 519, 20 Am. Ry. Rep. 299.

The purchaser of a bill of lading who has reason to believe that his vendor was not the owner thereof, or that it was held to secure an outstanding draft, is not a *bona-fide* purchaser, nor is he entitled to hold the merchandise covered by the bill against its true owner. *Shaw v. Merchants' Nat. Bank*, 101 U. S. 557.

One who clothes another with evidence of ownership of a bill of lading, thereby putting it in his power to deal with it as his own, is estopped from asserting his real title as against a purchaser having no knowledge of such title; and this, too, though such bill be merely assignable. *Dymock v. Missouri, A. & T. R. Co.*, 54 Mo. App. 400.

**117. Who is a bona-fide holder, a question of fact.**—In a suit by assignees of a bill of lading against a railroad for a non-delivery of the goods, the question whether plaintiffs are assignees for value is one of fact, and cannot be determined on demurrer. *Royal Canadian Bank v. Grand Trunk R. Co.*, 23 U. C. C. P. 225.—DISTINGUISHED IN *Oliver v. Great Western R. Co.*, 28 U. C. C. P. 143.

**118. Right of indorsee or transferee to sue in his own name.**—A statute making bills of lading negotiable by indorsement and delivery, without attempting to define the effect of the transfer, is to be understood as merely giving the indorsee the right to sue in his own name. *Shaw v. Merchants' Nat. Bank*, 101 U. S. 557.

Bills of lading stand in the place of the goods they represent, and delivery or indorsement of them transfers the right of property in the goods, but not in the contract itself, so as to enable the indorsee to maintain at common law an action on it in his own name. *Baltimore & O. R. Co. v. Wilkens*, 44 Md. 11.

The assignee of a bill of lading cannot sue thereon in his own name, but must sue in the name of the assignor, for his use, as such an instrument is a chose in action and is not negotiable. *Knight v. St. Louis, I. M. & S. R. Co.*, 141 Ill. 110; affirming 40 Ill. App. 471, 30 N. E. Rep. 543.

Under the Code the transferee of a bill of lading may bring an action thereon in his own name against the carrier. *Merchants' Bank v. Union R. & T. Co.*, 69 N. Y. 373; affirming 8 Hun 249.

**119. Right to maintain action of**

**trover.**—A claim for the conversion of goods is assignable, and the transfer of a bill of lading will pass to the transferee a claim of the transferor for the conversion of the goods represented by such bill. *Dickson v. Merchants' Elevator Co.*, 44 Mo. App. 498.

The remedy of the transferee of a bill of lading, where the carrier has delivered the property without a production of the bill, as required by statute, is not confined to an action for damages as given by the N. Y. act of 1866, ch. 440, § 3, but he may maintain an action for the conversion of the property, even though the delivery was by mistake, without evil intent. *Colgate v. Pennsylvania Co.*, 102 N. Y. 120, 6 N. E. Rep. 114.

A railroad company transporting grain deposited the same, in accordance with the custom of trade, in a grain elevator at the point of destination, where it was mixed with other grain of like quality. Subsequently, on demand, it delivered to the consignee of such grain an equal quantity to that transported, but without demanding the bill of lading, which was drawn to the consignee's order. An indorsee of said bill prior to the arrival of the grain brought trover against the railway company for a misdelivery. *Held*, that the plaintiff was entitled to recover. *Forbes v. Boston & L. R. Co.*, 9 Am. & Eng. R. Cas., 76, 80, 133 Mass. 154.

**120. Transferee of lost or stolen bill.\***—The holder of a lost or stolen bill of lading is not protected by the rule that a *bona-fide* purchaser of a lost or stolen bill or note, indorsed in blank or payable to bearer, is not bound to look beyond the instrument. The bill of lading is not negotiable in the sense of bills and notes, and the rule does not apply. *Shaw v. Merchants' Nat. Bank*, 101 U. S. 557.

**121. Transferee of bill issued when no goods were actually received.**—The carrier is liable to a *bona-fide* holder or innocent purchaser or indorsee of a bill of lading, even though the whole amount or no part of the goods mentioned in the bill was ever received by the carrier. *Wichita Sav. Bank v. Atchison, T. & S. F. R. Co.*, 20 Kan. 519, 20 Am. Ry. Rep. 299.

\* Indorsement of lost or stolen bill of lading, or bill of lading fraudulently issued, see note, 38 AM. DEC. 422.

† See ante, 14-16.

*Sioux City & P. R. Co. v. First Nat. Bank*, 1 *Am. & Eng. R. Cas.* 278, 10 *Neb.* 556, 7 *N. W. Rep.* 311. *Armour v. Michigan C. R. Co.*, 65 *N. Y.* 111, 22 *Am. Rep.* 603; *reversing* 3 *J. & S.* 563. *Brooke v. New York, L. E. & W. R. Co.*, 21 *Am. & Eng. R. Cas.* 64, 108 *Pa. St.* 529, 1 *Atl. Rep.* 206. To the contrary, see *National Bank v. Chicago, B. & N. R. Co.*, 44 *Minn.* 224, 46 *N. W. Rep.* 560. *Williams v. Wilmington & W. R. Co.*, 93 *N. Car.* 42, 53 *Am. Rep.* 450.

**122. Effect of transfer to divest vendor of his lien.**—The indorsement and delivery of a bill of lading transfer the property from the vendor to the vendee, are a complete legal delivery of the goods, and divest the vendor's lien. *Missouri Pac. R. Co. v. McLiney*, 32 *Mo. App.* 166.

**123. Effect of transfer to defeat seller's right of stoppage in transitu.\***—If a bill of lading be obtained without the authority of the owner and vendor of the goods, or by fraud, it will not authorize a transfer so as to defeat the title of the original owner or affect his right to stop the goods in transit. *Evansville & T. H. R. Co. v. Erwin*, 9 *Am. & Eng. R. Cas.* 252, 84 *Ind.* 457.—*QUOTING* *Saltus v. Everett*, 20 *Wend.* (N. Y.) 267; *Barnard v. Campbell*, 55 *N. Y.* 456.

A *bona-fide* holder of a bill of lading as collateral security has a title to the goods which is paramount to the unpaid vendor's right of stoppage *in transitu*, but such right of stoppage is not cut off where the bill of lading is taken as collateral for or in payment of an antecedent debt. *Dymock v. Missouri, K. & T. R. Co.*, 54 *Mo. App.* 400.

The assignment of a bill of lading indorsed thereon, accompanied by delivery of the instrument, passes to the assignee title to goods actually in transit as completely as though they had passed through the buyer's hands, so as to defeat the seller's right to stoppage *in transitu*. *Missouri Pac. R. Co. v. Heidenheimer*, 82 *Tex.* 195, 17 *S. W. Rep.* 608.

The transfer of a bill of lading by way of pledge, mortgage, or as collateral security for a loan does not absolutely defeat the right of stoppage *in transitu*, but the seller cannot exert that right until he has discharged the debt secured by the transfer.

\* When indorsement of bill of lading defeats right of stoppage *in transitu*, see note, 38 *Am. Dec.* 422; note to 23 *Am. & Eng. R. Cas.* 703.

*Missouri Pac. R. Co. v. Heidenheimer*, 82 *Tex.* 195, 17 *S. W. Rep.* 608.

A lot of merchandise was bought, one-half on a credit of sixty days, and the railway company, upon receiving the goods, executed two bills of lading, one marked "original" and the other "duplicate," the former of which was retained by the seller and the other sent to the purchaser. The duplicate bill was indorsed by the purchaser as collateral for a loan, and some two days afterward the sellers, learning that the purchasers were in financial trouble, stopped the goods while in transit, whereupon the party making the loan to the purchasers brought suit against the carrier to recover the goods. *Held*, that the bills of lading were each of equal legal effect, and that the indorsement of the duplicate to the plaintiff, in a *bona-fide* transaction, passed title to the property and cut off the right of stoppage *in transitu*. *Missouri Pac. R. Co. v. Heidenheimer*, 82 *Tex.* 195, 17 *S. W. Rep.* 608.

### 3. Transfer as Collateral Security.

**124. General.**—Bills of lading are not only intended as an insurance to the shipper, but as a representation to the "banker or private person" with whom the statute deals that they may act on the faith of it and advance their money. By *PATTERSON, A. J.*; *contra*, *BURTON, A. J.* *Erb v. Great Western R. Co.*, 3 *Ont. App.* 446; *affirming* 42 *U. C. Q. B.* 90.—*QUOTING* *Baltimore & O. R. Co. v. Wilkens*, 44 *Md.* 11, 22 *Am. Rep.* 26.

The assignment of a bill of lading as collateral security conveys title to the cargo. *Tilden v. Minor ex rel.*, 45 *Vt.* 196.

A bill of lading transferred as security for advances is a pledge for the goods themselves, unless circumstances indicative of a different intention appear; and the pledgee holds the legal title to the goods and is entitled to all the rights and remedies of a purchaser for value. *Dymock v. Missouri, K. & T. R. Co.*, 54 *Mo. App.* 400.

Where there is a valid agreement to ship property to persons to secure a debt contracted upon the faith that such shipment would be made, and the bill of lading evidences the fact that the property was delivered to the carrier in consummation of that agreement, and the bill of lading unindorsed is delivered to the consignees while the property is in transit, it is a sufficient delivery of the goods to constitute a pledge, and persons afterward making advances on



such goods will acquire no greater right than the consignees, though the goods at the time be in the hands of warehousemen who have no knowledge of the pledge. *Campbell v. Alford*, 57 Tex. 159.—REVIEWING *Pettitt v. National Bank*, 4 Bush (Ky.) 334; *Whitney v. Tibbitts*, 17 Wis. 370; *First Nat. Bank v. Kelly*, 57 N. Y. 35.

A firm was engaged in mercantile business at one station on a railroad, and in the milling business at another. A member of the firm was the railroad agent at the point where the mill was situated, but the business was practically conducted from the other station. For a considerable length of time the shipping of the firm between the two points was carried on, as to issuing and delivering of bills of lading, with considerable irregularity, which was known to the railroad company. After goods had been delivered to the consignees, as represented by certain bills of lading, the latter were transferred by the firm as collateral to innocent holders. Held, that as the railroad company had knowledge of the manner of conducting the business, it was liable to the holders of such bills. *Walters v. Western & A. R. Co.*, 56 Fed. Rep. 369.—DISTINGUISHING *Friedlander v. Texas & P. R. Co.*, 130 U. S. 416, 9 Sup. Ct. Rep. 570.

**125. Rights of one who has made advances, generally.**—(1) *Statement of the rule.*—A person who makes advances on bills of lading is as clearly bound by the terms of the bills as the purchaser of a bill of exchange is by the language of the draft he buys. *Bishop v. Empire Transp. Co.*, 48 How. Pr. (N. Y.) 119.

Bills of lading are constantly used by shippers to obtain advances upon their shipments, and it is to be expected by the carrier that such use will be made of them, and that advances will be made upon the faith of the property described in them and in the possession of the carrier, and upon the faith that such property will be delivered to the holder of the bills of lading. Those trusting in them and relying upon their truth do only what the carrier had every reason to expect will be done. *Tibbitts v. Rock Island & P. R. Co.*, 49 Ill. App. 567.

(2) *Its scope and extent.*—Where the purchaser of goods who has not paid for them becomes insolvent after they are shipped and before he receives the goods, one who takes from him an assignment of the bill of lading, and advances money

on the goods in good faith, without any knowledge of the insolvency, is entitled to recover the goods from the carrier as against the seller, who has notified the carrier of his intention to claim the goods under his right of stoppage *in transitu*. *Newhall v. Central Pac. R. Co.*, 51 Cal. 345.

Where the vendor of butter delivered it at a railway station, and authorized the agent to issue a bill of lading to the vendee, under a verbal agreement with the vendee and the agent that it should not be shipped until the balance of the purchase-price was paid, and the vendee pledged the bill of lading to a third party, who advanced him the value of the butter, without any notice of the verbal agreement—*Id.*, that while the verbal agreement may have been sufficient as between the vendor and vendee, yet it was not of the slightest avail as to the third party; and that by consenting to the delivery of the bill of lading the vendor had enabled the vendee to transfer a good title to any person dealing with him, without notice of the conditions annexed to the delivery. *Western Union R. Co. v. Wagner*, 65 Ill. 197.

An agreement between the owner of goods and the consignee, by which the latter has made advancements thereon, and has agreed to make further advancements upon receipt of a bill of lading, gives him a good title to the property to secure both advances, as against another who receives a second bill of lading, with notice of the first. *Stevens v. Boston & W. R. Corp.*, 8 Gray (Mass.) 262.

Where a railway company sends to a consignee duplicate advice notes, and acts in such a manner as to lead a person making advances on such advice notes to believe that there were two consignments instead of one, it is estopped from afterwards alleging that there was but one consignment, and is liable for the amount of one of the advances. *Coventry v. Great Eastern R. Co.*, 11 Q. B. D. 776. 52 L. J. Q. B. D. 694. 49 L. T. 641.

(3) *Its limits and exceptions.*—A railroad corporation will not be held liable for the value of property erroneously receipted for in a bill of lading by one of its station agents, but never received by the company, unless the claimant (being factor and consignee) shows that he has made a specific advance or loan on the security of the goods upon the faith of the receipt. *Hunt v. Mississippi C. R. Co.*, 29 La. Ann. 446.

A railroad company which delivers to the indorsee of certain bills of lading issued by

it the grain which they represent, is not liable for the value of the grain to a bank which had taken the bills of lading as security for a loan to the indorsee, but had permitted him to obtain possession of them, of whereby he secured the grain. *Douglas v. People's Bank*, 32 Am. & Eng. R. Cas. 510, 86 Ky. 176, 5 S. W. Rep. 420.—QUOTING *Newson v. Thornton*, 6 East 41; *Hatfield v. Phillips*, 9 M. & W. 648; *Meyerstein v. Barber*, L. R. 2 C. P. 38.

**126. Rights of one advancing money on a bill wrongfully or irregularly issued.\***—While it may be that property in the adverse possession of another is not transferable so as to pass the title, yet where a railroad company gives a bill of lading reciting that the property is then lying in a depot at a certain place, and agrees to forward the same to the consignee, and others advance money on the faith of such bill of lading, which is assigned by the shipper, the railroad company will be estopped, as against such persons, from showing that at the time of giving such bill of lading and its indorsement the goods were in the adverse possession of another person, so as to defeat an action brought by the consignee so advancing money on the bill of lading. *St. Louis & I. M. R. Co. v. Larned*, 6 Am. & Eng. R. Cas. 436, 103 Ill. 293.—NOT FOLLOWED IN *National Bank v. Chicago, B. & N. R. Co.*, 44 Minn. 224.

A railroad company is not liable for advances made by a commission merchant upon the faith of a bill of lading fraudulently signed by one of its station agents, the goods therein specified never having been shipped or received at the depot for transportation. *Baltimore & O. R. Co. v. Wilkens*, 44 Md. 11.—DISTINGUISHING *Tome v. Parkersburg Branch R. Co.*, 39 Md. 36.—DISTINGUISHED IN *Western Md. R. Co. v. Franklin Bank*, 60 Md. 36.

A consignor of goods took a bill of lading from one whom he believed to be the master of a vessel and who seemed to be acting as such, but who in fact was not such master, and had no authority to sign a bill of lading. The consignor indorsed the bill of lading and forwarded it to the consignee, and procured an insurance of the goods payable to the consignee, who had made advances on the goods. *Held*, sufficient to support a

finding of a delivery to the consignee. *Prince v. Boston & L. R. Corp.*, 101 Mass. 542.

W., being the general owner of a quantity of wheat subject to a lien in favor of the M. & T. Bank, and having the custody thereof (it being stored in his name), contracted verbally to sell the same to N., to be paid for on delivery. He gave to N. an order on the warehouseman to deliver the wheat to defendant, a common carrier, subject to order. Defendant thereupon, and without any evidence of any right or title of N. to the wheat, gave to N. a bill of lading stating that the wheat was shipped by N. to New York subject to plaintiff's order. On the faith of this bill of lading N. obtained from plaintiff an advance upon the wheat. Defendant obtained the wheat on the order and transported it to New York, where it was sold by plaintiff to reimburse the advance. The M. & T. Bank brought action against plaintiff for a conversion of the wheat and obtained a verdict, which plaintiff paid before entry of judgment thereon. *Held*, that plaintiff was entitled to recover of defendant the damage sustained by its wrongful or negligent act in issuing the bill of lading in the name of N. *Farmers' & M. Bank v. Erie R. Co.*, 72 N. Y. 188.—APPLIED IN *Robinson v. Memphis & C. R. Co.*, 9 Fed. Rep. 129.

**127. Rights of one who has purchased attached drafts.**—A bank cashing a draft with a bill of lading attached acquires title to the property represented by the bill of lading; and this is so even where the bill of lading is fraudulently used. *Illinois C. R. Co. v. Southern Bank*, 41 Ill. App. 287.—REVIEWING *Michigan C. R. Co. v. Phillips*, 60 Ill. 190.

The indorsee of a bill of lading who has purchased the draft accompanied by such bill of lading has a special property in the goods, and has the bill of lading and the shipment it represents for his security. *Dodge v. Meyer*, 61 Cal. 405.

A person purchasing a draft drawn by the shipper of the goods, with a bill of lading accompanying it, has a special property in the goods covered by the bill of lading; usually in the case of a time-draft this special property vests in the purchaser of the draft as security for its acceptance. It may be, if so agreed by the shipper and the purchaser of the draft, that the purchaser will have a right to retain the bill of lading and

\*See ante, 15, 16, 121.

Fraudulent bill of lading, see note, 21 Am. & Eng. R. Cas. 68.

thus retain his special property in the goods shipped, not only for the acceptance but for the payment of the draft. *Dodge v. Meyer*, 61 Cal. 405.

The *bona-fide* holder of a draft sent with a bill of lading attached has a lien on the goods against which the draft is drawn in the hands of the consignee, and he may recover the proceeds of the sale of the goods though the consignee be the creditor of the consignor. *Lee v. Bowen*, 5 Biss. (U. S.) 154.

**128. Rights of one who has discounted attached drafts.**—A carrier is responsible to one who holds a bill of lading as collateral security for advances made on the strength of the recitals therein, or to one who has in good faith discounted drafts attached to the bill, notwithstanding the fact that the goods purporting to be represented by the bill were never received by the carrier. *Wichita Sav. Bank v. Atchison, T. & S. F. R. Co.*, 20 Kan. 519, 20 Am. Ry. Rep. 299. *Sioux City & P. R. Co. v. First Nat. Bank*, 1 Am. & Eng. R. Cas. 278, 10 Neb. 556, 7 N. W. Rep. 311. *Armour v. Michigan C. R. Co.*, 65 N. Y. 111, 22 Am. Rep. 603; reversing 3 J. & S. 563.

A firm of grain dealers agreed to sell two carloads of wheat; it being a custom of the trade that such sales were cash, with the right to the purchaser to reject on inspection. The dealers ordered the elevator company to deliver the grain on cars, and it was accepted by the purchaser and shipped by him to a third party. The purchaser took the bills of lading, showing that he had shipped the grain, with drafts attached, and had them discounted in the bank. The consignee accepted the drafts but did not pay them, by reason of the grain being replevied in the hands of the railroad by the sellers. Held, that the contract between the sellers and the purchaser was an executory contract which became conditional upon delivery of possession, but that ownership was still retained by the sellers; but that, the contract not being recorded as required by the statute of the state (Minnesota) where the transaction occurred, and the bank's transaction being *bona-fide* and without notice, the title to the grain passed to it, subject to redemption. *Morse v. Chicago, R. I. & P. R. Co.*, 73 Iowa 226, 34 N. W. Rep. 825.

A merchant shipped goods to a foreign correspondent by a common carrier, taking

a bill of lading, making the goods deliverable at their destination to the shipper or his order. He then drew bills of exchange for the price of the goods on the person ordering them, payable to his own order 30 days after sight. Attaching the bills of lading indorsed in blank to the drafts, and indorsing the latter in blank, he had the drafts discounted at the bank, it being then agreed in parol with the bank that the bills of lading should not be delivered to the drawee until the draft should be paid. Held that, independent of the parol agreement, and as a matter of merely legal interpretation, the transaction did not import a sale of the goods upon credit, or determine that the drawee was entitled to the bills of lading upon his acceptance of the draft and without payment. *Security Bank v. Luttgen*, 29 Minn. 363, 13 N. W. Rep. 151.

Goods were shipped by the owner, deliverable upon his own order, as expressed in the bill of lading. He drew on the consignee, and, with the bill of lading attached, had the draft discounted at the bank. The bill of lading was indorsed, "Deliver to the consignee on payment of the accompanying draft," but the consignee refused to accept, and the draft was protested. Held, that the bank thereby acquired title to the goods, and could maintain replevin therefor. *City Bank v. Rome, W. & O. R. Co.*, 44 N. Y. 136.—APPLIED IN *Furman v. Union Pac. R. Co.*, 106 N. Y. 579. FOLLOWED IN *Merchants' Bank v. Union R. & T. Co.*, 69 N. Y. 373.

## BILLS OF PARTICULARS.

In stock-killing cases, see ANIMALS, INJURIES TO, 626, 627.

**1. When a bill of particulars may be required.**—A complaint in an action against a railroad company, which charges that the company failed to furnish plaintiff, a shipper, with "a due and reasonable quota of cars," is too indefinite; but the company's remedy is by asking for a bill of particulars. *Langdon v. New York, L. E. & W. R. Co.*, 39 N. Y. S. R. 471, 60 Hun 584, 15 N. Y. Supp. 255, 27 Abb. N. Cas. 166.

The driver of a horse and carriage sued to recover damages alleged to have been caused by blowing off steam from a locomotive engine and sounding the whistle,

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*Held*, that the company was entitled to a  
 bill of particulars showing the day, hour,  
 and place of the accident, and the direction  
 in which plaintiff was driving, but not a bill  
 showing the names of his witnesses. *Kerch*  
*v. Rome, W. & O. R. Co.*, 14 N. Y. S. R.  
 446, 14 Civ. Pro. 167.

Under New York Code Civ. Proc.,  
 § 531, providing that "the court may in any  
 case direct a bill of particulars of the claim  
 of either party, to be delivered to the ad-  
 verse party," it is proper, where a contractor  
 sues a railroad company to recover for work  
 done, and the company sets up that it was  
 done in a careless and unworkmanlike  
 manner, to require it to file a bill of par-  
 ticulars classifying the work and showing  
 its location. *Cunningham v. Massena*  
*Springs & Ft. C. R. Co.*, 20 N. Y. S. R. 698,  
 50 Hun 605, 3 N. Y. Supp. 98.

Where the complaint in an action against  
 a railroad company for the negligent killing  
 of plaintiff's intestate, a brakeman, alleges in  
 general terms that defendant carelessly and  
 negligently managed the train on which the  
 deceased was employed and other trains  
 and locomotives through incompetent and  
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 that deceased was killed by a locomotive so  
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 nature of the alleged negligent acts, or what  
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 to a bill of particulars in respect to these  
 matters, to enable it to prepare for trial.  
*McCarthy v. Lehigh Valley R. Co.*, 6 Misc.  
 (N. Y.) 422, 27 N. Y. Supp. 295.

Plaintiff sued for personal injuries as  
 driver of a street-car, and charged negli-  
 gence in being thrown from the car, which  
 "was out of repair and in an unsafe condi-  
 tion;" and in another averment, stated on  
 information and belief, charged certain par-  
 ticulars in which it was out of repair and  
 unsafe. *Held*, that it was proper to grant  
 an order requiring him to file a bill of par-  
 ticulars setting out wherein the car was de-  
 fective. *Kearns v. Coney Island & B. R.*  
*Co.*, 17 N. Y. S. R. 692, 49 Hun 608, 1 N. Y.  
 Supp. 906.

**2. When a bill of particulars may  
 not be required.**—A motion for a bill of  
 particulars is properly denied in an action  
 where plaintiff sues to recover for personal  
 injuries caused "by being precipitated be-  
 neath the wheels of defendant's car, by  
 reason of the carelessness and recklessness  
 of the persons in charge thereof." *Rich-*  
*mond v. Second Ave. R. Co.*, 47 N. Y. S. R.  
 306, 19 N. Y. Supp. 597.

The practice of requiring the plaintiff, in  
 actions for damages resulting from negli-  
 gence, to file a bill of particulars showing  
 when and by what means the damages ac-  
 crued, has never been adopted in Illinois.  
*Chicago & A. R. Co. v. Smith*, 10 Ill. App.  
 359.

**3. Interpretation.**—Kansas Gen. St.  
 p. 791, § 72, provides that "a bill of particu-  
 lars must state in a plain and direct manner  
 the facts constituting the cause of action;"  
 yet no technical precision is demanded in  
 pleadings in actions before justices of the  
 peace. The most liberal intendment will  
 be given to them, and if every fact essential  
 to the cause of action can be found in one  
 of them, stated in the most general way or  
 in the loosest or most indefinite manner,  
 and no objection is raised at the trial, it will  
 be held sufficient to sustain the judgment.  
*Kansas Pac. R. Co. v. Taylor*, 17 Kan. 566.—  
 FOLLOWED IN *St. Louis & S. F. R. Co. v.*  
*Ellis*, 25 Kan. 108.

When the bill of particulars states that a  
 demand was made upon the agent of a rail-  
 road company by the owner to pay for in-  
 juries to his cow, run into by the locomot-  
 ive and cars of said company, it will be  
 construed to mean, when first attacked after  
 judgment, that such agent was one upon  
 whom such demand could be made, under  
 article 2, c. 84, Kansas Comp. Laws 1879.  
*Missouri Pac. R. Co. v. Morrow*, 31 Am. &  
*Eng. R. Cas.* 520, 36 Kan. 495, 13 Pac. Rep. 789.

**4. Sufficiency—Certainty.**—The office  
 of a bill of particulars is to give the defend-  
 ant specific information of the cause of  
 action, and it cannot, therefore, be less  
 specific than the declaration, nor include  
 any items not embraced in the declaration.  
 So where a plaintiff sued a railroad com-  
 pany for failing to ship cotton in November,  
 1879, and March, 1881, it is error to allow him  
 to file a bill of particulars which would in-  
 clude cotton lost during the cotton season  
 of 1879 and 1880. *Chicago, St. L. & N. O.*  
*R. Co. v. Provine*, 61 Miss. 288.

A bill of particulars in a justice's court which alleges that a railroad corporation dug up and carried away clay from the land of plaintiff is good, without alleging that the corporation had not first proceeded to have the land condemned. *Atchison, T. & S. F. R. Co. v. Weaver*, 10 Kan. 344.—DISTINGUISHING *Cleveland & P. R. Co. v. Stackhouse*, 10 Ohio St. 567.

Plaintiffs' bill of particulars in a justice's court alleged in detail that the defendant company failed and refused to construct cattle-guards on its line of railroad where the same entered and left the plaintiff's fenced pasture-land, and that the plaintiffs were compelled to herd their cattle to prevent them from straying from such pasture-land. *Held*, sufficient to withstand an objection to the introduction of any evidence under it, for the reason that it did not state facts sufficient to constitute a cause of action. *Chicago, K. & N. R. Co. v. Behney*, 48 Kan. 47, 28 Pac. Rep. 980.—FOLLOWED IN *Nelson v. St. Louis & S. F. R. Co.*, 49 Kan. 165.

In a suit for work and labor, an exception that the petition does not state the time and place of its performance and the person by whose direction it was performed is not well taken, where a bill of particulars attached to the petition and made a part thereof supplies by its entries the defect. *Texas & St. L. R. Co. v. Ross*, 62 Tex. 447.

**5. Amendment.**—Plaintiff commenced an action before a justice, and his bill of particulars stated a good cause of action at common law, and also under the statute, except that it did not state that the company's track was not fenced, as required by statute. *Held*, that it was proper on appeal to the district court to allow an amendment stating a good cause of action under the statute. *Kansas City, Ft. S. & G. R. Co. v. Hays*, 13 Am. & Eng. R. Cas. 597, 29 Kan. 193.

### BLASTING.

**1. Precautions to be used.**—It seems that, had it been practicable in a business sense for the defendant company to remove rock without blasting, although at a somewhat increased cost, defendant, at least after having been informed of the injury, would have been bound to resort to some other method. And if less powerful blasts might have used, which

would not have occasioned or would have lessened the injury, the omission to use them was negligence. *Booth v. Rome, W. & O. T. R. Co.*, 57 Am. & Eng. R. Cas. 442, 140 N. Y. 267, 55 N. Y. S. R. 656, 35 N. E. Rep. 592; reversing 63 Hun 624, 44 N. Y. S. R. 9, 17 N. Y. Supp. 336.

The degree of care requisite to constitute due care in blasting by a railroad company must be commensurate with the danger, the blasting must be conducted with the most cautious regard for the neighbors' rights. *Booth v. Rome, W. & O. T. R. Co.*, 57 Am. & Eng. R. Cas. 442, 140 N. Y. 267, 55 N. Y. S. R. 656, 35 N. E. Rep. 592; reversing 63 Hun 624, 44 N. Y. S. R. 9, 17 N. Y. Supp. 336.

The acquisition by a railroad corporation of the right of way does not carry with it the privilege of throwing stones or other material, by blasting, to a distance of two hundred yards or more onto the lands of an adjacent proprietor, whereby the family of the latter are exposed to danger while engaged in their domestic duties. *Blackwell v. Lynchburg & D. R. Co.*, 111 N. Car. 151, 16 S. E. Rep. 12.

Where those engaged in the construction of a railway employ a powerful explosive in blasting — of the effects of which they will be presumed to have knowledge—it is their duty to cover the blast, or otherwise restrict the effect of the explosion, so as to prevent danger to others; and if this be impracticable, they should give timely warning of the explosion to all persons who may be in danger from it. *Blackwell v. Lynchburg & D. R. Co.*, 111 N. Car. 151, 16 S. E. Rep. 12.

The question of negligence in blasting with large quantities of dynamite near a railroad is one of fact for the jury. *Tissue v. Baltimore & O. R. Co.*, 112 Pa. St. 91, 3 Atl. Rep. 667.

**2. Injuries to persons.**\*—The company is negligent in blasting with dynamite near a railroad, thereby exposing its employees engaged in operating the road to danger. *Tissue v. Baltimore & O. R. Co.*, 112 Pa. St. 91, 3 Atl. Rep. 667.

A railroad corporation made a contract with certain persons that the latter should build a certain portion of the railroad. While the contractors were at work upon

\* Action for death caused by blasting in process of construction, see 52 AM. & ENG. R. CAS. 29, *abstr.*

the road, in pursuance of the contract, some rocks were blasted and a stone was thrown upon the plaintiff, causing him serious injuries. *Held*, that the plaintiff might maintain an action against the corporation to recover damages for the injury he had sustained. *Stone v. Cheshire R. Co.*, 19 N. H. 427.—REVIEWING *Lowell v. Boston & L. R. Co.*, 23 Pick. (Mass.) 24.—DISAPPROVED IN *Carter v. Berlin Mills Co.*, 58 N. H. 52.

No degree of care will excuse a person from responsibility for death caused by exploding a blast in a thickly-settled portion of a city. *Munro v. Pacific Coast D. & R. Co.*, 84 Cal. 515, 24 Pac. Rep. 303.

Where plaintiff was injured by a blast, though the usual and proper warning was given, to which plaintiff paid no attention, it is error to instruct that, unless plaintiff heard the warning, defendant is liable. *Hamilton v. Iron Mountain Co.*, 4 Mo. App. 564.

**3. Injuries to property, generally.\***  
—Legal possession by a company of a right of way and authority to construct a railroad thereon do not relieve it from liability for damages to adjoining lands caused by blasting and throwing dirt and rocks thereon. *Georgetown, B. & L. R. Co. v. Eagles*, 30 Am. & Eng. R. Cas. 228, 9 Colo. 544, 13 Pac. Rep. 696.

While excavating by blasting is a legitimate means of construction of railways, and its prudent use is deemed to have been in contemplation in the assessment of damages for right of way, nevertheless, where damage results therefrom to the lands of an owner adjacent to those condemned, because of the unskillful or careless method of employing it, or because the material adopted as an explosive is unnecessarily powerful, the corporation or person so employing such agency will be liable for any damages produced thereby. *Blackwell v. Lynchburg & D. R. Co.*, 111 N. Car. 151, 16 S. E. Rep. 12.

While a company has a right to blast in a proper manner, and to throw stones onto adjoining lands while constructing its road, yet they must be removed in a reasonable

time; and upon a failure to do so it will be liable to the landowner for such failure. *Sabin v. Vermont C. R. Co.*, 25 Vt. 363.—DISTINGUISHED IN *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504. REVIEWED IN *Stodghill v. Chicago, B. & Q. R. Co.*, 43 Iowa 26.

**4. Injuries to buildings.**—After a railroad was built, plaintiff constructed buildings near the track, and afterward the road company, desiring to widen its roadbed, while blasting to make excavations for that purpose, shook the earth so that the foundations of the buildings gave way. *Held*, that the right of plaintiff to recover, both for the injury to the soil and for the damages to his buildings, depended upon whether the company exercised ordinary prudence or not in doing the blasting. *Louisville & N. R. Co. v. Bonhays*, (Ky.) 21 S. W. Rep. 526.

A railroad company is not liable to adjoining owners for injury caused by blasting by subcontractors, though the company reserved a certain part of the cost of the work to cover damages. *Tibbets v. Knox & L. R. Co.*, 62 Me. 437.—FOLLOWING *Eaton v. European & N. A. R. Co.*, 59 Me. 520.

Where a railroad company has been granted the right to construct a railroad, and the necessary excavations along the right of way can only be made by blasting, and it is conceded that the work has been conducted with the most cautious regard for the rights of abutting owners, and the excavation was necessary to enable the company to conform its roadbed to the established grade, no recovery can be had for unavoidable injury to a neighboring house occasioned by the act of blasting. *Booth v. Rome, W. & O. T. R. Co.*, 57 Am. & Eng. R. Cas. 442, 140 N. Y. 267, 55 N. Y. S. R. 656, 35 N. E. Rep. 592; reversing 63 Hun 624, 44 N. Y. S. R. 9, 17 N. Y. Supp. 336.

In making a lawful excavation on its lands in order to remove rock, defendant resorted to blasting with gunpowder. Plaintiff's house on adjoining land was seriously injured by the blasting, presumably by the jarring of the ground or concussion of the atmosphere caused by the explosion. The persons engaged in the work were, during its progress, informed of the injury that was being done. In an action to recover damages for the injury it was conceded that defendant exercised due care, and that the blasting was necessary in order

\* Liability of company for injuries done by contractors in blasting, see note, 14 L. R. A. 830.

Liability of company for damage to adjoining property by blasting, see note, 17 L. R. A. 221.

Injury caused by negligent blasting. Recovery of damages. See note, 30 AM. & ENG. R. CAS. 232.



to remove the rock. The court charged the jury in substance that defendant in using powerful explosives in blasting did so at its peril, and was liable if plaintiff's house was injured thereby; that "it made no difference whether the work was done carefully or negligently." *Held, error*; that the use of explosives in blasting did not, under the circumstances, constitute a private nuisance. *Booth v. Rome, W. & O. T. R. Co.*, 57 *Am. & Eng. R. Cas.* 442, 140 *N. Y.* 267, 55 *N. Y. S. R.* 656, 35 *N. E. Rep.* 592; *reversing* 63 *Hun* 624, 44 *N. Y. S. R.* 9, 17 *N. Y. Supp.* 336.

Where a railroad corporation, in making an excavation upon its land for lawful purposes, is obliged to resort to blasting, the fact that the blasting caused injury to a building on adjoining land does not alone render it liable; it must also appear that it failed to exercise due care. *Booth v. Rome, W. & O. T. R. Co.*, 57 *Am. & Eng. R. Cas.* 442, 140 *N. Y.* 267, 55 *N. Y. S. R.* 656, 35 *N. E. Rep.* 592; *reversing* 63 *Hun* 624, 44 *N. Y. S. R.* 9, 17 *N. Y. Supp.* 336.

Where the walls of a house are so weakened by repeated blasting by a railroad company as to cause it to fall, the blasting will be deemed the proximate cause of the injury, and the company will be held liable, though there be no proof of direct negligence. *Booth v. Rome, W. & O. T. R. Co.*, 57 *Am. & Eng. R. Cas.* 442, 140 *N. Y.* 267, 55 *N. Y. S. R.* 656, 35 *N. E. Rep.* 592; *reversing* 63 *Hun* 624, 44 *N. Y. S. R.* 9, 17 *N. Y. Supp.* 336.

Injury to a dwelling-house upon the residue of a tract of land, part of which was granted to the railroad company, caused from the careful blasting of rock in construction, is not the subject of an action; but rock deposited on such land must be removed within a reasonable time, else it will form the basis of an action. *Watts v. Norfolk & W. R. Co.*, (W. Va.) 57 *Am. & Eng. R. Cas.* 694, 19 *S. E. Rep.* 520.

**5. Guests leaving hotel through fear.**—A hotel-keeper is entitled to damages resulting from guests leaving his hotel through fear of injury from blasting by a railroad company. *Georgetown, B. & L. R. Co. v. Doyle*, 9 *Colo.* 549, 30 *Am. & Eng. R. Cas.* 231, 13 *Pac. Rep.* 699.

Where a hotel-keeper sues a railroad for damages caused by guests leaving his hotel through fear of personal injury from blasting, evidence of injury to other buildings near by is admissible as tending to show

whether the fear was well founded or not. *Georgetown, B. & L. R. Co. v. Doyle*, 30 *Am. & Eng. R. Cas.* 231, 9 *Colo.* 549, 13 *Pac. Rep.* 699.

## BOARDS.

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## BOATS.

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## BONA-FIDE PURCHASERS.

Generally, see **GUARANTY**, 10; **SALES**, 1.  
Of bills and notes, rights of, see **BILLS, NOTES, AND CHECKS**, 15-17.

— corporate bonds, see **BONDS**, 45-50.  
— debentures, rights of, see **DEBENTURES**, 7-9.

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— railroads, see **SALE OF RAILROADS**, II.

— stock, rights of, see **STOCK**, V, 8.

## BONDED WAREHOUSES.

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## BONDHOLDERS.

Rights of, as such, see **BONDS**, 31-44.

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## BONDS.

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— carriers of the mails, see **CARRIAGE OF MAILS**, 6.

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— county treasurers, see **COUNTIES**, 9.

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— receivers, see **RECEIVERS**, IV, 4.

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#### I. POWER TO ISSUE.

##### 1. In General.

**1. Power to issue, generally.\*—**A corporation, like a natural person, has the right to carry on its legitimate business by all legal and necessary means not prohibited by law or by its charter; and it may issue its bonds for the purpose of carrying out the object of its creation, and it will be bound thereby. *Philadelphia & S. R. Co. v. Lewis*, 33 Pa. St. 33.

A railroad company has the power, without any specific authority being conferred by the charter, to accept a perpetual loan and to issue irredeemable bonds to the lenders. *Philadelphia & R. R. Co.'s Appeal*, 4 Am. & Eng. R. Cas. 118, 11 W. N. C. (Pa.) 325.

The power to borrow money and to give the ordinary evidences of loans in the form of bonds or other obligations to the same effect is a necessary incident to the power of the corporation to mortgage its property, and need not be expressly granted; moreover, it is a necessary incident of the power to build a railroad. *Gloninger v. Pittsburgh & C. R. Co.*, 46 Am. & Eng. R. Cas. 276, 139 Pa. St. 13, 21 Atl. Rep. 211.

Where a railroad company is authorized to issue its own bonds, it may receive bonds of another corporation in payment of debts, and may guarantee their payment in selling them again. *Rogers L. & M. Works v. Southern R. Assoc.*, 34 Fed. Rep. 278.

\* Issue of bonds by railroad companies, see note, 7 AM. & ENG. R. CAS. 117.

Where a railroad company proceeds under How. Mich. St. § 3352, authorizing an issuing of bonds by resolution for the purpose of borrowing money, it may lawfully pledge such bonds to secure borrowed money. *Farmers' L. & T. Co. v. Toledo & S. H. R. Co.*, 54 Fed. Rep. 759, 4 C. C. A. 561.—FOLLOWING *Platt v. Union Pac. R. Co.*, 99 U. S. 48; *Leo v. Union Pac. R. Co.*, 17 Fed. Rep. 275.

The court will not interfere to regulate the character of payments or the instrument to be issued therefor by a corporation authorized to issue bonds under a valid contract, unless they are expressly forbidden or unauthorized. *Willoughby v. Chicago, J. R. & U. S. Co.*, 50 N. J. Eq. 656, 25 Atl. Rep. 277.

A creditor of a corporation having only a claim for unliquidated damages cannot join the corporation from issuing bonds secured by a mortgage or from selling personal property. *Erie R. Co. v. Wilkesbarre C. & I. Co.*, 9 Phila. (Pa.) 262.

Under an authority to borrow money a railroad company has no right to raise money by the issue of irredeemable bonds entitling the holder merely to a share of the earnings after the payment of a certain dividend to the stockholders. *Taylor v. Philadelphia & R. R. Co.*, 7 Fed. Rep. 386.

Nor has it the right to issue interest-bearing bonds, secured by mortgage, if a portion of such bonds are perpetual. *Taylor v. Philadelphia & R. R. Co.*, 7 Fed. Rep. 386.

**2. Constitutional restrictions.**—Under Ala. Const. art. 14, § 6, providing "that no corporation shall issue stock except for money, labor done, or money or property actually received," a contract with a construction company for the building of a portion of a railroad, one-half of the contract price being payable in bonds and the other half in the stock of the company, is valid where the contract is fairly entered into and there is no over-valuation of the work; and such bonds are valid. *Coe v. East & W. R. Co.*, 52 Fed. Rep. 531.

Bonds issued by a reorganized company, after the foreclosure sale of a railroad, in payment of the property and rights bought at the sale, are not in violation of the provision of the Arkansas constitution forbidding the issuing of stock or bonds except for money actually received or labor done. *Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. Rep. 482; affirming 19 Fed.

*Rep.* 388.—FOLLOWED IN *Mackintosh v. Flint & P. M. R. Co.*, 36 Am. & Eng. R. Cas. 340, 34 Fed. Rep. 582. QUOTED IN *Brown v. Duluth, M. & N. R. Co.*, 54 Am. & Eng. R. Cas. 219, 53 Fed. Rep. 889.

The object of Ill. Const. art. 11, § 13, providing that "no railroad corporation shall issue any stock or bonds except for money, labor, or property actually received and applied to the purpose for which such corporation was created," and that "all stocks, dividends, and other fictitious increase of the capital stock or indebtedness of such corporation shall be void," is only to prevent reckless and unscrupulous speculation, and is not intended to interfere with the usual and customary methods of raising money by the issuing of stocks or bonds for the purpose of the corporation. *Peoria & S. R. Co. v. Thompson*, 7 Am. & Eng. R. Cas. 101, 103 Ill. 187.—DISTINGUISHING *Olds v. Cummings*, 31 Ill. 188. OVERRULING IN PART *Chicago, D. & V. R. Co. v. Lowenthal*, 93 Ill. 433.

Under the above provision of the constitution, railroad companies have no right to rent, give away, or sell on credit their bonds or stock, nor have they a right to dispose of them except for a present consideration and for corporate purposes. But if, upon a sale of its stocks or bonds for present consideration, the company should subsequently divert the proceeds to other than corporate purposes, a bona-fide purchaser of the stock or bonds, or his assignee, cannot be affected by the subsequent misappropriation by the company. *Peoria & S. R. Co. v. Thompson*, 7 Am. & Eng. R. Cas. 101, 103 Ill. 187.

**3. Power to issue under charter provisions.\***—The exercise of powers which are not conferred upon a corporation by express provision or clear implication must be taken as denied to it. So a railroad company cannot issue deferred income-bonds where there is no provision in its charter authorizing them. *McCalmont v. Philadelphia & R. R. Co.*, 14 Phila. (Pa.) 479.—QUOTING *Thomas v. West Jersey R. Co.*, 101 U. S. 82.

Where a railway company's act empowers it to borrow money after the whole capital has been subscribed for and one-half paid up, bonds issued while only part of the capital is subscribed for are illegal. *Cham-*

*bers v. Manchester & M. R. Co.*, 5 B. & S. 588, 33 L. J. Q. B. 268, 10 Jur. N. S. 700.

A provision in the charter of a street railway authorizing the directors to raise money for the purposes of the company, "by the issue of bonds or debentures, \*\*\* on such terms and credit as they may think proper," clearly authorizes an issue of bonds, with annual interest-coupons attached, payable at a bank named; but in a suit on such coupons such question can only be raised by special plea. *Geddes v. Toronto St. R. Co.*, 14 U. C. C. P. 513.—APPROVING *Chambers v. Manchester & M. R. Co.*, 10 L. T. 715.

Bonds or debentures, or interest-coupons thereon, is used by a street-car company, under authority of its charter, cannot be treated as promissory notes, which the company has not power to issue. *Geddes v. Toronto St. R. Co.*, 14 U. C. C. P. 513.

The charter of a railroad company authorized it to issue bonds which should constitute a first lien upon its property, including its government land grant to be earned, but afterward its charter was amended, omitting therefrom the provision relating to the lien on the government land grant. Subsequently bonds were issued attempting to charge the land grant. *Held*, that the bonds were not void as to the rest of its property, assuming that the land grant was not bound thereby. *Winnipeg & H. B. R. Co. v. Mann*, 7 Man. 81.

**4. Power to issue under statutes.**—Under Mass. act of 1854, ch. 286, providing how corporations may contract debts and issue bonds therefor, a railway corporation has no power to issue bonds except in the manner provided by the statute, or to make a mortgage to secure such bonds. *East Boston Freight R. Co. v. Hubbard*, 10 Allen (Mass.) 459, note.—REVIEWED IN *Adams v. Boston, H. & E. R. Co.*, 1 Holmes (U. S.) 30.

The power given by N. Y. act of 1848, § 17, to railroad companies to borrow money to be applied to the construction of their railroads and fixtures, includes the power to issue their bonds in payment thereof, and this power is not to be deemed as withheld because it is expressly given by the later act of 1850, p. 225, § 10. *Miller v. New York & E. R. Co.*, 18 How. Pr. (N. Y.) 374, 8 Abb. Pr. 431.

When a corporation hypothecates its bonds as security for a loan, it issues them, within the meaning of Wis. Rev. St. §

\* Right of corporation under its charter to issue bonds, see note, 4 AM. & ENG. R. CAS. 127.

1753; and if it is not stipulated that they shall be accounted for at not less than seventy-five per cent of their par value, the bonds so issued are void. *Pfister v. Milwaukee Elect. R. Co.*, 83 Wis. 86, 53 N. W. Rep. 27.

A company authorized by statute to issue irredeemable bonds, as it might see fit, but without further express power to borrow money, proposed to raise a fund by issuing \$50 irredeemable bonds, at the rate of \$15 each, to bear interest at the rate of six per cent on their face value, payable out of the earnings after defraying current expenses and distributing a dividend on the stock, said bonds to be entitled to share *pari passu* with the common stock in any surplus revenues of the company. A. B. contracted with the company to purchase such bonds. Subsequently, upon A. B. tendering the purchase-money, the company refused to issue to him the bonds for which he had subscribed, on the ground that their issue was beyond the chartered powers of the corporation. A bill being filed by A. B. against the company for specific performance of the contract—*held*, that the company could validly issue such bonds, that they were not usurious in their nature, and that therefore complainant was entitled to the relief prayed for. *Philadelphia & R. R. Co.'s Appeal*, 4 Am. & Eng. R. Cas. 118, 11 W. N. C. (Pa.) 325.

**5. Power to issue under agreement for reorganization.**—The stockholders, bondholders, and creditors of a mortgaged railroad entered into an agreement with the mortgage trustees, pending foreclosure proceedings, to the effect that the latter would take up the outstanding bonds of the company and issue their own certificates in lieu thereof, and that the property should be conveyed to a new corporation to be organized, which would issue two series of bonds secured by mortgages, the second series to be issued in redeeming the certificates issued by the trustees. The agreement contained a condition that the "certificate holders might at any time, by the vote or assent of a majority in par value of their number, modify or change this agreement, or any provision thereof, or the plan herein set forth in any manner they may deem best for the interest of all concerned." *Held*, that the power of amendment or alteration was limited to the creation of the new company and the con-

1 D. R. D.—42.

veyance of the property to it by the trustees, as provided for by the agreement; and that a pretended modification authorizing the issue of one series of bonds to be secured by one mortgage, to be used, so far as necessary, in redeeming the trustees' certificates, was not authorized, and therefore not binding on interested parties not assenting thereto. *Dutenhofer v. Adirondacks R. Co.*, 38 N. Y. S. R. 710, 60 Hun 578, 14 N. Y. Supp. 558.

**6. Issuing bonds in payment of debts of company.**—The power of a railroad corporation to contract debts includes the power to issue its bonds as an acknowledgment of such a debt. *Commissioners of Craven v. Atlantic & N. C. R. Co.*, 77 N. Car. 289.

Certain directors and stockholders made advances to their corporation to pay for repairs and improvements, and failed to collect interest on mortgage bonds held by them. A subsequent meeting of stockholders authorized an issue of second mortgage bonds in a sum larger than the claim held by such creditors, which were required to be sold at not less than 65 per cent of their par value. *Held*, that a purchase by such creditors, holding the entire floating debt of the company, of the whole of such bonds, to be paid for by a cancellation of their debts, and the balance in cash, was valid. *Coe v. East & W. R. Co.*, 52 Fed. Rep. 531.

By the Md. Act of 1841, ch. 168, the Annapolis and E. R. Co. was authorized to issue bonds to an amount not exceeding, etc., in the names of the creditors of that company as payees. A special fund was designated in the act for the payment of interest, the principal being irredeemable for thirty years. Another section of the act referred the claims of P. to the arbitration of L., and provided that any amount found due to him should be paid in like manner as the claims of other creditors, "and not otherwise." *Held*, that the creditors for whom provision was made, as aforesaid, were to be creditors of the company at that time; and that the fund thereby created was for the payment of those claims and none others, all the then creditors having an interest in it, of which they could not be deprived by the directors of the company without their consent. *McCullough v. Annapolis & E. R. R. Co.*, 4 Gill (Md.) 58.

To entitle P. or his assignee to an in-

terest in this fund he or his assignee must submit his claim to the award of L., which would be conclusive. The proof of such submission is upon him, and the directors of the company could not authorize their president to issue a bond to an assignee of P., payable out of the fund created by that act, unless P.'s claim had been first ascertained by L. *McCullough v. Annapolis & E. R. R. Co.*, 4 Gill (Md.) 58.

Where the legislature, by a subsequent act (1843, ch. 188), submitted the claim of P. to other arbitrators, to proceed *de novo*, disregarding the act of 1841, and directed the company to issue the bonds mentioned in the first act to such additional amount as would be sufficient to pay the second award, it was further held, that the creditors of the company, or such of them as had agreed to the law of 1841, and their claims, ascertained by the company, had an interest in the fund, and that without their consent no part of it could be applied to the payment of any debt for which the act of 1841 did not provide. *McCullough v. Annapolis & E. R. R. Co.*, 4 Gill (Md.) 58.

**7. Issuing bonds for lease of another road.**—A contract entered into by certain stockholders and directors of a railroad company for the lease of a railroad owned by an iron company, in which the same parties were directors and stockholders, the railroad company to pay therefor in its bonds, which lease is ratified by the unanimous vote of the stockholders of the railroad company, is not void, but at most only voidable; and where the contract for the lease was fairly entered into, bonds issued in carrying it out will be held valid. *Coe v. East & W. R. Co.*, 52 Fed. Rep. 531.—**APPLYING** *Elyton Land Co. v. Birmingham, W. & E. Co.*, 92 Ala. 407, 9 So. Rep. 129. **FOLLOWING** *Van Cott v. Van Brunt*, 82 N. Y. 535; *Barr v. New York, L. E. & W. R. Co.*, 125 N. Y. 263, 26 N. E. Rep. 145.

**8. Issuing bonds convertible into stock.**\*—Where the directors of a railroad company have borrowed money to complete the road or to operate it, they have the right to issue bonds therefor, convertible into stock, though the whole amount of stock may exceed that fixed by charter; and it follows that they have a right to issue stock in exchange for such bonds. *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637

But if it sufficiently appear that such issue of bonds is about to be made for the purpose of fraudulently increasing the capital stock of the company, and not for the payment of money so borrowed, an injunction will be awarded to restrain the issuing of such bonds; and an injunction may be awarded to restrain the conversion of such bonds into stock against persons holding them who had notice that they did not represent a *bona-fide* indebtedness. *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637.

**9. Right of foreign corporation to issue.**—The law of Ohio, authorizing railroad companies to sell their own bonds and notes at such prices as they may deem expedient, is extended by comity to the companies of other states authorized to transact business in Ohio. *Junction R. Co. v. Ashland Bank*, 12 Wall. (U. S.) 226.

**10. Ratification of irregular issue.**—A corporation having power to issue its bonds to another corporation, for the purpose of enabling it to exchange them for bonds of the state, may ratify and affirm, by subsequent action of its stockholders, a previous irregular issue and exchange of its bonds, made by officers or stockholders of the company. *State v. Florida C. R. Co.*, 15 Fla. 690.

Where the president of a railroad company is authorized by the directors to execute a mortgage on the road to secure bonds, and exceeds his power by inserting a provision that the principal sum shall become due, at the option of the holder, upon default of payment of semi-annual interest, it is competent for the directors to subsequently ratify the bonds as issued; but in this case there was not sufficient evidence of such ratification. *Jesup v. City Bank*, 14 Wis. 331.

## 2. Formalities Attending the Issue of Bonds.

**11. Necessity of formal issue.**—Bonds executed by a railroad company and in the hands of its agents to be negotiated for its use are not property as described by the New York Code, and cannot be seized on attachment, execution, or other process against the corporation. *Cunningham v. Pennsylvania, S. & N. E. R. Co.*, 11 N. Y. S. R. 663. *Sickles v. Richardson*, 23 Hun (N. Y.) 559.

**12. Responsibility of signers.**—A bond in these terms, "We, J. B., T. H. (and nineteen others), stockholders in the D. &

\* See post, 40.

**A. R. R., send greeting:** Whereas the D. & A. R. R. Co. borrowed of J. B. (and two others) thirty-five thousand dollars; and whereas we, whose names are hereunto subscribed and seals affixed, have agreed with the said J. B. and others that in case the corporate property should fail to pay said thirty-five thousand dollars and interest, so that a loss or deficiency should happen, that in that event each of us and each of them, the said J. B. and others, shall sustain an equal portion of said loss," expresses on its face that each should become responsible when and as he signed it, and excludes parol proof that none was to be responsible until all the stockholders had signed it. *Black v. Shreve*, 13 N. J. Eq. 455.

**13. The accompanying security—Mortgage or deed of trust.**—The bonds issued by the Brunswick & F. R. Co. under its charter, as amended by Ga. act of 1838, without the execution of any mortgage to secure them, do not *ipso facto* become a lien upon the property of the corporation so as to be superior or even equal in dignity to other bonds issued by the company and secured by deed of trust. *Brunswick & A. R. Co. v. Hughes*, 52 Ga. 557, 7 Am. Ry. Rep. 137.

A railroad having a claim for an unpaid subscription to its stock has the power to sell it or to make a contract to dispose of it for the purposes of the road, as much as to assign a promissory note. But the power to sell such securities does not include the power to mortgage them. So the act of the legislature of Wisconsin, in relation to the execution of mortgages by railroad companies, does not authorize such companies in that state to mortgage their stock subscriptions as security for the payment of their bonds. *Morris v. Cheney*, 51 Ill. 451.

**14. Guaranty by directors.\***—The fact that the directors of a railroad company guarantee the company's bonds in their individual capacity does not change what would otherwise be a sale of the bonds into a loan; but the fact of the personal guarantee is a circumstance to be looked to in determining whether the transaction was a sale or a loan. If a sale, the guarantee passes as an incident, and is, in equity, assignable to subsequent purchasers of the bonds. *Bank of Ashland v. Jones*, 16 Ohio St. 145.

\* Guaranty of bonds of another company; validity of, see note, 26 AM. & ENG. R. CAS. 105.

**15. Sale or exchange of bonds.**—Where railroad bonds are subscribed for, to be paid for upon call, the buyer may tender the price at any time without waiting for calls, and may demand the bonds. *Watjen v. Green*, 46 Am. & Eng. R. Cas. 343, 48 N. J. Eq. 322, 21 Atl. Rep. 1028.

An act which authorizes the directors of a company to sell or negotiate bonds issued by said company, at such rates as they may think proper, and which provides that the bonds so sold shall be as valid in every respect as if sold at their par value, applies both to the bonds and to the security given for their payment; and, therefore, the sale of the bonds at a discount does not render invalid a mortgage given to secure them. *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372.—REVIEWED IN STATE *ex rel. v. Goshen Tp.*, 14 Ohio St. 569.

A company with authority to issue bonds and sell them at such rates as the directors may think proper may exchange them for iron rails. *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372.

A corporation created by state law and authorized to issue bonds and sell them to raise funds may sell them either in the state or out, and if sold out of the state, where a lower rate of interest exists, the transaction will not be regarded as a loan. *Bank of Ashland v. Jones*, 16 Ohio St. 145.

## II. NEGOTIABILITY.

**16. In general.\***—Railroad bonds payable to a person named, or order, at a place named, are negotiable instruments, and the title thereto passes by delivery without indorsement by the payee; and this is so whether they are under sale or not. *Connecticut Mut. L. Ins. Co. v. Cleveland, C. & C. R. Co.*, 26 How. Pr. (N. Y.) 225, 41 Barb. 9; *affirming* 23 How. Pr. 180.—APPLYING *Zabriskie v. Cleveland, C. & C. R. Co.*, 23 How. (U. S.) 400.

Where a railroad corporation issues its bonds payable to bearer, their negotiability is not affected by a provision therein that they may "be registered and made payable by transfer only on the books of the company." *Savannah & M. R. Co. v. Lancaster*, 62 Ala. 555.

A mere general recital in a bond issued by a railway company, negotiable on its

\* Railroad bonds are negotiable, see note, 14 AM. & ENG. R. CAS. 565.



face, that such bond belongs to a series of bonds secured by a trust deed of the property of the company, whose absolute obligation it purports to be, is not sufficient to destroy its negotiability, or to put the *bonafide* holder upon inquiry as to the existence of conditions in the deed qualifying the terms of the bond, or affecting his right to maintain a suit at law thereon, upon default in the payment thereof when due. *Gulford v. Minneapolis, S. St. M. & A. R. Co.*, 51 *Am. & Eng. R. Cas.* 98, 48 *Minn.* 560, 51 *N. W. Rep.* 658.—**DISTINGUISHING** *Manning v. Norfolk S. R. Co.*, 29 *Fed. Rep.* 838; *Caylus v. New York, K. & S. R. Co.*, 10 *Hun* (N. Y.) 295.

Although, as a general rule, bonds issued by a corporation for the purpose of procuring loans, and made payable to bearer, are negotiable, when such instruments contain special stipulations, and their payment is subject to contingencies not within the control of the holders, they are deprived thereby of the character of negotiable instruments, and are subject, in the hands of a transferee, to any defense existing thereto that would be available if they were still held by the original payee. *McClelland v. Norfolk S. R. Co.*, 110 *N. Y.* 469, 18 *N. E. Rep.* 237, 18 *N. Y. S. R.* 344, 1 *L. R. A.* 299, 6 *Am. St. Rep.* 397, 38 *Alb. L. J.* 410; *reversing* 3 *N. Y. S. R.* 250.

To be negotiable such an instrument must provide for the unconditional payment to a person or order, or bearer, of a certain sum of money, at a time capable of exact ascertainment. *McClelland v. Norfolk S. R. Co.*, 110 *N. Y.* 469, 18 *N. E. Rep.* 237, 18 *N. Y. S. R.* 344, 1 *L. R. A.* 299, 6 *Am. St. Rep.* 397, 38 *Alb. L. J.* 410; *reversing* 3 *N. Y. S. R.* 250.

**17. Coupon bonds.\***—Coupon bonds issued by a corporation and drawn payable to bearer are negotiable instruments. *Langston v. South Carolina R. Co.*, 2 *So. Car.* 248.

Where bonds and coupons payable in another state are so framed as to be negotiable by the general law-merchant, they will, in the absence of evidence to the contrary, be presumed to be negotiable by the law of such other state. *Tyrell v. Cairo & St. L. R. Co.*, 7 *Mo. App.* 294.

**18. Municipal aid bonds.†**—A bond

\* Coupon bonds, character and negotiability of, generally, see note, 64 *AM. DEC.* 428.

See also title COUPONS.

† See also MUNICIPAL AND LOCAL AID, XII,

issued in part payment of a municipal subscription to railroad stock, payable at a bank in New York City at a certain time, and providing that it shall be a lien on the stock of the railroad company issued to the city, and that it may be exchanged for a part of said stock at any time before a cash dividend is declared, with coupons attached for the annual interest accruing, is governed by the law of New York, and, as such, is governed by the law-merchant, and is negotiable. *Aurora v. West*, 22 *Ind.* 88.

**19. Liability of company indorsing void bonds.**—A railroad company sold on the market bonds of a state which were indorsed by the company. The latter certified that the state held its first-mortgage bonds for an equal amount. It was afterward decided that the bonds of the state were unconstitutional, and that therefore it was not bound. *Held*, that the railroad was bound by its certificate and indorsement, the case coming within the rule that an indorser of commercial paper is a guarantor of its genuineness. *Florida C. R. Co. v. Schutte*, 3 *Am. & Eng. R. Cas.* 1, 103 *U. S.* 118.—**FOLLOWED IN** *Tompkins v. Little Rock & Ft. S. R. Co.*, 21 *Fed. Rep.* 370, 120 *U. S.* 160, 7 *Sup. Ct. Rep.* 469, 5 *McCrary* (U. S.) 597, 18 *Fed. Rep.* 344 **REFERRED TO IN** *Smith v. Florida C. & W. R. Co.*, 43 *Fed. Rep.* 731.

Under these circumstances the company is estopped, as to its own liability as indorser, from denying the validity of the bonds. *Florida C. R. Co. v. Schutte*, 3 *Am. & Eng. R. Cas.* 1, 103 *U. S.* 118.

**20. Transfer by delivery.**—Railroad bonds issued payable to the holder are negotiable instruments, and the title thereto passes by delivery. *Carpenter v. Rommel*, 5 *Phila. (Pa.)* 34.—**DISTINGUISHING** *Diamond v. Lawrence County*, 37 *Pa. St.* 353. **FOLLOWING** *Carr v. Le Fevre*, 27 *Pa. St.* 413; *Bullock v. Wilcox*, 7 *Watts* (Pa.) 328. **OVER-RULING** *McCullough v. Houston*, 1 *Dall.* (U. S.) 441. **QUOTING** *Delafield v. Illinois*, 2 *Hill* (N. Y.) 159.

Railroad bonds payable to a person named, or his assigns, are negotiable commercial paper, and the title thereto passes by delivery by an assignment in blank, and their transfer cuts off prior equities existing between the company and the original payee. *Brainerd v. New York & H. R. Co.*, 25 *N. Y.* 496; *affirming* 10 *Bosw.* 332.—**EXPLAINING** *Bank of Rome v. Rome*, 19 *N. Y.* 20;

*White v. Vermont & M. R. Co.*, 21 How. (U. S.) 575; *Diamond v. Lawrence County*, 37 Pa. St. 353. FOLLOWING *Illinois v. Delafield*, 8 Paige (N. Y.) 527, 2 Hill 159.

Bonds of railroad companies and other corporations, payable to A. or his assigns, and assigned by A. in blank, are transferable by delivery; and a purchaser of such a bond, suing the obligors thereon, need not, in the first instance, give evidence to connect his purchase with the payee's blank assignment. *Brainerd v. New York & H. R. Co.*, 10 Bosw. (N. Y.) 332.—REVIEWING *White v. Vermont & M. R. Co.*, 21 How. (U. S.) 575; *Mechanics' Bank v. New York & N. H. R. Co.*, 4 Duer (N. Y.) 480.

Thus, where the plaintiff in such action produced the bond with an assignment in blank indorsed thereon, and proved that she purchased it in the market some time after the date of such assignment, and had owned it ever since—held, that in the absence of any evidence to the contrary she was to be presumed to be the rightful owner, and might recover without any proof connecting the purchase with the assignment by the payee. *Brainerd v. New York & H. R. Co.*, 10 Bosw. (N. Y.) 332.

**21. Days of grace.**—Prior to the Mass. act of 1824, ch. 137, negotiable promissory notes were not entitled to grace, unless expressly made payable with grace; but by such act days of grace were allowed "on all bills of exchange payable at sight, or at a future day certain within this state, and on all promissory notes, orders, and drafts payable at a future day certain within this state, in which there is not an express stipulation to the contrary." By the act of 1852, ch. 76, "bonds or other obligations under seal for the payment of money issued by a corporation payable to bearer, or to some person designated, or bearer, are made negotiable in the same manner as promissory notes are negotiable;" but railroad bonds are not negotiable notes within the meaning of this statute, and are therefore not entitled to days of grace. *Chaffee v. Middlesex R. Co.*, 146 Mass. 224, 6 N. Eng. Rep. 59, 16 N. E. Rep. 34.

### III. VALIDITY.

**22. In general.**—Obligations which circulate as money are payable on demand. Therefore railroad bonds payable ten years after date are not within the provisions of a

statute restraining unauthorized banking. *Hubbard v. New York & H. R. Co.*, 36 Barb. (N. Y.) 286, 14 Abb. Pr. 275.

The bonds of a railroad are not rendered void in consequence of being secured by a mortgage which the company may have had no authority to execute. *Philadelphia & S. R. Co. v. Lewis*, 33 Pa. St. 33.

**23. Consideration.**—The Pennsylvania act of April 8, 1861, entitled "An act concerning the sale of railroads, canals, turnpikes, bridges, and plank roads," does not authorize corporations organized thereunder to issue bonds otherwise than for a new, adequate, valuable consideration, increasing the available funds of the corporation. *Kemble v. Wilmington & N. R. Co.*, 13 Phila. (Pa.) 469.

Bonds given for the payment of the purchase-price of the road are supported by sufficient consideration, and the fact that the property was conveyed to a corporation of which the purchasers were members does not destroy or defeat that consideration so as to render the bonds invalid. *Holland v. Lee*, 40 Am. & Eng. R. Cas. 379, 71 Md. 338, 18 Atl. Rep. 661.

**24. Interest and Usury.**—Railroad bonds are not void by a provision therein to pay an illegal rate of interest, but are only void as to the excess in the rate of interest. *Philadelphia & S. R. Co. v. Lewis*, 33 Pa. St. 33.

The Arkansas act of January 22, 1855, § 7, limiting the rate of interest to seven per cent on corporation bonds issued for an increase of stock or for borrowed money, does not apply to bonds issued in payment of railroad property bought at a foreclosure sale. *Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. Rep. 482.

Bonds of a railroad company are not void because, under authority to issue them at "a rate of interest not exceeding eight per cent per annum, and having not more than thirty years to run," the company issued bonds with interest payable semi-annually and contracted that, in default of the reasonably prompt payment of the interest as it should accrue, the principal sum might be treated as due and payable, as an amendment to the charter was accepted by the company by issuing and selling the bonds and executing the mortgage to secure their payment as authorized by the amendment. *Newport & C. Bridge Co. v. Douglass*, 12 Bush (Ky.) 673, 18 Am. Ky. Rep. 221.

**25. Illegality.**—A board of county commissioners, without being authorized by law, issued to a company orders on the county treasury for the purpose of aiding in building its road, and for the orders received income bonds of the company. The orders were not applied to the purpose for which they were issued; but before they were paid, the commissioners took the personal bond of the directors, conditioned that, whereas the orders had been issued to enable the company to complete its road, and they had been otherwise used, without so doing, the bond should be void if the road was finished in a specified time, and then paid the orders as they afterward became due. *Held*, that the orders, having been issued without authority, and in violation of the constitution and laws of the state, were illegal and void; that the bond of the directors to the commissioners, having been taken in furtherance of an illegal purpose, was taken in violation of the public policy of the state, and was therefore void; and that, though the condition of the bond might be broken, no recovery could be had thereon, for either the penal sum named therein or the amount paid on the illegal orders. *Delaware County Com'rs v. Andrews*, 18 Ohio St. 49.

**26. Invalidity cured by statute.**—An act was passed by the legislature of Quebec (37 Vic. ch. 23) limiting the issue of bonds by the L. & K. Ry. to £300,000; £100,000 to be issued at once, £100,000 when forty-five miles of the road had been completed and in running order, as certified by the government inspecting engineer, and the remaining £100,000 as soon as thirty additional miles should have been completed. In 1875, by the act 39 Vic. ch. 57, the legislature modified the condition to be fulfilled before the third issue could be made, the preamble of which act declared that, "Whereas it appears that, a total length of forty-five miles of the company's line having been completed, the first and second issue each of £100,000 of the company's debentures have been made." *Held*, that the effect of this act was to make the bonds therein mentioned valid and binding on the company although the conditions precedent specified in 37 Vic. ch. 23 might not have been fulfilled when they were issued, and although it was in fact shown that only forty-three and one-half miles of the road had been completed when the second issue of £100,000 was made. *Quebec v. Quebec C. R.*

*Co.*, 10 Can. Sup. Ct. 563.—QUOTING *In re Bagnalstown & W. R. Co.*, L. R. 4 Ir. Eq. 526; *In re Cork & Y. R. Co.*, 21 L. T. 738.

**27. Incomplete bonds, generally.**—A railroad company issued its bonds, which were incomplete by reason of not having the certificate of a certain trust company thereon, and not having the seal of the railroad company; in this condition they were stolen, and the certificate and seal forged thereto, and they subsequently passed into the hands of the plaintiffs, who were *bona-fide* purchasers for value. *Held*, that the company was not bound thereby. *Maas v. Missouri, K. & T. R. Co.*, 11 Hun (N. Y.) 8.

**28. — filling blanks.**—A railroad company issued its bonds payable in blank, and delivered them to a citizen of the state. After several transfers, they came into the hands of plaintiff, a citizen of another state. *Held*, that he had a right to fill the blank by inserting his own name as payee, and to sue thereon in the United States circuit court on account of diverse citizenship. *White v. Vermont & M. R. Co.*, 21 How. (U. S.) 575. EXPLAINED IN *Brainerd v. New York & H. R. Co.*, 25 N. Y. 496. QUOTED IN *Beaver County v. Armstrong*, 44 Pa. St. 63. REVIEWED IN *Brainerd v. New York & H. R. Co.*, 10 Bosw. (N. Y.) 332.

A railroad company issued bonds in all respects complete and perfect instruments, except that they were issued with the name of the payee blank. Subsequently they were ratified and confirmed by an act of the legislature. *Held*, that a holder of such bonds might sue thereon in his own name. *Chapin v. Vermont & M. R. Co.*, 8 Gray 575.

A railroad company issued bonds acknowledging "the receipt of \$1000 from ....., and in consideration thereof the railroad company promise and agree to pay ..... or assigns the sum of \$1000." A complaint in an action thereon averred that "the corporation received the money from some person unknown to the plaintiff and delivered the bond to such person for the purpose and with the intent that the same should be assignable and transferable by delivery from hand to hand without other writing; that before its maturity it came lawfully into the possession of the plaintiff for value, and that he is the owner and holder." *Held*, that the complaint was good on demurrer, as it was lawful for any holder to fill his

name in the blank as payee. *Hubbard v. New York & H. R. Co.*, 36 *Barb. (N. Y.)* 286, 14 *Abb. Pr.* 275.

Railroad bonds were issued for a certain amount sterling, if payable in London, or for a certain number of dollars, if payable at certain designated cities in the United States, with coupons for interest to correspond. They recited that the president of the company was authorized by indorsement to fix the place of payment; but the president indorsed them, "I hereby agree that the within bond and interest-coupons thereto attached shall be payable in . . . . . ." *Held*: (1) that the bonds were not negotiable, not being made payable at a place certain; (2) that the bonds having been stolen and come into the hands of an innocent purchaser for value, such purchaser had no authority to fill the blank so as to designate a place of payment, but would hold the bonds subject to the defects in title caused by the manner in which they had been put in circulation. *Jackson v. Vicksburg, S. & T. R. Co.*, 2 *Woods (U. S.)* 141.

Bonds of a railroad corporation, which were conditioned for the payment of either of two specified kinds and amounts of national currency, to be determined by the place to be fixed for their payment; which contained a clause authorizing the president of the corporation to fix by his indorsement such place of payment; and which had been indorsed in blank by the president, were stolen while still in the possession of the corporation—*held*, that a *bona-fide* holder was not authorized to fill the blank, and that he acquired and could convey no title to the bonds. *Ledwich v. McKim*, 53 *N. Y.* 307; *affirming* 3 *J. & S.* 304.

**29. Altered bonds.**—Where negotiable bonds which form part of a large issue by a railroad company are stolen, and the numbers altered, and they are purchased in good faith before maturity and for value, the original owner cannot recover while the bonds are outstanding in the hands of the purchaser. *Wylie v. Missouri Pac. R. Co.*, 43 *Am. & Eng. R. Cas.* 431, 41 *Fed. Rep.* 623.

The numbers of bonds which form part of a large issue by a railroad company, in which the numbers only serve the collateral purpose of protection and convenience, and do not directly or indirectly enter into the tenor of the contract, are not material; and where negotiable bonds are stolen and the

numbers are altered, and the bonds are afterward sold to a *bona-fide* purchaser for value, such alteration does not affect the validity in the hands of the purchaser. *Wylie v. Missouri Pac. R. Co.*, 43 *Am. & Eng. R. Cas.* 431, 41 *Fed. Rep.* 623.

**30. Over-issue.**—Where a railroad company had contracted that it would not issue its first-mortgage bonds in excess of \$10,000 per mile of completed road, but, subsequent to the sale of its first-mortgage bonds to that extent, it did issue its bonds in excess of such an amount—*held*, that such over-issue was void as against the holders of the bonds regularly issued to the extent limited, none of the holders of such over-issue being innocent purchasers for value. *Union Trust Co. v. Nevada & O. R. Co.*, 17 *Am. & Eng. R. Cas.* 207, 20 *Fed. Rep.* 80, 10 *Sawyer (U. S.)* 122.

A railroad company executed a mortgage to secure a certain number of bonds, each bond of the series to be numbered. Several bonds were issued above the number designated, but all were indorsed and certified alike. *Held*, that the numbering of the bonds was only a matter of convenience and did not affect their validity; that those above the designated number, in the hands of *bona-fide* holders for value, were of equal validity with the others; and that upon a foreclosure, if the railroad property did not sell for enough to pay all, the whole issue should be paid *pro rata*. *Stanton v. Alabama & C. R. Co.*, 2 *Woods (U. S.)* 523.—*APPLIED IN* *McLane v. Placerville & S. V. R. Co.*, 26 *Am. & Eng. R. Cas.* 404, 66 *Cal.* 606.

#### IV. RIGHTS OF PURCHASERS AND HOLDERS.

##### 1. Rights of Bondholders as Such.

**31. In general.\***—Each bondholder is brought into contract relations with his co-bondholders, and his absolute rights in respect to the procedure for the collection of the principal or interest are limited by the provisions of the trust deed and the peculiar nature of the security. *Guilford v. Minneapolis, S. St. M. & A. R. Co.*, 51 *Am. & Eng. R. Cas.* 98, 48 *Minn.* 560, 51 *N. W. Rep.* 658.

Where a railroad company issues bonds under an act giving the holder the right to

\* Rights of bondholders purchasing bonds under fraudulent prospectus, see 33 *AM. & ENG. R. CAS.* 32, *abstr.*

vote for directors, but containing nothing to prohibit a consolidation with another road, the holder of such bonds will be deemed to have taken them subject to the contingency of such consolidation, and cannot complain if it occurs. (HERRICK, J., dissents). *Hart v. Ogdensburg & L. C. R. Co.*, 52 N. Y. S. R. 799.

Notwithstanding 7 & 8 Vic. ch. 85, § 19, which imposes penalties on a company for giving loan notes or securities, the holders of instruments under the seal of a railway company, given with the knowledge of the shareholders, and acknowledging money to be due from the company (called Lloyd's bonds), have a valid claim against the assets of the company so far as it has had the benefit of the money. *Cork & Y. R. Co. in re Overend, Gurnet & Co. ex parte*, L. R. 4 Ch. 748, 39 L. J. Ch. 277, 21 L. T. 735.—CRITICISED IN *In re National P. B. B. Soc. ex parte Williamson*, L. R. 5 Ch. 309, 22 L. T. 284, 18 W. R. 388.

So long as a company is a going concern debenture-holders are not entitled to interfere with the directors in dealing with the assets in the ordinary course of business. If there is a default in payment of principal or interest the remedy is by appointment of a receiver. *Phelps v. St. Catharines & N. C. R. Co.*, 46 Am. & Eng. R. Cas. 336, 19 Ont. 501.—QUOTING *Gardner v. London, C. & D. R. Co.*, L. R. 2 Ch. 217; *In re Panama, N. Z. & A. R. Mail Co.*, L. R. 5 Ch. 318. REVIEWING *Simpson v. Ottawa & P. R. Co.*, 1 Chan. Cham. 126; *Peto v. Welland R. Co.*, 9 Grant Ch. 455.

A mortgage bondholder of a railroad company entered into an agreement to exchange his bonds for lands that the company had acquired by a grant from the government, the company covenanting to warrant and defend the title; subsequently another company succeeded to the rights in the property of the former, becoming liable for all of its debts. *Held*, that such bondholder could maintain an action on the covenant against the succeeding railroad company for being evicted from the lands. *Wood v. Dubuque & S. C. R. Co.*, 28 Fed. Rep. 910.

A railroad company issued its bonds to run for a term of thirty years, and afterward made an arrangement with another company for the operation of the road, by which it was to retain a certain share of its net earnings as a fund for the payment of

such bonds, the contract to run for thirty years, or for a time sufficient to accumulate a fund to pay off the whole of the bonds, and such agreement was indorsed on the bonds. *Held*, that the company had not the right to call in the bonds in a shorter time than thirty years; and pay them off, upon having the money to do so. *Chicago & I. R. Co. v. Pyne*, 30 Fed. Rep. 86.

The first- and second-mortgage bondholders of the Vermont & Canada R. Co., having elected to avail themselves of an authority given for their benefit, and at public meetings chosen a committee to represent them in matters appertaining to the management of the property, are all bound by the acts of said committee within the scope of its authority. The issuing of loans by the receivers and managers, as such, for the benefit and conservation of the property, was a matter within the scope of its authority to advise with the receivers and managers about, and assent to. *Langdon v. Vermont & C. R. Co.*, 4 Am. & Eng. R. Cas. 33, 53 Vt. 228.

A Spanish railway company issued bonds charged on their railway. Owing to delay in realizing the bonds it became impossible to carry out the undertaking. At the suit of a minority of bondholders the court administered the unspent part of the proceeds of such bonds in the hands of English trustees, on the footing that such funds ought to be applied, in the first place, in saving and realizing the property charged, and then be distributed *pro rata* among the bondholders, and that interest on and amortization of the bonds should cease from the date of the judgment. *Collingham v. Sloper*, 54 Am. & Eng. R. Cas. 623, [1893] 2 Ch. 96.

**32. The bondholder's lien.**—Holders of railway bonds, issued under an act providing that the bonds were "to be taken and considered to be the first and preferential claims and charges upon the undertaking," have a lien on the funds of the company in bank, as against execution creditors. *Phelps v. St. Catharines & N. C. R. Co.*, 18 Ont. 581.

A statute providing that bonds of a railway shall be a first lien on "the undertaking" means a first lien on the complete works of the company from which money may be earned, including the money itself. *Phelps v. St. Catharines & N. C. R. Co.*, 18 Ont. 581.

The holders of railway bonds, issued under a statute declaring that they shall be "considered the first and preferential claims and charges upon the undertaking, and the real property of the company, including its rolling-stock and equipments," has not a prior lien on the earnings of the company in bank, as against an attaching judgment creditor. *Phelps v. St. Catharines & N. C. R. Co.*, 46 *Am. & Eng. R. Cas.* 336, 19 *Ont.* 501.—*REVIEWING Swiney v. Enniskillen*, etc., *R. Co.*, 2 *Ir. R. (C. L.)* 338.

Where the lien of railroad bondholders is created by statute, though a resulting equity would have arisen without the aid of the statute, still the statute takes the place of this and regulates the rights of the bondholders; and the question is not so much what the bondholders ought to have as what the statute gives them. *North Carolina R. Co. v. Drew*, 3 *Woods (U. S.)* 691.

A railroad company funded its overdue bonds by issuing registered certificates at a higher rate of interest and extending the time of payment. *Held*, in the absence of anything to the contrary, that the acceptance of such certificates was a waiver of the lien of the bonds. *Skiddy v. Atlantic, M. & O. R. Co.*, 3 *Hughes (U. S.)* 320.

**33. The majority rule.**—The plaintiff town held about one-twentieth of the bonded debt of a railroad and a much less proportion of its stock. The defendant towns held the balance and voted to sell the road. The plaintiff declined. *Held*, that it was the right of the majority to control, such action of the majority not being fraudulent, collusive, or oppressive. *Waldoborough v. Knox & L. R. Co.*, 84 *Me.* 469, 24 *Atl. Rep.* 942.

**34. Position of bondholder as regards creditors.**—The agreement of holders of mortgage bonds of a railroad company to lend the company certain amounts of money, and to take in payment therefor interest-bearing debenture bonds of the company, does not amount to an unpaid subscription to the capital stock of the company, but is, in effect, an agreement to make a loan to the company upon the bonds as security. *Pettibone v. Toledo, C. & St. L. R. Co.*, 36 *Am. & Eng. R. Cas.* 227, 148 *Mass.* 411, 19 *N. E. Rep.* 337, 1 *L. R. A.* 787.

A bill will not lie in favor of the creditors of such company to compel the subscriptions to the bonds to be applied on their

claims; and the fact that such debenture bonds were issued to enable the company to complete its road creates no trust in favor of creditors for supplies furnished in its construction. *Pettibone v. Toledo, C. & St. L. R. Co.*, 36 *Am. & Eng. R. Cas.* 227, 148 *Mass.* 411, 19 *N. E. Rep.* 337, 1 *L. R. A.* 787.

Massachusetts Pub. St. ch. 151, § 2, cl. 11, giving a remedy in equity to creditors, to reach "any property, right, title, or interest, legal or equitable," of a debtor, does not apply to such contracts between the subscribers to the bonds and the corporation, since the contract is executory on both sides and is not assignable by either party. *Pettibone v. Toledo, C. & St. L. R. Co.*, 36 *Am. & Eng. R. Cas.* 227, 148 *Mass.* 411, 19 *N. E. Rep.* 337, 1 *L. R. A.* 787.

**35. Bondholder's right to sue, generally.\***—The owner of corporate bonds who has a lien upon the lands of the corporation to secure payment of such bonds has as much interest in the subject-matter as a stockholder, and may maintain a suit to prevent another corporation from obtaining the same land by the wrongful use of the name of the corporation whose bonds he holds. *Newby v. Oregon C. R. Co.*, 1 *Sawyer (U. S.)* 63.

**36. Right to sue for an accounting.**—When money applicable to the payment of mortgage bonds of a railroad company has come to the hands of the trustees for the bondholders, each holder at that time becomes immediately entitled to the share of the money applicable to his bond, and can immediately recover the same. *Dwight v. Smith*, 13 *Fed. Rep.* 50.

The question whether bondholders who acquired their bonds after money applicable to the bonds accrued in the hands of the trustees are entitled to share in that money, depends upon the nature of the right and of the transaction by which they acquired the bonds. *Dwight v. Smith*, 13 *Fed. Rep.* 50.

Where a railroad company issues its bonds for a corporate debt, and mortgages its property to trustees, money coming to the hands of the trustees is security for that debt, and when the debt passes, the security passes also, without reference to when holders acquire their bonds; and when the trustees have funds in their hands, after satisfying prior liens, the bondholders are entitled

\* See *post*, 51-64.



to have it applied to the discharge of their bonds and interest. *Dwight v. Smith*, 13 *Fed. Rep.* 50.

A railroad corporation, defendant, issued certain income bonds secured by mortgage on its road. Each of said bonds contained a covenant for the payment of interest semi-annually out of the earnings of the road, followed by a proviso to the effect that no more interest should be paid than should be certified by defendant's "board of directors, for the time being, to have been by said corporation earned over and above all expenses, including necessary repairs, during six months ending one month before such time fixed for such half-yearly payments, and theretofore to have accumulated during the current year; and in default of said certificates no interest shall be payable." In an action by holders of a portion of said bonds for an accounting, etc.—*held*, that no trust-relation between the bondholders and the company authorizing an accounting was created by the contract; that the designation of a fund out of which the interest was to be paid did not operate as an equitable assignment of the fund for the benefit of the bondholders, or create an equitable lien thereon in their favor, so as to constitute the surplus earnings a trust fund; that until there was a surplus beyond what was required for expenses and necessary repairs, ascertained as provided in the contract, the company remained the absolute owner of the fund, and the bondholders acquired no title, legal or equitable, thereto; and that, so long as the company remained solvent, while a breach of the contract rendered it liable to the bondholders, the only remedies left open to them were such as the law affords for a breach of contract in other cases. *Thomas v. New York & G. L. R. Co.*, 139 *N. Y.* 163, 54 *N. Y. S. R.* 498; *affirming* 47 *N. Y. S. R.* 250, 19 *N. Y. Supp.* 766, 22 *Civ. Pro.* 326.—*APPROVING Day v. Ogdensburg & L. C. R. Co.*, 107 *N. Y.* 129. *DISTINGUISHING Boardman v. Lake Shore & M. S. R. Co.*, 84 *N. Y.* 157; *Uhlman v. New York Life Ins. Co.*, 109 *N. Y.* 421.

**37. Enjoining misapplication of funds.\***—A bondholder in a corporation cannot obtain an injunction to restrain the directors thereof from sacrificing its interests to another corporation, where the

company is solvent and abundantly capable of responding in damages to the complainant. *Matthews v. Murchison*, 9 *Am. & Eng. R. Cas.* 693, 15 *Fed. Rep.* 691.

Where a suit is brought at the instance of income-mortgage bondholders, alleging that the board of directors of the corporation have fraudulently failed to set apart the net earnings of the road for the payment of interest, no relief can be had in such action if the complainant fails to show fraud on the part of the directors, even though it appears that the directors had erroneously diverted the income to other purposes. *Spies v. Chicago & E. I. R. Co.*, 40 *Am. & Eng. R. Cas.* 401, 40 *Fed. Rep.* 34.

A railway income mortgage provided that the board of directors should deduct from the gross income the necessary operating expenses and betterments required to maintain the road in first-class condition, and declared that, if the board of directors should adjudge that no net income had been realized during the year applicable to the payment of interest on the mortgage bonds, they should thereupon enter a resolution to that effect on the journal of their proceedings, and that the adjudication should be final and conclusive as an award, and should operate as a bar against any demand by any bondholder for interest for that year. *Held*, that the bondholders were entitled to have an honest effort on the part of the directors to ascertain the net earnings of the railroad, and that the mere passing of a resolution that no income has been earned, without an attempt to ascertain the fact, was not a compliance with the terms of the contract. *Spies v. Chicago & E. I. R. Co.*, 40 *Am. & Eng. R. Cas.* 401, 40 *Fed. Rep.* 34.

Where the owner of railroad bonds sues in his own behalf and that of other bondholders to restrain a judgment-creditor from levying on the property of the company until overdue interest is paid on the bonds, it is no objection to a continuance of the injunction that some of the bonds had been pledged by him to other persons as collateral security. *Buller v. Rahm*, 46 *Md.* 541, 18 *Am. Ry. Rep.* 86.

Bondholders of a corporation of the same class cannot take advantage of the fact that directors have issued a large number of shares to themselves at a discount, where the transaction is not *ultra vires*, and the corporation itself does not complain. If the directors abuse their power complaint must

\* Injunction by income bondholders to restrain a misapplication of funds, see 36 *AM. & ENG. R. CAS.* 339, *abstr.*

be made by the corporation or its corporations. *Bank of Toronto v. Cobourg, P. & M. R. Co.*, 10 Ont. 376.

**38. Rights of holder who is a pledgee.**—A pledgee of certain bonds claimed that the pledge had been foreclosed by sale at auction, and that through such sale he became the owner; the terms of the sale, or whether before sale there had been a demand of payment or notice to redeem, did not appear. *Held*, that, as no right to sell was shown, the holder of the bonds must still be treated as pledgee. *Duncomb v. New York, H. & N. R. Co.*, 4 Am. & Eng. R. Cas. 293, 84 N. Y. 190; *reversing 23 Hun* 291.

D. & B. contracted with the M. & K. R., one of the defendants, to construct its railroad for, among other things, \$40,000 cash, to be paid in monthly instalments by the N. & L. R., another defendant, who had promised to loan that sum to the M. & K. R. on its notes and securities agreed upon and delivered. The N. & L. R. exacted from D. & B., as a condition of paying the money, double the amount of bonds in the M. & K. R., which D. & B. deposited with the N. & L. R., and subsequently assigned to the plaintiffs as security for money advanced by them to D. & B. to aid in the construction of the railroad. After the insolvency of D. & B., and without the knowledge or consent of B. or of the plaintiffs, D. assigned the bonds to the N. & L. R. In a suit for the recovery of the bonds—*held*, that the N. & L. R. had no title to them against the claim of the plaintiffs, to whom they should be delivered. *Hale v. Nashua & L. R. Co.*, 60 N. H. 333.

**39. Surrender of bonds and acceptance of new bonds.**—In an accounting under a railroad mortgage, in which provision is made for retiring a series of second-income bonds and issuing, in exchange, new bonds which are to be held by a trust company until all the second-income bonds are retired, a bondholder declining to surrender his bonds is not entitled to claim as interest more of the income than his share would have been had there been no surrender of the bonds. *Barry v. Missouri, K. & T. R. Co.*, 36 Am. & Eng. R. Cas. 332, 34 Fed. Rep. 829.

In ascertaining income applicable to the payment of interest, an allowance made by the mortgagor company to a connecting road for a division of earnings was under

the peculiar facts and circumstances of the case rejected. *Barry v. Missouri, K. & T. R. Co.*, 36 Am. & Eng. R. Cas. 332, 34 Fed. Rep. 829.

A railroad contracted to exchange its new bonds for old ones, upon the surrender of all of the old ones. *Held*, that it was not bound to negotiate with individual bondholders, but only to deliver new bonds upon a surrender of all the old ones. *Union Pac. R. Co. v. Stewart*, 95 U. S. 279.

A railroad company issued bonds with a provision in the mortgage securing them, that the holders might exchange them for bonds of another series at any time after execution and delivery. *Held*, that the privilege of exchange was limited as to time, and that a court of equity would not decree a specific performance by compelling the exchange after a lapse of thirteen years, when the bonds were selling at a discount, and more than five years after the company had ceased to make such exchanges. *De Witt v. Chicago, B. & Q. R. Co.*, 41 Fed. Rep. 484.

A railroad company executed a second mortgage to secure the indebtedness of the first and also an additional indebtedness, reciting that the holders of bonds secured by the first mortgage had agreed to surrender the same and accept new ones to constitute a first lien; but some of the bondholders refused to surrender them. *Held*, that those thus refusing were not entitled to priority over other first-mortgage holders who did exchange, but that they could not be prejudiced by the additional debt secured by the second mortgage. *Ames v. New Orleans, M. & T. R. Co.*, 2 Woods (U. S.) 206.—**DISTINGUISHED IN** *Barry v. Missouri, K. & T. R. Co.*, 36 Am. & Eng. R. Cas. 332, 34 Fed. Rep. 829.

Complainant filed a bill alleging that he was the holder of railroad bonds; that under a plan of reorganization of the company he had surrendered them, new ones to be issued in their stead; and that the company refused to issue the new bonds, claiming that a third party was entitled to them. Complainant prayed that the company be required to deliver the new bonds, that it be restrained from delivering them to the third party, and that a certificate held by such third party be cancelled. *Held*, that the complaint stated but one cause of action, namely, the delivery of the bonds to plaintiff, the prayer for cancellation of the

certificate being but auxiliary relief. *Turner v. Conant*, 18 *Abb. N. Cas.* (N. Y.) 160.

The C. I. Co. held first-mortgage bonds under a mortgage, dated in 1872, given by the S. V. R. Co., and the two companies made an executory agreement providing that the bonds held by the C. I. Co. should be cancelled, and that in place of them the S. V. R. Co. should issue and deliver to the C. I. Co. second-mortgage bonds, which were to be subject to certain first mortgage bonds, specified in the agreement, to be issued by the S. V. R. Co. to other persons, to complete the railroad of the S. V. R. Co. Under the agreement the bonds under the mortgage of 1872 were cancelled, and a release of that mortgage was made by the trustee therein. Then the S. V. R. Co. executed three mortgages on its property, the trustee therein having notice of the right of the C. I. Co. under said agreement. It never delivered to the C. I. Co. the second-mortgage bonds called for by said agreement. *Held*, that under such an agreement the C. I. Co. was entitled to equitable compensation for the failure of the S. V. R. Co. to deliver such second-mortgage bonds, and that, notwithstanding the failure to deliver such second-mortgage bonds, the equitable compensation for such failure decreed to the C. I. Co. must be subject to the first-mortgage bonds to which such agreement made the second-mortgage bonds subject, and could not be accorded priority over such bonds by reason of the mortgage of 1872. *Fidelity I., T. & S. D. Co. v. Shenandoah Valley R. Co.*, 43 *Am. & Eng. R. Cas.* 356, 33 *W. Va.* 761, 11 *S. E. Rep.* 58.

The C. I. Co. repudiated such agreement, claimed as for the said cancelled bonds, did not demand such second-mortgage bonds, and never claimed any compensation under said agreement for failure to deliver the second-mortgage bonds until after a decree holding it bound by said agreement. Had such bonds been delivered according to the agreement, however, they could have been sold by the C. I. Co. at par, and that company is thus damaged by such failure to deliver the bonds; yet these facts will not give it preference, for the compensation decreed to it, over the first-mortgage bonds, to which the agreement makes such second-mortgage bonds subject, notwithstanding that such position of subordination may entail great loss to the C. I. Co., as compared with what it would have realized by

the sale of the second-mortgage bonds had they been delivered. *Fidelity I., T. & S. D. Co. v. Shenandoah Valley R. Co.*, 43 *Am. & Eng. R. Cas.* 356, 33 *W. Va.* 761, 11 *S. E. Rep.* 58.

#### 40. Conversion of bonds into stock.\*

—Where railroad bonds are issued with a privilege to holders to have them exchanged for stock at any time on or before their maturity, a holder forfeits his right to exchange them for stock by a failure to present them on or before maturity. *Chaffee v. Middlesex R. Co.*, 146 *Mass.* 224, 6 *N. Eng. Rep.* 59, 16 *N. E. Rep.* 34.

Where railroad bonds were payable in money or convertible into stock "at maturity," at the option of the holder, and they matured on Sunday, a presentation for the purpose of a conversion on the preceding Saturday at 3.10 o'clock P.M. is seasonable, though the business hours of the company's office closed at 3 o'clock. *Chaffee v. Middlesex R. Co.*, 146 *Mass.* 224, 6 *N. Eng. Rep.* 59, 16 *N. E. Rep.* 34.

The holder of a railroad bond, convertible into stock, at his option, at maturity, cannot assign the right of action for a breach of the stipulation for conversion while he retains the bond; and a petition which fails to state that plaintiff is the holder of the bond for the non-conversion of which he sues is fatally defective. *Denney v. Cleveland & P. R. Co.*, 28 *Ohio St.* 108, 14 *Am. Ry. Rep.* 73.

Where, by the terms of a railroad bond, a period was fixed within which it might be converted into stock at the option of the holder—*held*, that an agreement for the extension of time of payment before maturity of the bond did not extend the right of conversion after the time limited. *Muhlenberg v. Philadelphia & R. R. Co.*, 47 *Pa. St.* 16.

A decree in a railroad foreclosure suit provided that where bondholders became purchasers of the property they might exchange their bonds for stock if they chose to do so. *Held*, that the choice of making the exchange must be exercised before the property is conveyed to those who have decided to become purchasers and make the exchange, and that this is so though a bondholder was not aware of the legal proceedings, and had overlooked the fact of his owning bonds until after the conveyance. *Landis v. Western Pa. R. Co.*, 133 *Pa. St.* 579, 26 *W. N. C.* 64, 19 *Atl. Rep.* 556.

\* See ante, 8.

A statute gave the bondholders of a railway company an option to convert their bonds into stock, and enacted that this "converted bonded stock," and any new subscribed stock should be preferential to the ordinary stock and be entitled to dividends of 8 per cent per annum in priority to any dividend to the ordinary shareholders. By a subsequent act the company was authorized to unite with another company, and it was declared that the two companies and those who should become shareholders in the new company under the acts relating to the first-mentioned company and under the deed of union should constitute the new company. *Held*, that the union did not extinguish the right of the bondholders to elect as to converting their bonds into stock. *Cayley v. Cobourg, P. & M. R. & M. Co., 14 Grant Ch. (U. C.) 571.*

**41. Rights of bondholders as regards interest.\***—Where railroad bonds contain the provision that, if the net earnings of the road are not sufficient to pay the interest annually on the bonds, then the company may, at its option, issue scrip for the interest, the option thus reserved to the company must be exercised at the time the interest falls due, and the scrip must bear interest. *Texas & P. R. Co. v. Marlor, 123 U. S. 687, 8 Sup. Ct. Rep. 311.*

In such case no demand by a bondholder is necessary to enable him to recover interest in money, the company having failed to issue scrip the day the interest fell due. *Texas & P. R. Co. v. Marlor, 123 U. S. 687, 8 Sup. Ct. Rep. 311.*

The election of the bondholders to treat the default in payment of interest as a forfeiture of the contracts so far as they prescribed the length of time for which the bonds were to run, operated *prima facie* to cancel all coupons representing instalments of interest not then due, and the principal sums, if treated as due in the judgment for the sale of the road, will bear interest at the agreed rate from the date of the election. *Newport & C. Bridge Co. v. Douglass, 12 Bush (Ky.) 673, 18 Am. Ry. Rep. 221.*

A railroad company issued its bonds, providing for a sinking fund for their redemption, with a right to redeem a certain number each year, to be determined on

a date fixed by drawings by lot, and that in a certain time after such drawing the principal of the bonds so drawn should be payable, at the option of the holders, with any interest unpaid, and that thereafter the interest thereon should cease. *Held*, that where bonds were so drawn and not surrendered for payment the interest thereon ceased; that the provision that the bonds when so drawn should be payable "at the option of the holders" only meant that bondholders had a right to retain possession of the bonds, but that if they did so they could draw no interest. *Henry v. Syracuse, G. & C. R. Co., 24 N. Y. S. R. 21, 25 J. & S. 69, 5 N. Y. Supp. 437.*

A contract, by designating a fund out of which interest is to be paid, does not operate as an equitable assignment of the fund to the bond creditors or create an equitable lien thereon in their favor, so that when any sum has been earned applicable to the payment of interest it should be constituted a trust fund in the hands of the company for the benefit of the bondholders; but they acquire no title, legal or equitable, to the fund itself. *Thomas v. New York & G. L. R. Co., 54 N. Y. S. R. 498; affirming 47 N. Y. S. R. 250.*

A board of directors are bound to act in good faith, but any expenditures incurred which, by fair construction, come within the permitted charges are conclusive upon the bondholders. It is for the board to determine, in the first instance, what repairs are necessary; and a mistake in judgment as to the necessity or extent of repairs directed will afford no ground of complaint by the bondholders. *Thomas v. New York & G. L. R. Co., 54 N. Y. S. R. 498; affirming 47 N. Y. S. R. 250.*

When interest-coupons of mortgage bonds have been presented and paid at the place of payment with money furnished by a third party, a private arrangement between such third party and the mortgagor that the transaction shall be treated as a purchase of the coupons by the former is not enforceable against the bondholders. *Fidelity I., T. & S. D. Co. v. Western Pa. & S. C. R. Co., 138 Pa. St. 494, 21 Atl. Rep. 21.*

**42. Funding coupons.**—Certain railroad bonds were issued under a statute declaring them a first lien on the company's property, and subsequently a statute was passed postponing the lien and providing for funding past-due coupons for bonds.

\* Provision in bonds that railway shall have option to pay interest in scrip. When option must be exercised. Demand by bondholders, see 33 AM. & ENG. R. CAS. 55 *abstr.*

*Held*, that persons funding under the second act were estopped from claiming a first lien under the original act. *Hand v. Savannah & C. R. Co.*, 17 So. Car. 219.

After railroad bonds had been issued and guaranteed by the state under a statute declaring them a first lien, a further law was passed postponing the lien and providing for a surrender of past-due coupons and accepting bonds in lieu thereof under the second act. *Held*, that the question whether a holder of such coupons who had exchanged them for bonds was estopped from claiming a prior lien under the original act was one of fact for the jury, with the burden of proof on the one asserting the estoppel. *Hand v. Savannah & C. R. Co.*, 17 So. Car. 219.

A statute provided that holders of past-due coupons from railroad bonds might exchange them for bonds of the company. *Held*, that entries in the handwriting of a treasurer of the company, made eleven years before in the regular books of the company, were competent evidence to show who had funded coupons. *Hand v. Savannah & C. R. Co.*, 17 So. Car. 219.

Where a statute provides for funding past-due coupons by exchanging them for bonds of the company, the mere fact that coupons were funded is not sufficient to show that the persons who did the funding are the same parties who, years afterward, owned bonds, with such certainty as to estop the parties. *Hand v. Savannah & C. R. Co.*, 17 So. Car. 219.

The present owners of bonds may have acquired them prior to 1869 without the coupons, but if afterward, the act of that year did not charge them with notice that the coupons cut off had been funded by persons then owning the bonds from which they had been cut. *Hand v. Savannah & C. R. Co.*, 17 So. Car. 219.

#### 43. Registration of bonds as shares to enable holder to vote.—

A statute provided that, in the event of interest on railway bonds being due and unpaid, the holders of the bonds "at the next general meeting of the company" should have the right to vote as shareholders, upon having the bonds and any transfers thereof registered as shares. *Held*, that the words "next general meeting" only fixed the earliest time at which bondholders might vote; that no new registration was necessary to entitle a bondholder to vote at any subsequent meeting;

and that the right to vote extended to all matters that might come before an annual meeting upon which shareholders might vote. *Hendrie v. Grand Trunk R. Co.*, 13 Am. & Eng. R. Cas. 62, 2 Ont. 441.

And where by amendment to the above statute the right of such bondholders is extended to "special meetings," the right to vote extends to all subjects properly coming before such meetings. *Hendrie v. Grand Trunk R. Co.*, 13 Am. & Eng. R. Cas. 62, 2 Ont. 441.

A statute provided that a railway company might enter into an agreement with any other company for the leasing or working of its road upon the consent of two-thirds of its shareholders. *Held*, that the term "shareholders" must be understood to include not only shareholders proper, but also bondholders who had registered, under the statute, for the purpose of voting the same as shareholders, on account of interest on the bonds being due and unpaid, including the right to vote at a special meeting called to obtain the consent of the shareholders to such lease or working agreement. *Hendrie v. Grand Trunk R. Co.*, 13 Am. & Eng. R. Cas. 62, 2 Ont. 441.

A mandamus will issue to compel registration of railway bonds, under 38 Vic. ch. 56, O., in the name of a transferee, without the production or registration of the intermediate transfers. *In re Osler v. Toronto, G. & B. R. Co.*, 8 Prac. (Ont.) 506.

Bankers in London forwarded certain railway bonds, representing them as belonging to certain designated persons, and requested that they be registered for the purpose of voting thereon at a meeting of the corporation; but the secretary of the company refused to register such as had been transferred unless written transfers were produced. *Held*, that a mandamus would issue to compel a registration; that the representation of the bank that the bonds belonged to certain persons was sufficient proof of ownership; and that the issuing of scrip in London to represent the bonds would not invalidate the right of the actual holders of the bonds to vote on them. *In re Johnson*, 8 Prac. (Ont.) 535.

A demand on the acting secretary of a railway company for a registration of bonds is a sufficient compliance with 34 Vic. ch. 43, § 33, though the statute only provides for a registration "by the secretary." *Re Thomson*, 9 Prac. (Ont.) 119.

Under 34 Vic. ch. 43, § 33, enacting that, in the event of interest on railway bonds being due and unpaid, the holders may have them registered as shares, and vote thereon, it is necessary, in order to acquire such right, that the transfers be evidenced in the same manner as is required of shares; but no provision by a by-law is necessary. *Re Thomson, 9 Prac. (Ont.) 119.*

The holders of railway bonds on which interest is due and unpaid are only required to make out a *prima-facie* title thereto, to enable them to have them registered and to vote as shareholders, under the statute; and the mere fact that such holders are directors will not deprive them of the right, where there is no denial of compliance with 37 Vic. ch. 63, § 25, to entitle them to become holders. *Re Thomson, 9 Prac. (Ont.) 119.*

**44. Relative rights of several sets of bondholders.**—Where a railroad issued bonds and gave a third mortgage to secure them, and both were expressly made subject to the lien of the second mortgage, all purchasers of the third-mortgage bonds are charged with knowledge of the lien of the second mortgage. *Bronson v. La Crosse & M. R. Co., 2 Wall. (U. S.) 283.*—FOLLOWED IN *Mineral Point v. Lee, 18 Law Ed. (U. S.) 456.*

The Cent. Ohio R. R. Co. issued certain "income bonds," wherein it was recited that, "for the punctual payment of the interest and principal of said obligations, *in preference to the payment of dividends on the capital stock of said company, the income arising from the road and its appurtenances is specifically pledged;*" and afterwards executed a mortgage upon the whole of its line, in trust, to secure the payment of other bonds, issued and to be issued, with interest, to the amount of \$950,000. A bill was filed by certain of the holders of said "income bonds," praying an injunction to restrain the sale of said "mortgage bonds," and claiming a priority over, and an equitable lien upon, said "mortgage bonds" in the hands of their holders. There was no competent and admissible evidence tending to show that any of the complainants were induced to purchase the "income bonds" under any other representations than those on the face of said bonds, or that the R. R. Co. had authorized any one to make such representations. *Held*, that fraud against the "income bondholders" is not to be

imputed to the railroad in consequence of the issuing of said "mortgage bonds;" that under the said bill, answers, and evidence the injunction should not have been made perpetual in the court below; and that the terms of the "income bonds" are specific, and the holders of said bonds must be confined to the preference thereby given. *Garrett v. May, 19 Md. 177.*

A railroad company executed a first mortgage to secure an issue of bonds at the rate of \$15,000 per mile of the completed road. By the mortgage power was reserved to issue a like amount per mile for every mile of road thereafter to be completed. Subsequently a general mortgage was executed to secure bonds amounting to \$25,000 per mile of the road. In the latter mortgage it was provided that bonds might still be issued under the first mortgage, but that they should be retained by the trustee under the general mortgage to secure bondholders thereunder. The general mortgage was executed for the purpose of retiring the bonds secured by the first mortgage, if possible. After the execution of the general mortgage first-mortgage bonds to the amount of \$1,560,000 were executed and deposited with the trustee under the general mortgage. This amount represented \$15,000 per mile of an extension of the road. A prospectus was issued under which the general-mortgage bonds were sold, and in which it was represented that the first-mortgage bonds would be deposited for the purpose of securing bondholders under the general mortgage. *Held*, that, in a question with the bondholders under the first mortgage, the bondholders in the general mortgage were entitled to the benefit of the issue of the first-mortgage bonds for \$1,560,000, and that such issue was authorized and valid. *Atwood v. Shenandoah Valley R. Co., 38 Am. & Eng. R. Cas., 534, 85 Va. 966, 9 S. E. Rep. 748.*

A limitation contained in a general mortgage restricting the issue of bonds thereunder to \$25,000 per mile is made for the benefit of bondholders under such general mortgage, and may be waived by them, and the bondholders under a prior mortgage cannot, in an action of foreclosure, attack the validity of the issue of the bonds under the general mortgage on the ground that they were in excess of the prescribed limit. *Atwood v. Shenandoah V. R. Co., 38 Am. & Eng. R. Cas. 534, 85 Va. 966, 9 S. E. Rep.*



748.—*QUOTING Duncomb v. New York, H. & N. R. Co.*, 84 N. Y. 190.

As to the relative rights of holders of railroad bonds secured by a first, second, and third mortgage, respectively, in relation to an exchange of their bonds for new bonds secured by a new mortgage, see *Ex parte White*, 2 So. Car. 469.

## 2. Bona-Fide Purchasers.

**45. Who are deemed to be bona-fide purchasers.\***—One who purchases railroad bonds in open market, supposing them to be valid, and having no notice to the contrary, will be deemed a *bona-fide* holder. *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459.

Holders of negotiable railroad bonds secured by a mortgage and pledged as collateral to secure debts due from the company issuing the bonds, are *bona-fide* holders and are entitled to enforce payment of the bonds by the appointment of a receiver, and a foreclosure, as long as the debts for which they were hypothecated are unsatisfied. *Allen v. Dallas & W. R. Co.*, 3 Woods (U. S.) 316.

A creditor who, in consideration of the transfer of negotiable bonds to him, extends time for the payment of a debt, becomes a purchaser for value; and the circumstance that the bonds were taken for a pre-existing debt does not deprive him of the rights of a purchaser for value before maturity, without notice of the equities between the original parties to the bonds. *Tyrell v. Cairo & St. L. R. Co.*, 7 Mo. App. 294.

Every transfer of railroad coupon bonds for value and without notice gives the transferee a good title to them as against the former holder, and the transferee is presumed to be a *bona-fide* holder for value. *Gibson v. Lenhart*, 101 Pa. St. 522.

A person contemplating a purchase of railway bonds applied to its vice-president, secretary, and attorney for information as to their validity, and was informed that the bonds were regularly issued and sold, and were valid. The purchase was made from the president and one of the directors, and the company's books showed that the bonds were to be sold for a specified sum and that the director's name appeared as the purchaser, and that he was credited as having paid the amount at which the bonds were

to be sold. *Held*, that the buyer was an innocent purchaser, and that the company was estopped from denying the validity of the bonds as against him. *Union L. & T. Co. v. Southern Cal. M. R. Co.*, 51 Fed. Rep. 840.

**46. Who are not bona-fide purchasers.**—A person buying overdue bonds at 40 cents on the dollar from the vice-president of the company issuing them, after the mortgaged property has passed into the hands of a receiver in a suit to foreclose, is not a *bona-fide* holder, especially where inquiry would have shown that the vice-president was not authorized to sell the bonds. *American L. & T. Co. v. St. Louis & C. R. Co.*, 42 Fed. Rep. 819.

One member of a firm cannot be said to be an innocent holder of railroad bonds which have been declared fraudulent where the bonds were delivered to his firm in payment of work claimed to have been done for the company, and where another member of the firm was an active participant in the fraud which was held to render the bonds invalid. *Smith v. Florida C. & W. R. Co.*, 43 Fed. Rep. 731.—*QUOTING Trask v. Jacksonville, P. & M. R. Co.*, 124 U. S. 515, 8 Sup. Ct. Rep. 574. *REFERRING TO Florida C. R. Co. v. Schutte*, 103 U. S. 127.

A party receiving from the president of a railroad a bond given to the company, with an assignment in blank upon it, by such president, which purports to have been made by him as president by order of the board of directors, as collateral security for an antecedent debt due by such president individually, is not such a *bona-fide* holder for value, without notice, that he can hold the bond against the company. *Garrard v. Pittsburgh & C. R. Co.*, 29 Pa. St. 154.

A railroad company executed a mortgage to secure its bonds upon "all its property, real and personal, and all rights and interests therein now owned and hereafter to be acquired." A foreclosure decree conveying the property to complainant mentioned the real, personal, and mixed property of the company, and "any and all other property, real, personal, or mixed, belonging to the corporation." Complainant claimed to be the owner of certain municipal aid bonds issued to the company and held by it under the mortgage and foreclosure. The conditions upon which the bonds were issued were not complied with by the railroad company, and the municipality resisted payment. *Held*, that complainant was not a *bona-fide*

\* *Bona-fide* holders of municipal aid bonds, see note, 30 AM. & ENG. R. CAS. 267.

holder of the bonds and could not sue and recover thereon. *Foot v. Mt. Pleasant, 1 McCrary (U. S.) 101.*

By statute, the charter of a railway company was extended to enable it to complete its road; and it was authorized to issue its bonds, registered or coupon, for \$1,200,000, and sell them at less than par, and secure them by mortgage or deed of trust upon all the property and franchises of the company. By the same act it was provided that, unless the road should be completed to a certain point by a certain day, the company should forfeit to the state their corporate franchises and rights, together with their road-track and roadbed, and all works and materials thereon, or other property; the state to hold the same as trustee for certain parties named. The company accepted the charter, issued \$480,000 of bonds, and executed a deed of trust upon its property and franchises to secure them. The company failed to complete the road to the point fixed by the time prescribed, or, as it would seem, to expend any money in its construction; and the state proceeded to declare the charter forfeited, and to take possession of the road and the other property and franchises of the company, and to turn it all over to the *cestuis que trustent*, who organized another company. Persons, one of whom was the president of the road, and all of whom were the principals in the road when the act was passed, or were connected with them, claimed that they were the holders of \$323,500 of the bonds issued, and filed their bill to enforce the deed of trust. *Held*: (1) that under the provisions of the forfeiture of the charter the state took the property and franchises of the company free from the trust; (2) that upon the failure of the company to complete the road to the point fixed by the day prescribed, the forfeiture became absolute and complete; and that, the state having entered and elected to hold under the forfeiture, no inquisition, or judicial proceedings, or inquest, or finding of any kind was required to consummate the forfeiture; (3) that, from the relations of these plaintiffs to the company and to each other, they must be held to have had notice of the terms of the act which authorized the execution of the deed of trust under which they claim; (4) that, as no money had been expended on the road, or, as they claimed, paid for interest, the strong presumption was that the company received no money

1 D. R. D.—43.

for the bonds; and (5) that the plaintiffs were not, therefore, innocent purchasers for value and holders of the bonds without notice of the provisions of the act. *Silliman v. Fredericksburg, O. & C. R. Co., 27 Gratt. (Va.) 119, 17 Am. Ry. Rep. 157.*

#### 47. The protection accorded them.\*

—A citizen of the United States purchasing the bonds of a railroad organized under a foreign government takes them subject to the policy of that government, and is bound by its statutes. This is the case though the bonds are payable in the United States, and though their payment could be enforced by the courts of this country. *Canada S. R. Co. v. Gebhard, 14 Am. & Eng. R. Cas. 581, 109 U. S. 527, 3 Sup. Ct. Rep. 363.* — QUOTED IN *St. Albans v. National Car Co., 57 Vt. 68.*

A *bona-fide* purchaser for value, without notice, of railroad bonds payable to bearer, which had been stolen, has a good title as against the former owner. *Carpenter v. Rommel, 5 Phila. (Pa.) 34.*

Where railroad bonds, with coupon attached, which were transferable by delivery, are stolen, a subsequent *bona-fide* purchaser before they are due, paying market value therefor, will have a good title as to the bonds and all interest coupons which are not due, but not as to those which are past-due. *Gilbough v. Norfolk & P. R. Co., 1 Hughes (U. S.) 410.*

Coupon bonds of a railroad company payable to bearer pass by delivery; and a *bona-fide* purchaser of them before maturity takes them freed from any equities that may have been set up against the original holders of them. The burden of proof is on him who assails the *bona fides* of such purchase. *Kneeland v. Lawrence, 46 Am. & Eng. R. Cas. 319, 140 U. S. 209, 11 Sup. Ct. Rep. 786.* *Finnegan v. Lee, 18 How. Pr. (N. Y.) 186.*

*Bona-fide* holders of railroad bonds, executed in due form and by the proper officers, cannot be prejudiced by the fact that the mortgage given to secure the same was executed out of the state, or by virtue of a resolution of its directors, at a meeting held out of the state. The company and its privies are bound thereby. *Galveston, H. & H. R. Co. v. Cowdrey, 11 Wall. (U. S.) 459.*

\* *Bona-fide* purchasers of negotiable bonds before maturity acquire title, see note, 46 Am. & Eng. R. Cas. 322.

The purchaser of negotiable railroad bonds before maturity, without notice, is not bound by a judgment against his vendor declaring the bonds void. *Enfield v. Jordan*, 119 U. S. 680, 7 Sup. Ct. Rep. 358.

The purchasers of bonds sold to satisfy debts for which they were held as collateral are vested with title as owners of such bonds. *Newport & C. Bridge Co. v. Douglass*, 12 Bush (Ky.) 673, 18 Am. Ry. Rep. 221.

As against a *bona-fide* holder of bonds issued by a railroad corporation, it may not be shown that restrictions imposed by its charter on its power to issue bonds were violated, as such corporations, in general, have power to issue bonds. *Ellsworth v. St. Louis, A. & T. H. R. Co.*, 98 N. Y. 553; *affirming* 33 Hun 7.—FOLLOWING *Woods v. Lawrence County*, 1 Black (U. S.) 386; *Mercer County v. Hackett*, 1 Wall. (U. S.) 83.

Where railroad bonds are issued with a covenant in the mortgage securing them that they are to be sold and the proceeds applied to improving the road, but they are sold under a different agreement and the proceeds applied to other purposes, neither the purchasers nor those holding under them without actual knowledge of the covenant can enforce specific performance of its provisions, and this is so even where the mortgage contains a provision that it shall be for the benefit of all persons who become holders or owners of the bonds. *Belden v. Burke*, 20 N. Y. Supp. 320.

It is no defense to an action on the bonds of a railroad company that the defendant's books do not show that any value had been received for them, and that the bonds had been delivered to the president, who had made no return of the proceeds. The bonds being in form to pass by delivery, a *bona-fide* purchaser had nothing to do with the application of the money paid for them. *Philadelphia & S. R. Co. v. Lewis*, 33 Pa. St. 33.

Persons holding bonds of a railroad company inserted an advertisement in a newspaper offering them for sale, and adding that "the road is in successful operation and earning net more than the interest on all its bonds." Held, that this provision in the notice could not be taken to infer exceptionally larger earnings at the exact date of the advertisement, or at the time it might appear in the newspaper, but inferred that the road was then on a paying foundation;

that it was regularly and habitually earning more than the interest on all its bonds. *Blake v. Watson*, 45 Conn. 323.

A company entered into a contract for finishing its road in a specified time, and in accordance with its terms delivered its coupon bonds from time to time to the contractor as the road progressed; the road was finished, but not within the time specified—held, that, against holders of the bonds who had received them *bona fide* from the contractor, the company was estopped from setting up a claim for damages for the delay in finishing. *McElrath v. Pittsburgh & S. R. Co.*, 55 Pa. St. 189.

**48. What will put a purchaser upon inquiry.**—As the usual duties of trustees in railroad mortgages are to act for the bondholders in enforcing payment, and to bring suit against the corporation if the bonds, with interest, are not paid at maturity, the fact that a trustee places the bonds on the market and sells them for a very small part of their face value is sufficient to put a purchaser upon inquiry as to the regularity of the issuance and sale of the bonds. *Riggs v. Pennsylvania & N. E. R. Co.*, 16 Fed. Rep. 804.

The fact that interest coupons are past due and unpaid at the time bonds are sold does not affect the *bona fides* of a holder of the bonds who purchased them in good faith for their market value. *McLane v. Placerville & S. V. R. Co.*, 26 Am. & Eng. R. Cas. 404, 66 Cal. 606, 6 Pac. Rep. 748.

Where a series of railway mortgage bonds secured by a trust deed covering the road, property, and franchises of a railway company is issued, and reference is made to such trust deed on the face of the bonds, holders of such bonds and the coupons attached to the same are put upon inquiry by the recital in the bonds, and charged with notice of the terms of such trust deed, and are bound by the conditions therein. *Guilford v. Minneapolis, S. St. M. & A. R. Co.*, 51 Am. & Eng. R. Cas. 98, 48 Minn. 560, 51 N. W. Rep. 658.

But if the bonds and mortgage which put the purchaser upon inquiry lull and satisfy inquiry, he is not required to make further inquiry. *Stanton v. Alabama & C. R. Co.*, 2 Woods (U. S.) 523.

While a statute is in force authorizing the company issuing railway bonds to consolidate with another company, a purchaser of the bonds must be deemed as having con-

templated at the time of the purchase a probable consolidation. *Tysen v. Wabash R. Co.*, 13 *Am. & Eng. R. Cas.* 134, 11 *Biss. (U. S.)* 510, 15 *Fed. Rep.* 763.

A railroad company prepared bonds, each for a stated amount, to be made payable in London, New York, or New Orleans, as the president of the company by his indorsement might fix. Blanks were left for such indorsement, which were never filled. The bonds were seized by soldiers during the war and sold for a small consideration. *Held*, that, no place of payment being fixed, the bonds were not negotiable, and that a purchaser was put upon notice, and did not sustain the position of a *bona-fide* holder. *Parsons v. Jackson*, 99 *U. S.* 434.

A railroad company issued bonds with coupons attached, payable to certain persons named or bearer at the office of the company in a certain city, with interest payable semi-annually, with a further provision that the company should make "scrip preferred stock" attached to the bonds full-paid stock at any time within ten days after any dividend should have been declared and become payable in such preferred stock, upon surrender in the city of New York of the bonds and unmatured interest-warrants. To each of the bonds there was originally attached, by a pin, the certificate of scrip preferred stock thus referred to, which stated that the complainant was entitled to ten shares of the capital stock of the company designated as "scrip preferred stock;" and that upon the surrender of the certificate and the accompanying bond and all unmatured coupons thereon, as provided in the agreement, he should be entitled to receive ten shares of full-paid preferred stock. Three of these bonds with certificates attached were stolen from the plaintiff, and were taken by the defendants as collateral security for notes discounted by them, without actual notice of any defect in the title of the holder; but the certificates were, at the time, detached from the bonds. *Held*: (1) that the bonds were negotiable instruments, notwithstanding the agreement respecting the scrip preferred stock contained in them, that agreement being independent of the pecuniary obligation of the company; (2) that the absence of the certificates originally attached to the bonds when the latter were taken by the defendants was not of itself a circumstance sufficient to put the defendants upon inquiry as to the title of the holder.

*Hotchkiss v. National Banks*, 21 *Wall. (U. S.)* 354; affirming 10 *Blatchf.* 384.

**49. Notice of infirmities or defenses.**—Where a railroad company contracts with the purchaser of part of its issue of mortgage bonds that the issue shall be restricted to a certain sum for each mile of completed road, a person who thereafter receives bonds exceeding the contract limit, and who has notice of the restriction, cannot be deemed a *bona-fide* holder for value entitled to a first lien under the mortgage for the bonds so issued to them. But not so of persons who took them without notice. *McMurray v. Moran*, 43 *Am. & Eng. R. Cas.* 442, 134 *U. S.* 150, 10 *Sup. Ct. Rep.* 427.

Notice of the restriction in the contract cannot be imputed from the fact that the contract has been put upon record, when by law such instruments are not required to be recorded, and it is not provided that registration shall be notice to all the world of the contents of the instrument recorded. *McMurray v. Moran*, 43 *Am. & Eng. R. Cas.* 442, 134 *U. S.* 150, 10 *Sup. Ct. Rep.* 427.

The possession of a negotiable bond is strong *prima-facie* evidence of just title, and, in ordinary cases, throws upon the party questioning it the burden to show that it is not *bona-fide*, and that the holder had notice of some vice or defect which vitiates his title. *Western Division N. C. R. Co. v. Drew*, 3 *Woods (U. S.)* 691.

Notice of defenses to railroad bonds, given to one of the trustees in the deed of trust given to secure them, is not such notice to the bondholders as will destroy a *bona-fide* holding of the bonds under the deed of trust. *Johnson County Com'rs v. Thayer*, 94 *U. S.* 631.

There must be circumstances showing that the purchaser of railroad bonds knew that there was a corrupt or fraudulent motive on the part of the vendor or person transferring the bonds, in order to make him a holder in bad faith. The mere fact that a merchant received railroad bonds from its treasurer in payment of goods will not prevent him from claiming to be a *bona-fide* holder, where the goods are of such a character as to be valuable to the company in the construction or operation of its road. *Kennicott v. Supervisors Wayne County*, 6 *Biss. (U. S.)* 138.

Where railway bonds are delivered to a contractor under an agreement by him to build so many miles of road, a purchaser

from him may recover their full value from the company, though such purchaser has knowledge that the contractor had built only a portion of the road which he was to build. *Mercantile Trust Co. v. Zanesville, Mt. V. & M. R. Co.*, 52 Fed. Rep. 342.

A railroad was sold to another company without legal authority, and the purchasing company issued bonds, securing them by a mortgage on the road purchased as well as on its other property. *Held*, that the purchasers of such bonds were charged with notice of the lack of authority of the selling company to dispose of its road, and that where the conveyance is set aside the mortgage itself may be declared cancelled as being a cloud upon the title. *Mayor, etc., of Knoxville v. Knoxville & O. R. Co.*, 22 Fed. Rep. 758.—QUOTED IN *Venner v. Atchison, T. & S. F. R. Co.*, 28 Fed. Rep. 581.

**50. Taking subject to equities.**—Where railroad bonds, with other property, are assigned after an execution has been levied on them, the assignee will take the bonds subject to the execution. *Hetherington v. Hayden*, 11 Iowa 335.

#### V. ACTIONS ON BONDS.

**51. Jurisdiction.**—Certain bondholders, whose bonds with others were secured by a common mortgage given by a corporation, filed a bill to recover certain moneys alleged to be due on a contract made by the city of Memphis with the mortgagor, which contract was assigned in the mortgage as part of the security for the bonds. *Held*, that, as the demand against the city was cognizable at law in the name of the mortgagor, and as no special circumstances were shown for a resort to equity, the bill should be dismissed. *New York, G. & I. Co. v. Memphis Water Co.*, 107 U. S. 205.—DISMISSED IN *Rutten v. Union Pac. R. Co.*, 12 Am. & Eng. R. Cas. 374, 17 Fed. Rep. 460.

**52. The right to sue generally.\***—Where a railroad company issues negotiable bonds payable to bearer, and they are indorsed or guaranteed by another company before the bonds are put in circulation, no disability of the bearer to sue the assignee arises under the judiciary act of September 24, 1789, § 11. *Codman v. Vermont & C. R. Co.*, 17 Blatchf. (U. S.) 1.

It is immaterial whether a railroad mort-

gage secures interest on its bonds by a lien upon the lands of the company or by a lien upon its earnings, or by a lien upon both, or whether it is not secured at all by the company. If there is an agreement to pay interest and it is not paid, there is a breach of the bond for which the holder can maintain an action. *Marlor v. Texas & P. R. Co.*, 17 Am. & Eng. R. Cas. 215, 19 Fed. Rep. 867.

Where a railroad company issues bonds with a provision in the mortgage securing them, that if the net earnings of the road are not sufficient to pay interest on the bonds the company may in its option issue scrip in lieu thereof, the bondholder's right of action is *prima facie* perfect upon proof of nonpayment of the interest on the presentment of his bond at the place where the interest is made payable. It then devolves upon the company to show the existence of the fact which authorized it to issue the scrip, and then the exercise of the option. *Marlor v. Texas & P. R. Co.*, 17 Am. & Eng. R. Cas. 215, 19 Fed. Rep. 867.

Where the bondholders of a railroad hold stock of the company as collateral security for the payment of the bonds, and the road is afterward leased, such bondholders cannot maintain a bill in equity against the lessors to charge them with the earnings of the road, where there is no charge that the lease is void or voidable as between the lessor and lessee. *Gibson v. Richmond & D. R. Co.*, 37 Fed. Rep. 743, 2 L. R. A. 467.

Where a railway company issues its bonds payable to bearer, with interest-coupons attached, and secures them by a mortgage or deed of trust, making them a first lien on the road, a holder may enforce his own lien for bonds or coupons held by him or on behalf of persons to whom he has transferred coupons. *Wright v. Ohio & M. R. Co.*, 1 Disney (Ohio) 465.

The holder of railway bonds which constitute a privileged claim on the movable property of the company may, for the protection of his rights, proceed against such property by an attachment in *revendication* in the nature of a *saisie conservatoire*. *Wyatt v. Senecal*, 4 Queb. L. R. 76.

A railroad company issued its bonds payable to bearer, with semi-annual interest-coupons, secured by a mortgage upon the income from the operation of its road and from the sale of its lands, and subsequently

\* See ante, 35-37.

the road was consolidated with another. *Held*, that holders of the bonds had a specific lien upon the property, and might file a bill against the consolidated company to enforce payment. *Rutten v. Union Pac. R. Co.*, 12 *Am. & Eng. R. Cas.* 374, 17 *Fed. Rep.* 480.—DISTINGUISHING *Walser v. Seligman*, 13 *Fed. Rep.* 415; *Jones v. Green*, 1 *Wall. (U. S.)* 330; *Whipple v. Union Pac. R. Co.*, 28 *Kan.* 474; *Hayward v. Andrews*, 106 *U. S.* 672, 1 *Sup. Ct. Rep.* 544; *New York G. & I. Co. v. Memphis Water Co.*, 107 *U. S.* 205, 2 *Sup. Ct. Rep.* 279.

A railroad company issued its bonds payable in blank and secured them by a mortgage. Subsequently the legislature passed a law ratifying and confirming the bonds. *Held*, that any holder might sue thereon in his own name. *Chapin v. Vermont & M. R. Co.*, 8 *Gray (Mass.)* 575.

The defendant company gave a bond to the plaintiff, reciting that the latter had agreed to lend it £25,000, to assist in constructing its railway, and conditioned that the company should not expend the loan or begin to construct its road until the whole sum necessary to complete it from Woodstock to Port Dover should be obtained. *Held*, that there was nothing in the 19 *Vic. ch. 74* to relieve defendant from liability for a previous breach of this condition. *Town Council of Woodstock v. Woodstock & L. E. R. Co.*, 16 *U. C. Q. B.* 146.

**53. Right of one holder to sue for benefit of all.**—One holder of part of the bonds of a railroad company may file a bill in his own name, but for the use and benefit of himself and all other bondholders, to compel payment of the bonds. *Mason v. York & C. R. Co.*, 52 *Me.* 82.

One of several joint owners of railway bonds cannot maintain a bill in his own name, without making the other joint owners parties, for the purpose of having the bonds declared a lien upon the company's property. *Messchaert v. Kennedy*, 4 *McCrary (U. S.)* 133.

**54. Completing the right of action—Demand, etc.**—Failure to present a matured bond for payment excuses the maker from payment of any interest thereon after date of maturity. *McDonald v. Great Western R. Co.*, 21 *U. C. Q. B.* 223.

The maker of negotiable paper, such as the coupon-bonds of a railroad, is liable without presentment at the place designated for payment, but if the maker was at the

place, and ready there to pay, the fact may be pleaded, and goes to reduction of damages. *Baltzer v. Kansas Pac. R. Co.*, 3 *Mo. App.* 574.

Although bonds of a corporation are expressed to be payable at their office, in a particular way, yet if at the maturity of the bonds there is no office of the company at the place, a demand for payment elsewhere is sufficient. *Alexander v. Atlantic, T. & O. R. Co.*, 67 *N. Car.* 198, 2 *Am. Ry. Rep.* 181.

**55. Parties.**—Where the holder of railway bonds secured by a mortgage or trust deed sues to compel the company to comply with its agreement as to the mortgage, the mortgage-trustee is not a necessary party. *Spies v. Chicago & E. I. R. Co.*, 30 *Fed. Rep.* 397.—DISTINGUISHING *Morgan v. Kansas Pac. R. Co.*, 21 *Blatchf. (U. S.)* 134, 15 *Fed. Rep.* 55; *Barry v. Missouri, K. & T. R. Co.*, 22 *Fed. Rep.* 631.

**56. Declaration or complaint.**—A railway bond payable to bearer is properly described in an action of *assumpsit* thereon as "a bond;" and it will be deemed a note or bill the same as bills of exchange or promissory notes, as an instrument importing a consideration, and therefore it is not necessary to aver a consideration. *Id. v. Passumpsic & C. R. Co.*, 32 *Vt.* 297.

Where railway bonds are issued containing a provision that no more interest shall be payable than shall be earned by the road above cost of expenses and repairs, as shall be certified by the board of directors, and that no interest shall be payable in default of such certificate, a complaint in an action to recover such interest is fatally defective which does not show that there is money in the hands of the company above expenses and repairs, which is applicable to the payment of interest, and which has been retained by the company. *Thomas v. New York & G. L. R. Co.*, 54 *N. Y. S. R.* 498; *affirming* 47 *N. Y. S. R.* 250.

Railroad bonds were issued containing a provision that no interest should be paid on them until the directors had certified earnings of the company above cost of expenses and repairs. A complaint in an action to recover such interest charged that the board of directors had wrongfully neglected and refused to certify that such interest or any interest whatever had at any time been earned. *Held*, that the allegation was sufficient on demurrer. *Thomas v.*



*York & G. L. R. Co.*, 54 *N. Y. S. R.* 498; affirming 47 *N. Y. S. R.* 250.

A railroad mortgage provided that no more interest should be payable on bonds secured by the mortgage than should be certified by a vote of the board of directors as having been earned by the company, and that no interest should be payable in default of such certificate. A holder of such bonds brought an action to compel the company to account for its net income, and to have any surplus applied to the payment of the bonds. *Held*, that the complaint must charge that the certificate of the directors was either given, or unreasonably refused after being requested. *Thomas v. New York & G. L. R. Co.*, 47 *N. Y. S. R.* 250, 22 *Civ. Pro.* 326, 19 *N. Y. Supp.* 766.

Allegations in such case to the effect that the company did various things "wrongfully" regarding the expenditures of its earnings, are mere allegations of conclusions of law, and are not sufficient in the absence of any charge of bad faith. Facts should be stated from which the court may determine whether the expenditures were wrongful or unnecessary, and therefore prevented a surplus which should have been applied to the payment of the bonds. *Thomas v. New York & G. L. R. Co.*, 47 *N. Y. S. R.* 250, 22 *Civ. Pro.* 326, 19 *N. Y. Supp.* 766.

A coupon attached to a railway bond was as follows: "Interest-warrant for \$30, being half-yearly interest on bond No. 50 of N. L. W. & P. Railway Company, payable on February 1, 1856. J. D., treasurer." *Held*, that such warrant was but a mere acknowledgment of indebtedness for interest which should fall due under promise to pay as contained in the bond, and therefore could not be the basis of an action; that the promise to pay, being contained in the bond, should have been specially declared upon; and that a failure to do so constituted a fatal variance. *Crosby v. New London, W. & P. R. Co.*, 26 *Conn.* 121.

**57. Matters of defense.**—The defense of *ultra vires* will not avail against *bona-fide* holders for value of negotiable bonds issued by the directors of a corporation, where the stockholders allowed the bonds to be sold and availed themselves of the benefits therefrom. *Tyrell v. Cairo & St. L. R. Co.*, 7 *Mo. App.* 294.

The managers of a railroad issued negotiable bonds which were guaranteed by an

other company. *Held*, in a suit against the guarantors to recover on interest-coupons, that the right to recover was not affected by the fact that the notary protesting the bonds did not have them to present when the interest coupons were presented and payment demanded. *Codman v. Vermont & C. R. Co.*, 17 *Blatchf. (U. S.)* 1.

In an action by the holder of certain bonds issued by a railroad company against the trustee named in a mortgage of the road and franchises securing the bonds, and against another company holding title to the mortgaged property, among other things, to have the property charged with the lien of the mortgage, and to recover the amount of the bonds; which action was based upon allegations of breach of trust on the part of the trustee in transferring title to the mortgaged property, which he had acquired by purchase under a foreclosure sale, it appeared that plaintiff had acquiesced in and ratified the acts of the trustee complained of—*held*, that plaintiff was not entitled to have judgment for a proportionate share of the money received by the trustee upon such transfer; and that, having failed to sustain the cause of action stated in the complaint, it was properly dismissed. *Butterfield v. Cowing*, 112 *N. Y.* 486, 20 *N. E. Rep.* 369, 21 *N. Y. S. R.* 500.

Plaintiff sued to recover the amount of railway bonds, and the company asked judgment that plaintiff be required to execute a satisfaction or release of the mortgage given to secure the bonds. *Held*, that, in order to entitle the company to such satisfaction piece, it should pay or tender the amount due on the bonds. *Roosevelt v. New York & H. R. Co.*, 30 *How. Pr. (N. Y.)* 226, 45 *Barb.* 554.

A corporation issued bonds with interest-coupons payable semi-annually, and agreed that upon three successive defaults in payment of interest the principal should become due. The bonds were secured by a mortgage in which it was provided that the trustees in it should sell the mortgaged property at the request of the holders of bonds of the value of \$100,000. *Held*, that this provision in the mortgage was no defense to a suit on the bonds after a breach of their condition. *Philadelphia & B. C. R. Co. v. Johnson*, 54 *Pa. St.* 127.—**DISTINGUISHING** *Ashhurst v. Montour Iron Co.*, 35 *Pa. St.* 30; *Bradley v. Chester Valley R. Co.*, 36 *Pa. St.* 154.

**58. Replication.**—A plea of tender is an admission of the justice of plaintiff's claim to the extent of the sum tendered, but to render it valid the money should be brought into court; but where plaintiff sued on railway bonds and the company set up a tender, a replication thereto tendering an issue is a waiver of the irregularity in not bringing the money into court, and the court will order payment of the amount tendered. *Roosevelt v. New York & H. R. Co.*, 30 *How Pr. (N. Y.)* 226, 45 *Barb.* 554.

In an action on a Lloyd's bond issued by a railway company, it pleaded an agreement with the plaintiff that he should pay the bond at maturity and indemnify the company therefrom and from all losses and damages which it might become liable to or be called upon or compelled to pay on account of the nonpayment on such bond. The plaintiff replied that he assigned the bond for value to third parties without notice, and that he was suing as trustee on their behalf. *Held*, that the replication was a good answer to the equitable plea. *Dickson v. Swansea Vale & N. & B. J. R. Co.*, 17 *W. R.* 51, 19 *L. T.* 346, *L. R.* 4 *Q. B.* 44, 38 *L. J. Q. B.* 17.

**59. Amount of recovery—Scaling laws.**—Holders of bonds issued during the war of the rebellion, and sold for Confederate currency, are only entitled to recover thereon, as against subsequent purchasers of the road, the value of the currency at the time of the purchase with interest thereon. *Spence v. Mobile & M. R. Co.*, 79 *Ala.* 576.

In 1862 a North Carolina railroad issued bonds, falling due at different times from 1869 to 1875. In 1865 the state adopted an ordinance relating to contracts during the civil war, and in 1866 a law was passed, as required by the ordinance, fixing the value of Confederate currency in gold on the first day of each month from November, 1861, to April, 1865. Under the law a contract payable in "dollars" was presumed to be payable in Confederate currency, but this presumption might be rebutted. If found payable in currency the amount was to be "scaled" to the gold value at the time made. *Held*, that the circumstances attending the execution of the railroad bonds, especially the long time they were to run, overcame the presumption that they were payable in Confederate currency, and that the company therefore was not entitled to the benefit of the scaling act, as to the principal and interest,

though it was payable semi-annually. *Atlantic, T. & O. R. Co. v. Carolina Nat. Bank*, 19 *Wall. (U. S.)* 548.

**60. Action for refusal to complete purchase.**—A party agreed to take five bonds of a railroad company of \$1000 each, for which he was to pay \$650 for each bond on demand of the secretary, he also to receive five shares of stock for each bond so taken, which bonds were secured by a first mortgage bearing seven per cent interest, payable semi-annually, which mortgage provided that if any of the interest was not paid within ninety days after due, the entire principal and interest should become due. He received and paid for two of the bonds, upon which the company made default in the payment of interest for more than ninety days before it brought suit to recover damages of him for refusing to receive and pay for the other three bonds. *Held*, that the payment of interest on the bonds was a part of the consideration, and that the failure to pay the interest for ninety days made the bonds become due and payable, and that the party, when sued for not completing his contract, might recoup the amount due on his two bonds against the damages growing out of his refusal to accept and pay for the other three bonds. *Galena & S. W. R. Co. v. Barrett*, 2 *Am. & Eng. R. Cas.* 520, 95 *Ill.* 467.—*FOLLOWING* *Christy v. Ogle*, 33 *Ill.* 295; *Streeter v. Streeter*, 43 *Ill.* 155.

**61. Action for rescission on ground of fraud.**—To entitle a party to rescind a contract because he was induced to enter into it by means of false and fraudulent representations, he must first return, so far as he may not be prevented from doing so by the act of the defendant, whatever he has received through the performance of the contract. So, where the purchaser of railroad bonds exchanged them for bonds in a reorganized company, he was held not entitled to a rescission for fraudulent representations inducing the purchase of the original bonds. *Cohen v. Ellis*, 52 *Hun (N. Y.)* 133, 5 *N. Y. Supp.* 133.

After a railroad mortgage securing bonds had been foreclosed, a holder of bonds was induced to exchange them for bonds issued by a reorganized company, at the rate of fifty cents on the dollar of the bonds exchanged. At the time suit was brought the new bonds had a greater market value than the old ones would have had if they had been retained. *Held*, that the holder was

not in a position to insist upon a rescission of the contract by which he purchased the original bonds; and that he could not recover the purchase-money paid therefor upon tendering back the new bonds, though there was such fraud in the representations of the seller inducing the purchase as would have entitled him to a rescission if he had retained the original bonds. *Cohen v. Ellis*, 52 Hun (N. Y.) 133, 5 N. Y. Supp. 133.

**62. Suit to enforce surrender or cancellation.**—Where bonds of a corporation, pledged as security for its debt, were void under § 1753, Rev. St., because issued without its receiving seventy-five per cent of their par value, no action for the surrender or cancellation thereof could be maintained by the corporation, or by a stockholder in its right, without a tender of the amount due to the pledgee. The plaintiffs in this case the corporation and a stockholder who, as president, had participated in the unlawful issue of the bonds—were in equal wrong with the party to whom they were issued, and were not entitled to relief. *Hinckley v. Pfister*, 83 Wis. 64, 53 N. W. Rep. 21.

**63. Suits on lost bonds.**—The owner of registered railroad bonds was lost on board of a vessel, and the bonds were lost at the same time, and his administrator sued the company to compel it to issue duplicate bonds and to recover past-due interest. *Held*, that the company would be required to do both upon receiving an indemnity bond. *Rogers v. Chicago & N. W. R. Co.*, 6 Abb. N. Cas. (N. Y.) 253.

Certain persons holding ten first-mortgage bonds and thirty-seven non-mortgage bonds of a railroad corporation, all of which were alleged to have been destroyed, although there was difficulty in establishing the loss, made, through their attorney, with the corporation, an agreement by which, in settlement of their claims, they received interest-fund bonds to the amount of \$8600 for their first-mortgage bonds, and state-guaranteed bonds to the amount of \$16,000 and interest-fund bonds for \$6725 for their non-mortgage bonds; and upon such bonds they collected interest for four years. The corporation afterward became insolvent, and upon sale realized enough to pay its first-mortgage and state-guaranteed bonds in full, but the non-mortgage and interest-fund bonds proved to be worthless. The bondholders, retaining their state-guaranteed

bonds, offered to return their interest-fund bonds of \$8600 and to establish their ten lost first-mortgage bonds, claiming the lien of the first mortgage, and that the substituted bonds were *ultra vires*. *Held*, that the intention of the settlement was payment and not substitution; and that, for that reason, and because it was a compromise of a doubtful right, made with full knowledge of the facts, and an arrangement which was a unity, the petitioners could not be allowed to establish the ten lost bonds, or to claim for the substituted bonds the lien of the first mortgage. *Gibbes v. Greenville & C. R. Co.*, 12 Am. & Eng. R. Cas. 360, 15 So. Car. 224.

### BONUSES.

To railroads, see MUNICIPAL AND LOCAL AID, XI.

### BOOKS.

Inspection of, see DISCOVERY, 3.  
Production of, see DISCOVERY, 7.  
Right of stockholders to inspect, see STOCKHOLDERS, 1, 2.  
Stock-books or ledgers, see STOCK, V, 9.

### BOYCOTTING.

Injunction to restrain, see STRIKES, 6.

**1. Sufficiency of complaint.\***—The keeper of a hotel and saloon filed a complaint alleging that the defendant railroad company had instituted a boycott against his business and used all its power and influence to drive away custom; that one of its officers, who employed more than 1000 men, who often visited the city where complainant's business was situated, had publicly declared that he would discharge the men if they patronized complainant, had actually discharged a number for doing so, and had refused employment to others for the same reason; and that the company, with full knowledge of the facts, ratified and approved them, to the great damage of complainant in the sum of a specified number of dollars per month for a given time. *Held*, that the complaint stated a good cause of action on general demurrer. *International & G. N. R. Co. v. Greenwood*,

\* Criminal and civil liability for conspiracies known as "boycotts," see note, 59 AM. REP. 720.

2 *Tex. Civ. App.* 76, 21 *S. W. Rep.* 559.—  
REVIEWING *Delz v. Norman*, 80 *Tex.* 403.

### BRAKEMEN.

Authority to employ, see CONDUCTOR, 4.  
When deemed fellow-servants with other  
employés, see FELLOW-SERVANTS, VI, 2.

### BRAKES.

Duty of company as to, with respect to ani-  
mals on a near track, see ANIMALS, INJUR-  
IES TO, 30.  
— to employés as to safety of, see EM-  
PLOYÉS, INJURIES TO, I, 6.

## BRANCH AND LATERAL ROADS.

1. What is a "branch road."—  
Under a charter authorizing a railroad com-  
pany "to extend branches into and through  
any counties that the directors may deem  
advisable, a road constructed from the  
junction of the main line of one road with  
another, but extending in a different direc-  
tion, is a branch road within the meaning  
of a provision of the charter authorizing  
counties to subscribe to the stock of branch  
roads. *Howard County v. Central Nat.  
Bank*, 108 *U. S.* 314, 2 *Sup. Ct. Rep.* 689.

A short elevated track running from the  
terminus of a railroad along a public land-  
ing is a branch road within the meaning of  
Pa. act of April 1, 1868, giving the company  
the right to construct branch railroads.  
*McAboy's Appeal*, 107 *Pa. St.* 548.—QUOTED  
IN *Volmer v. Schuylkill River E. S. R. Co.*, 18  
*Phila. (Pa.)* 248; *Philadelphia v. Philadel-  
phia & R. R. Co.*, 19 *Phila. (Pa.)* 507.

2. Validity of statutes.—The Pa. act  
of May 5, 1832, authorizing the construction  
of lateral railroads to connect private  
property with public improvements, is con-  
stitutional. *Harvey v. Thomas*, 10 *Watts  
(Pa.)* 63. *Harvey v. Lloyd*, 3 *Pa. St.* 331.—  
FOLLOWED IN *Shoenberger v. Mulhollan*, 8  
*Pa. St.* 134.—*Hays v. Risher*, 32 *Pa. St.* 169.

The general railroad act of April 4,  
1868, P. L. 62, in so far as it confers power  
on a railroad company to construct branches  
from its main line, is not repealed. The  
act of May 21, 1881, P. L. 27, has no appli-  
cation to the power to construct branches  
conferred by the former act. *Volmer's Ap-  
peal*, 115 *Pa. St.* 166, 8 *Atl. Rep.* 223.

### 3. Power to construct, generally.\*

—It is unlawful to build any branch roads  
which have not first been found by a judge  
of the superior court, upon application and  
public notice, to be of public convenience  
and necessity. *Shepaug Voting Trust  
Cases*, 60 *Conn.* 553, 24 *Atl. Rep.* 32.

The mere fact that the building of lateral  
branch roads may add to the earnings of the  
main line of a railroad company, or increase  
its business, will not authorize such corpora-  
tion to build the same where its charter  
fails to so provide. *Chicago & E. I. R. Co.  
v. Wiltse*, 24 *Am. & Eng. R. Cas.* 261, 116 *Ill.*  
449, 6 *N. E. Rep.* 49.—FOLLOWED IN *Illino-  
is C. R. Co. v. Chicago*, 138 *Ill.* 453.

The right of the Elizabethtown & P. R. Co.  
to build branch roads is as full and complete  
as the right to construct the main road  
itself, and a second subscription of stock in  
said company by the city of Louisville, for  
the purpose of building a branch road, is  
valid; nor does the express grant to the  
company of the right to extend its main  
road to the city of Louisville preclude it  
from connecting with that city by a branch  
road. *Tyler v. Elizabethtown & P. R. Co.*,  
9 *Bush (Ky.)* 510.

Under a provision in a railway charter  
authorizing the company "to construct  
branch roads from the main line to other  
points or places in the several counties  
through which said road may pass," the  
right to construct branches is limited to  
such as begin and end in the same county.  
*Works v. Junction R. Co.*, 5 *McLean (U. S.)*  
425.

Where a railroad company is chartered  
to build a road between designated points,  
with authority to vary the route and change  
the location of its road, for certain causes  
named, it is authorized not to disregard the  
termini named, but only to vary or change  
its route at intermediate points for the  
causes named. *Works v. Junction R. Co.*, 5  
*McLean (U. S.)* 425.

The right to construct a lateral railroad  
to a navigable river is not affected by the  
fact that it would cross an ordinary railroad,  
as to the portion lying between the railroad  
and the river; nor does the existence of  
such ordinary railroad prevent the lateral  
railroad from appropriating land for a wharf

\* Right of company to contract for construc-  
tion of branches, see 52 *AM. & ENG. R. CAS.* 6,  
*abstr.* See also note, 20 *AM. & ENG. R. CAS.*  
319.

or landing on the river; neither does the fact of crossing an ordinary railroad destroy the continuity of the lateral railroad. *Hays v. Briggs*, 3 *Pittsb. (Pa.)* 504.

The N. P. R. Co. not being authorized by its charter under act of congress to construct a branch line between Tacoma and Gray's Harbor, the Tacoma, O. & G. H. R., although constructed and operated by the N. P. R. Co., is not entitled to the benefit of reservations of rights of way in conveyances made by the latter company. *Biles v. Tacoma, O. & G. H. R. Co.*, 5 *Wash.* 509, 32 *Pac. Rep.* 211.

A grantee of the N. P. R. Co. is not estopped by the recitals in the deed from denying the right of his grantor to build a branch road, when such branch road is one that the grantor is not legally authorized to construct. *Biles v. Tacoma, O. & G. H. R. Co.*, 5 *Wash.* 509, 32 *Pac. Rep.* 211.

Permissive words in an act of parliament authorizing a railway company to construct a branch line are not obligatory. *Edinburgh, P. & D. R. Co. v. Philip*, 2 *Macq. H. L. Cas.* 514, 3 *Jur. N. S.* 249.

A new line made by the defendant company to form a connection between two branch lines on opposite sides of the main line was a railway or a portion of a railway which under 5 & 6 Vic. c. 55, § 4, could not be opened without previous notice to the board of trade. *Attorney-General v. Great Western R. Co.*, *L. R.* 7 *Ch.* 767.

**4. Power to construct under statutes of Pennsylvania.**—The power given to a company to build a main line involves the right to build branches and sidings to carry out the purposes of the company's charter. *Schofield v. Pennsylvania S. V. R. Co.*, 2 *Pa. Dist.* 57.

If the power of constructing branch railroads is not conferred upon the company in plain words or by necessary implication it is deemed to be withheld. *Philadelphia, W. & B. R. Co. v. Philadelphia & R. R. Co.*, 1 *Pa. Dist.* 73.

Pa. act. of March 29, 1840 (Lateral Railroads) is a supplement to the act of May 5, 1832, is *in pari materia* with it, and should be so construed. Neither act authorizes the connection of a lateral road, except with a public improvement, railroad, or highway, as enumerated in those acts. *Keeling v. Griffin*, 56 *Pa. St.* 305.

The Pa. act of April 4, 1868, and the supplement thereto of April 28, 1871, relating

to the formation of railroad companies, vest in voluntary associations the powers which had previously been given by special charters, and applied to railroad companies in the sense in which the term is usually used, but do not authorize the construction of lateral railroads. *Edgewood R. Co.'s Appeal*, 79 *Pa. St.* 257.

The Pa. act of March 17, 1869, § 1, providing that it should be lawful for any railroad, canal, or slack-water navigation company "to make new feeders," refers only to canal companies, and does not confer upon railroad companies the power to construct branch roads. *Philadelphia, W. & B. R. Co. v. Philadelphia & R. R. Co.*, 1 *Pa. Dist.* 73.

Under the Pa. act of 1871, providing for lateral railroads and landings, such a lateral road may cross an intervening railroad. *Hays v. Briggs*, 74 *Pa. St.* 373.

Under the Pa. act of June 19, 1871, a court of equity has jurisdiction to inquire whether a railroad chartered under the act of 1868 possesses the franchises it claims; and, if not, injunction is the appropriate remedy for the wrong. *Edgewood R. Co.'s Appeal*, 79 *Pa. St.* 257.

The power of the Pennsylvania Railroad Company to make branch or lateral railroads, by the terms of their charter, is as large as the powers granted for the construction of the main line of their railroad, and authorizes the construction of a branch connecting their road with the Pittsburgh and Steubenville Railroad in South Pittsburgh, by a route best suited to promote the convenience of the inhabitants of the city and the interest of the company. *Mayor of Pittsburgh v. Pennsylvania R. Co.*, 48 *Pa. St.* 355.—APPLIED IN *Philadelphia v. Philadelphia and R. R. Co.*, 19 *Phila. (Pa.)* 507. DISTINGUISHED IN *Pennsylvania R. Co.'s Appeal*, 115 *Pa. St.* 514. REVIEWED IN *State ex rel. v. St. Louis, K. C. & N. R. Co.*, 3 *Mo. App.* 180; *Volmer v. Schuylkill River E. S. R. Co.*, 18 *Phila. (Pa.)* 248.

The act of 1846, § 17, incorporating the Pennsylvania Railroad Company, provides that it shall be lawful for the company "to make such lateral railroads or branches \* \* \* as the president and directors may deem advantageous and suited to promote the convenience of the inhabitants thereof (along the line) and the interests of said company." By the act of May 16, 1857, the main line of a state railroad was directed to

be sold, with a provision that "any company already incorporated by this commonwealth that might become a purchaser should possess, hold, and use the same under the provisions of their act of incorporation;" and the Pennsylvania company became the purchaser. *Held*, that by virtue of these two acts the company had the same power to construct lateral railroads or branches on the line purchased from the state that it had on its original line. *Duncan v. Pennsylvania R. Co.*, 13 Phila. (Pa.) 68.

The act of April 10, 1867, P. L. 993, does not extend the branching powers of the Pennsylvania Railroad Company to the lines it holds by lease. In view of the previous legislation relative to railroad companies the words "lands, tenements, and property" are not used in a new sense which includes established roads. *Pennsylvania R. Co.'s Appeal*, 115 Pa. St. 514, 5 Atl. Rep. 872.—DISTINGUISHING Getz's Appeal, 10 W. N. C. 453.

The charter of defendant railroad company authorized it to build a railroad between designated points in a city, and a complaint was filed charging that it was about to commence the construction of a railroad about midway between the designated points and build to a navigable river, without complying with the act of 1881 providing that any company chartered under the act of 1868, upon deciding to construct a railroad not exceeding fifteen miles in length, should obtain supplementary articles of incorporation accepting the provisions of article 16 of the constitution of the state. The company answered that it was constructing, not an extension, but a branch under the act of 1868, § 9. *Held*, that the company had a right to construct a branch without complying with the statute, and that an injunction to restrain it from doing so should be refused. *Volmer v. Schuylkill River E. S. R. Co.*, 18 Phila. (Pa.) 248.—QUOTING McAboy's Appeal, 107 Pa. St. 548. REVIEWING Mayor of Pittsburgh v. Pennsylvania R. Co., 48 Pa. St. 355; Western Pa. R. Co.'s Appeal, 99 Pa. St. 155.

A statute giving a railroad company power to build a road "with power to construct such branches as the directors may deem necessary, and to connect all or either of them with any railroad or railroads now constructed, or that may hereafter be constructed," gives a continuing power to con-

struct branch roads, and the time limited for the completion of the railroad has no relation to the building of the branches. *Pittsburgh, V. & C. R. Co. v. Pittsburgh, C. & S. L. R. Co.*, (Pa.) 57 Am. & Eng. R. Cas. 46.

Where a railroad company was given a certain time to complete its road "with one or more tracks, sidings, depots, and appurtenances," the word "appurtenances" does not comprehend branches, consequently branches cannot be constructed after the expiration of the time thus limited. *Pittsburgh, V. & C. R. Co. v. Pittsburgh, C. & S. L. R. Co.*, (Pa.), 57 Am. & Eng. R. Cas. 46.

**5. Connecting with another main line.**—Where, by its charter, power is given a railroad company to construct branch or lateral roads, such power includes authority to construct a branch line running in the same general direction as the main line; and the fact that the new line will connect the main line with another railroad makes it none the less a branch road. *Blanton v. Richmond, F. & P. R. Co.*, 43 Am. & Eng. R. Cas. 617, 86 Va. 618, 10 S. E. Rep. 925.

**6. Within city limits.**—The construction of a new track further into a city by virtue of an ordinance of the city council, whereby certain provisions were made as to its location and grade, was fully authorized by the act of June 9, 1874 (P. L. 282), enabling cities to contract with railroad companies for the relocating, changing, or elevating of tracks so as to secure the safety of life or property and promote the interests of the municipality. *Appeal of the Western Pa. R. Co.*, 4 Am. & Eng. R. Cas. 191, 99 Pa. St. 155.

A provision in the charter of the Louisville & Nashville Railroad Company authorizing it to construct lateral or side-tracks from its main track to terminate on the bank of the Kentucky river, in the city of Frankfort, does not authorize the construction of a lateral or side-track which does not commence at the main track or terminate at the river, and the city had no power to grant a right of way across its streets and through an alley for the construction of such a track—no such power being conferred by its charter. *Commonwealth v. Frankfort*, 92 Ky. 149.

One Jessup purchased, under a deed of trust, the road and franchises of the North Missouri Railroad Company; respondent



filed articles of association and became a body corporate, and purchased the North Missouri Railroad and franchises from Jessup. Among these franchises was the right to construct lateral or branch roads to any point. Respondent acquired the right from the city of St. Louis to pass from west to east through the city to the Union depot, and proceeded to construct a branch road from Ferguson station, on the line of said road, to the Union depot in said city. *Held*, that it had the right to do this, and that the policy of the state—that all railroads entering a city should find a terminus at one common centre—having been declared by the act of March 18, 1871, the state could not object on the ground that respondent was usurping powers not granted by the state. *State ex rel. v. St. Louis, K. C. & N. R. Co.*, 3 Mo. App. 180.—DISTINGUISHING *Works v. Junction R. Co.*, 5 McLean (U. S.) 425.—REVIEWING *Pittsburgh v. Pennsylvania R. Co.*, 48 Pa. St. 355.

**7. Extensions of main line.**—Where the charter of a railroad company authorizes it to build branches, it may build what is practically an extension of the main line by beginning at one terminus and building in the same general direction that the main line runs. *Atlantic & P. R. Co. v. St. Louis*, 66 Mo. 228; *reversing* 3 Mo. App. 315.

Where a railroad has the power, under its charter, to construct lateral or branch lines, and it buys another road under an act of the legislature providing that it shall be sold and used under the provisions of the charter of the purchasing road, the latter has the right to extend the purchased road. *Duncan v. Pennsylvania R. Co.*, 7 Am. & Eng. R. Cas. 1, 94 Pa. St. 435.

Whether a company was authorized to extend its track further into a city, under its original charter, or not, such extension was fully authorized by the act of April 4, 1868, § 9 (P. L. 62), enabling railroads to construct such branches from their main lines as they may deem necessary to increase their business and accommodate the public. *Appeal of the Western Pa. R. Co.*, 4 Am. & Eng. R. Cas. 191, 99 Pa. St. 155.

**8. Switches, sidings, etc.**—A grant of corporate power to build and operate a railroad between specified termini carries with it the right to construct turn-outs, sidings, switches, stations, and engine-houses, and all works and appendages

usual in the convenient operation of a railroad. *Arrington v. Savannah & W. R. Co.*, 95 Ala. 434.

Owners or proprietors of lateral railroads must insert, or suffer others to insert, the necessary switches, sidings, and connections to get cars on and off the main track, and permit cars, whether laden or empty, to pass up and down the road, according to the reasonable rules that prevail on other railroads. *Com. ex rel. v. Corey*, 2 Pittsb. (Pa.) 444.

**9. Private branch and lateral lines.**—The power to construct private branch lines communicating with a railway, and for that purpose to cross highways, is subject to the statutory requirement that where the railway injures a road in crossing it, it must form a new road in lieu thereof. *Rex v. Morris*, 1 B. & Ad. 441.

Where a railway act permits adjoining landowners to construct railways across the company's road and to use them "for the benefit of themselves and of all and every other person or persons to whom they or any of them may from time to time give leave, and in such way and for such purposes as they or any of them may require," a neighboring landowner may construct a railway on his own land and carry it under the company's railway, and use it as a public railway for general traffic. *Hughes v. Chester & H. R. Co.*, 3 De G. F. & J. 352, 8 Jur. N. S. 221, 21 L. J. Ch. 97.

Where a statute authorizing landowners to construct private branch lines to communicate with a railway provides that the company shall not be bound to make an opening for such a line where they have already erected any building, station, or yard, the assent of the company to an opening being made at a station is not in the nature of a license, and cannot be revoked. *Bell v. Midland R. Co.*, 3 De G. & J. 673.

A person owning coal and land, and locating a lateral road for the purpose of running his coal to market, is entitled to the right of way as located, as against a stranger who subsequently locates a lateral road on the same ground. *Hays v. Briggs*, 3 Pittsb. (Pa.) 504.

**10. Width of the road.**—The acts of 1832 and of 1865 on the subject of lateral roads limit the width of such roads to twenty feet. If under the latter act a greater width is necessary for sidings, wharves, chutes, etc., such greater width may

be used for those specific purposes. In that event the special additional structures, together with the quantity of ground requisite for the purpose, should be carefully described in the petition and order, so that they may appear on the record. *Pittsburgh Nat. Bank v. Shoenberger*, 25 Am. & Eng. R. Cas. 177, 111 Pa. St. 95, 2 Atl. Rep. 190.

As a greater width than twenty feet is expressly prohibited by the original act of 1832, the width becomes a jurisdictional fact which may be taken advantage of at any stage of the proceeding. *Pittsburgh Nat. Bank v. Shoenberger*, 25 Am. & Eng. R. Cas. 177, 111 Pa. St. 95, 2 Atl. Rep. 190.

**11. Length of the road.**—A railroad company organized under the general law may build and construct lateral and branch roads not exceeding fifty miles in length, and use and operate any part or portion of their main line and branch or branches, when completed, the same as though the whole of the proposed railroad were fully completed. (Chapter 54, § 69, Code W. Va. 1887.) *Wheeling, B. & T. R. Co. v. Camden Consolidated Oil Co.*, 47 Am. & Eng. R. Cas. 27, 35 W. Va. 205, 13 S. E. Rep. 369.

Such branches may have, in part, a common stem leading from the main line—that is, there may be a branch from a branch—provided the limit as to length is not exceeded. *Wheeling, B. & T. R. Co. v. Camden Consolidated Oil Co.*, 47 Am. & Eng. R. Cas. 27, 35 W. Va. 205, 13 S. E. Rep. 369.

The construction of a branch railroad nearly double the length of the main line is not of itself an abuse of the branching powers conferred on railroad companies by Pa. act of April 4, 1868 (P. L. 62). The relative importance of the main line and the branch cannot always be measured by their length respectively. *Volmer's Appeal*, 115 Pa. St. 166, 8 Atl. Rep. 233.

**12. Who authorized to build.**—Pa. act of March 28, 1840, amending the act of May 5, 1832, entitled "An act regulating lateral railroads," extends the right of making and constructing lateral railroads over intervening lands to the owner or owners of land, mills, quarries, coal or other mines, lime-kilns, or other real estate, in the vicinity of any railroad, canal, or slack-water navigation, made or to be made thereafter, by any company, individuals, or by the state of Pennsylvania, to each and every county in the state. *Shoenberger v. Mulhollan*, 8 Pa. St. 134.

Pa. act of 1832 empowers "any owner or owners" of lands near public improvements to construct lateral railroads—held, to include a case where plaintiff was in possession of a coal mine under an equitable title. *Shoenberger v. Mulhollan*, 8 Pa. St. 134.

A company desirous of constructing a branch road agreed to lease its land for the purpose of obtaining the means of doing so, and the branch was constructed under 27 Vic. ch. 60, by the lessees and the defendants as their assignees. The above act sanctions the construction of the branch by authority of the company, and confers on the lessees the right to use it under the franchise of the company. Held, that the lessees and their assignees were not personally liable for anything which was done within the powers given to the company under the acts relating thereto. *Hamilton v. Covert*, 16 U. C. C. P. 205.

**13. Time within which to build.**—Where a railroad company is authorized to construct a main line and lateral roads, a subsequent act extending the time in which it may complete its road operates to extend the time also in which to complete the lateral roads. *Newhall v. Galena & C. U. R. Co.*, 14 Ill. 273.

**14. Who may use and operate—Mandamus.**—Pennsylvania lateral railroad act of May 5, 1832, does not contemplate that the petitioner for a road to public works should own land at the point of connection; he may use his road there consistently with the interests of the owners of the land. *Harvey v. Thomas*, 10 Watts (Pa.) 63.

Mandamus will lie in a proper case to compel the builder of a lateral railroad to permit others to use his road, under the provisions of the lateral railroad law of May 5, 1832, § 7, and the pendency of proceedings for assessment of the owner's damages through whose land the road is laid, is no reason for excluding transporters from the use of the road; nor the possibility that the transporter might convey his tonnage by some other route; nor the fact that his cars and wagons would be an obstruction to the business of the proprietors of the road. *Com. ex rel. v. Corey*, 2 Pittsb. (Pa.) 444.

Where a railway company is authorized to construct a branch railway there is no duty imposed upon it which will be enforced by mandamus. *Great Western R.*

*Co. v. Queen*, 1 *El. & Bl.* 874, 16 *Jur.* 675.

The court will not interfere on a complaint by the proprietor of a branch line, that a sufficient number of trains of the main line do not stop at the junction, or at convenient times, unless the public are not sufficiently accommodated. *In re Caterham R. Co.*, 1 *C. B. N. S.* 410, 26 *L. J. C. P.* 161.

**15. Taking lands for branch roads, generally.\***—When a company has the power to build an additional lateral road—that is, a lateral road whose construction and maintenance are possible only upon an independent right of way—the right of way statute does not prevent the condemnation of land for such additional road. *Lower v. Chicago, B. & Q. R. Co.*, 10 *Am. & Eng. R. Cas.* 17, 59 *Iowa* 563, 13 *N. W. Rep.* 718.

A private road is a wagon or cart road, and cannot be converted into a lateral railroad by putting a railroad track on it when opened. The restrictions of the lateral railroad act upon the exercise of the power of taking private property for public use cannot be evaded by converting a private road into a lateral railroad. *Keeling's Road*, 59 *Pa. St.* 358.

Under the Pa. act of Feb. 17, 1871, land cannot be taken for a lateral railroad wharf or landing when the owner *bona fide* intends to use it for the same purpose in the future. *Hays v. Briggs*, 74 *Pa. St.* 373.

Under Pa. act of June 9, 1874, authorizing counties, cities, and townships to contract with railroad companies for the relocation or elevation of their roads in such manner as the authorities may deem best adapted to secure the safety of life and property, a company has the right, after obtaining the consent of a city, to appropriate longitudinally any street to the construction of a branch road. *Duncan v. Pennsylvania R. Co.*, 13 *Phila. (Pa.)* 68.

**16. — procedure, appeals, etc.**—The number of viewers in locating lateral railroads is regulated by the practice under the act of 1849, and should be seven. *Pittsburgh Nat. Bank v. Shoenberger*, 25 *Am. & Eng. R. Cas.* 177, 111 *Pa. St.* 95, 2 *Atl. Rep.* 190.

Under the Pa. lateral railroad act of May 5, 1832, an appeal does not lie to the su-

preme court from a decree of the common pleas overruling exceptions to a report of viewers. *Hall's Appeal*, 56 *Pa. St.* 238.

Exceptions were filed to the report of viewers for a lateral railroad and an appeal to the common pleas was taken. The exceptions were overruled while the appeal was pending; there was no final judgment, and a *certiorari* from the supreme court was premature. *Hall's Appeal*, 56 *Pa. St.* 238.

Where proceedings under the Pennsylvania lateral railroad act to obtain the location of a wharf or landing for a lateral railroad are appealed, it is not necessary to put the report of the viewers marking off the landing in evidence on the trial on appeal. *Hays v. Briggs*, 3 *Pittsb. (Pa.)* 504.

Where the landowner only appeals from the report of a jury allotting land for a lateral railroad and a landing, it is error on appeal to increase the amount of land allotted. If the petitioner is dissatisfied with the allotment he should file exceptions. *Hays v. Briggs*, 74 *Pa. St.* 373.

**17. — subsequent remedies of landowner.**—The Pa. lateral railroad act of May 5, 1832, is not intended to give the petitioner more than a privilege to open, construct, complete, and use a railway through the land of another. He may use material from the right of way to construct the road, but coal displaced belongs to the owner of the fee, and he may maintain trover for its conversion. *Lyon v. Gormley*, 53 *Pa. St.* 261.

The owner of a coal mine proceeded by petition under the Pa. act of May 5, 1832, to ascertain the amount of damage which a landowner would sustain by reason of the location of a railroad. The matter was proceeded with so that a verdict was rendered for the amount of damage, which amount the petitioner paid into court. The petitioner then entered upon the land and made the road before a judgment was entered on the verdict. *Held*, that though the proceedings under the petition did not furnish a justification of the trespass, yet they protected him from vindictive damages. *Harvey v. Thomas*, 10 *Watts (Pa.)* 63.

**18. Taxation of branch roads.**—Branch railroads built under Mo. act of March 21, 1868, are practically independent lines, and are not exempt from taxation under an exemption in the charter of the main line. *Chicago, B. & K. C. R. Co. v. Guffey*, 29 *Am. & Eng. R. Cas.* 200, 120 *U. S.* 569, 7 *Sup. Ct. Rep.* 693.—APPROVED IN

\* Exercise of the right of eminent domain for branch road, see note, 36 *AM. & ENG. R. CAS.* 551.

Right of way for lateral- and spur-tracks, see note, 4 *L. R. A.* 276.

State *ex rel. v. Keokuk & W. R. Co.*, 41 Am. & Eng. R. Cas. 694, 99 Mo. 30, 6 L. R. A. 222, 12 S. W. Rep. 290.

**19. Forfeiture of franchise.**—Railroad companies are not required to provide trains for passengers or freight which are not wanted or which the business of the road would utterly fail to support; and a company having other lines to support does not forfeit its charter, at the suit of the commonwealth, by reason of a failure to run the number of trains on a branch road that it had formerly run, after the legislature has cut down its patronage by chartering a parallel rival road. *Commonwealth v. Filchburg R. Co.*, 12 Gray (Mass.) 180.

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#### I. CONSTRUCTION, REPAIRING, AND REBUILDING.

##### 1. Statutes.\*

**1. Constitutionality.**—The Alabama act of February 27, 1889, authorizing the board of revenue of two designated counties to erect a bridge across the Alabama river near the city of Montgomery, making it a free foot and wagon bridge, or a railroad bridge, or both combined, and authorizing the issuing of county bonds to pay for it and to levy a tax to pay interest on the same, is, so far as it authorizes the counties to build a bridge for railroad purposes, or a foot and wagon and railroad bridge combined, in violation of article 4, § 55, of the constitution, declaring that no county, city, or municipality shall lend its credit or grant public money or anything of value in aid of or to any individual, association, or corporation; and is also in violation of article 9, § 5, of the constitution, prohibiting counties from levying in any one year a tax greater than one-half of one per cent, except in cases of necessary bridges. *Garland*

\* See *post*, 19, 21, 22, 33, 59-68, 94.

*v. Montgomery County Revenue Board*, 87 Ala. 223, 6 So. Rep. 402.

The act of the Delaware assembly of 1837 (vol. 959), authorizing the railroad company to erect a close bridge over White Clay creek, is constitutional, and gives no right of action to the owner of a mill above, though damage results to him from the loss of navigation and obstructing the flowage of water; but such bridge must be made and kept up in conformity with the law, and any additional obstruction is unauthorized, and, if attended with special damage, actionable. *Bailey v. Philadelphia, W. & B. R. Co.*, 4 Harr. (Del.) 389.

Where a railroad company, having a charter empowering it to construct a bridge over a navigable river, has made only such obstructions in the stream as are authorized by an act of the legislature, a statute providing a right of action for such obstructions in navigable streams is a violation of the company's charter and unconstitutional, as being an impairment of the obligation of a contract; a statute, however, providing for a summary action by way of remedy against unauthorized obstructions may be constitutional, even though passed after obstructions were made. *Bailey v. Philadelphia, W. & B. R. Co.*, 4 Harr. (Del.) 389.—REVIEWED IN *Philadelphia, W. & B. R. Co. v. Bowers*, 4 Houst. (Del.) 506.

The Massachusetts act of 1872, ch. 295, empowering a railroad company to bridge a certain river by a structure adapted to both railroad use and ordinary travel, and providing that the county shall pay a certain proportion of the cost thereof, to be determined by commissioners appointed for the purpose, is constitutional. *Brayton v. Fall River*, 124 Mass. 95.

**2. Interpretation, generally.**—The congressional laws allowing the erection of railroad bridges across the Mississippi river, among which is one at Dubuque, Iowa, and the act of June 15, 1866, passed by congress under its constitutional authority to regulate commerce among the states, authorizing railroads "to connect with roads of other states, so as to form continuous lines for transportation," do not command the things therein contained, but are simply permissive. *Richmond v. Dubuque & S. C. R. Co.*, 33 Iowa 422.

The general railroad law of New Jersey, of April 2, 1873, provides for conferring the

franchise of bridging the Delaware, so far as the authority of New Jersey can avail for that purpose. *Attorney-General v. Delaware & B. B. R. Co.*, 27 N. J. Eq. 631.—QUOTING *Rundle v. Delaware & R. C. Co.*, 14 How. (U. S.) 86; *President v. Trenton City Bridge Co.*, 13 N. J. Eq. 46.

Section 102 of the New Jersey general railroad law (Rev. p. 929; Rev. Sup. p. 828, § 9; P. L. of 1887, p. 226), providing for the construction of bridges over, under, and across a railroad where a highway crosses it, imposes a duty looking to the reparation of an injury lawfully done, and carries with it no authority or power save that which is incidental to its exercise. *Raritan Tp. v. Port Reading R. Co.*, 50 Am. & Eng. R. Cas. 169, 49 N. J. Eq. 11, 23 Atl. Rep. 127.—DISAPPROVING *People v. New York, N. H. & H. R. Co.*, 89 N. Y. 266.

**3. — statutes providing for construction, widening, and repairing.**

—A statute requiring that a bridge constructed thereunder shall leave a passageway of one hundred and sixty feet clear between the piers, must be construed to mean that the one hundred and sixty feet is to be measured directly across the river and not along the bridge, which runs diagonally across the stream. *Missouri River P. Co. v. Hannibal & St. J. R. Co.*, 1 McCrary (U. S.) 281, 2 Fed. Rep. 285.

The Wilmington & W. R. Co. is not compelled by § 27 of its charter to construct and keep in repair bridges rendered necessary by roads laid out after the construction of the railroad of the said company. *State v. Wilmington & W. R. Co.*, 74 N. Car. 143.

Bat. N. Car. Revisal, ch. 104, § 6, requiring a railroad company to keep up at its own expense all bridges on or over county or incorporated roads made necessary by the establishment of its road, does not apply to railroads built before the passage of the act. *State v. Wilmington & W. R. Co.*, 74 N. Car. 143.

A city charter provided that the common council might order the repairing, widening, or building of all bridges crossing railroad tracks within the city; and, upon a failure of any company to obey the order of council, that it might have the work done and authorize its treasurer to collect the cost thereof from the company. *Held*, that the statute only extended to the repairing, widening, or building of bridges proper, and not to em-

bankments, fills, and approaches, unless such could be deemed part of the bridge itself, and that the city could not recover for the cost of their repair. *New Haven v. New York & N. H. R. Co.*, 39 Conn. 128, 4 Am. Ry. Rep. 253.—DISTINGUISHED IN *Burritt v. New Haven*, 42 Conn. 174; *Hayes v. New York C. & H. R. R. Co.*, 9 Hun (N. Y.) 63.

**4. — statutes providing for construction of approaches.\***—The Minnesota act (Special Laws 1879, ch. 185) authorizing the Minneapolis & St. L. R. Co. to build branch lines and tracks, and requiring the city to construct the approaches to street bridges rendered necessary, is not to be construed so as to apply to the line of road already built and existing. *State v. Minneapolis & St. L. R. Co.*, 35 Am. & Eng. R. Cas. 250, 39 Minn. 219, 39 N. W. Rep. 153.

**5. — statutes providing for presentment and collection of claims.**—A statute authorizing a railroad bridge enacted that if the bridge should "invade or abridge any private rights" the company should make compensation, but that proceedings for the recovery must be commenced within six months. After the six months a second statute was enacted which extended the recoveries that might be had under the term "private rights." *Held*, that the recoveries under the second statute were not restricted to those who began proceedings under the first statute within the six months. *Reg. v. Great Western R. Co.*, 14 U. C. C. P. 462.

The royal assent to the building of a railroad bridge was given on June 10, 1857, the statute providing that all persons "who shall give notice to the company within three months from the passing of this act of their intention to make claim for compensation in consequence of the erection of such bridge shall be entitled to compensation." Notice was given of a claim on Sept. 10th of the same year. *Held*, that the three months commenced to run from the day after the passage of the act, and that the notice was therefore in time. *St. Andrew's Church v. Great Western R. Co.*, 12 U. C. C. P. 399. See also in *re New York Bridge Co.*, 67 Barb. (N. Y.) 295.

**6. — statutes providing remedy for violation of franchise.**—The rem-

edy given by a statute, providing that the owner of franchise to build a bridge and collect tolls may sue and collect before a justice treble the amount of tolls of an owner of an unauthorized bridge used in competition with the authorized bridge, is merely cumulative, and does not preclude an action in equity for a violation of the franchise. *Thompson v. New York & H. R. Co.*, 3 Sandf. Ch. (N. Y.) 625.

**7. — statutes providing for issue of bonds.**—The act of congress of February 24, 1871, authorizing the Union Pacific Railroad Company to issue bonds to construct a bridge across the Missouri river, between Omaha and Council Bluffs, did not make the bridge a separate undertaking, so as to relieve the company from the duty of operating its road as a continuous line; neither did it operate to change the eastern terminus of the line. *United States v. Union Pac. R. Co.*, 4 Dill. (U. S.) 479. Compare *Garland v. Montgomery County Revenue Board*, 87 Ala. 223, 6 So. Rep. 402.

**8. — statutes relating to duties of railroad commissioners.\***—Under Connecticut Gen. St. § 3480, giving the railroad commissioners power to direct the lowering of a highway by a railroad company at a crossing, so as to carry the highway over or under the railroad track, the commissioners gave notice requiring the company to construct and maintain bridges in obedience to their order, and directing it to place supports at a street-curb line under a bridge constructed by it over the street. *Held*, that their action was filed, and that the city could not appeal therefrom. *Waterbury's Appeal*, 57 Conn. 84, 17 Atl. Rep. 355. Compare *Works v. Junction R. Co.*, 5 McLean (U. S.) 425.

**9. Interpretation of particular words and clauses.**—(1) *Generally.*—The permission given to a company under the Wisconsin act of 1872, ch. 119, § 11, to construct its road "across, along, or upon any streams, etc.," must be interpreted to authorize the company to build bridges across streams, etc. *Miller v. Prairie du Chien & McG. R. Co.*, 34 Wis. 533. See also *Works v. Junction R. Co.*, 5 McLean (U. S.) 425.

A bridge forming part of the line of railway itself is an engineering work within § 14 of Railway Clauses Act. *Attorney Gen-*

\* See post, 39-42.

† See post, 91, 92.

1 D. R. D.—44.

\* See post, 66.



*eral v. Tewkesbury & M. R. Co.*, 1 *De G. J. & S.* 423, 32 *L. J. Ch.* 482.

(2) "Approach."—Within the meaning of Massachusetts Pub. St. ch. 112, § 128, the word "approach" will not include that portion of a street lowered for the purpose of permitting passage beneath a railroad bridge. *Whitcher v. Somerville*, 138 *Mass.* 454.

The duty imposed by statute is that railroad companies shall construct and maintain crossings, and so clear the ground on each side thereof that such crossings may be safely passed over. Ditches made by the company before the establishment of the highway or other obstructions to travel within the limits of the right of way, but beyond the limits of a proper construction of "approaches" to the railroad crossings, are not within the terms of the statute, and such ditches therefore need not be bridged. *O'Fallon v. Ohio & M. R. Co.*, 45 *Ill. App.* 572.

(3) "Bay."—The word "bay," as used in the act chartering the Hudson River R. Co., and requiring bays to be bridged by drawbridges under certain conditions and circumstances, does not include such places as at low water are used only by one person, and are covered with but a few inches of water. *Getty v. Hudson River R. Co.*, 21 *Barb. (N. Y.)* 617.

(4) "Bridge."—A structure erected over a railroad track where it crosses a highway, for the passage of travellers, is a "bridge" within the meaning of the Maine statutes. *State v. Gorham*, 37 *Me.* 451.

The New York act of 1856, ch. 146, entitled "An act authorizing the construction of a bridge across the Hudson river at Albany," construed to authorize a bridge for the transportation of railroad trains and also as a common highway for the accommodation of the general public. *Silliman v. Hudson River Bridge Co.*, 4 *Blatchf. (U. S.)* 74.

(5) "Profits."—Under the act of congress of June 30, 1864, § 122, providing, *inter alia*, that all profits of a railroad company carried to "the account of any fund or used for construction shall be subject to and pay a duty of 5 per centum on the amount of such profits," moneys used for repairing a railroad bridge of the same materials and dimensions are not "profits used for construction," within the meaning of the statute; but the additional cost of replacing a

wooden bridge by a more expensive stone bridge is within the statute. But if the cost of the stone bridge be charged to the company's expense account, and the whole amount of such account for the year is not more than a proper percentage of its gross earnings to cover current expenses and to make necessary repairs, the additional cost of such bridge will not be deemed within the provision of the statute. *Hartford & N. H. R. Co. v. Grant*, 9 *Blatchf. (U. S.)* 542.

(6) "Public works."—Under a provision of § 20 of Ohio St. May 1, 1852 (Curwen's Rev. St. Ohio, § 3317, 6th ed.), providing that whenever the line of any railroad company shall cross any canal or any navigable water, the company shall file with the board of public works, or with the acting commissioner thereof having charge of the public works for such crossing as proposed, the plan of the bridge and other fixtures for crossing, the expression "public works" does not confine the jurisdiction of the commissioner to such works only as shall be constructed over waters made navigable by the state, but extends to railway bridges over any navigable waters of the state. *Works v. Junction R. Co.*, 5 *McLean (U. S.)* 425.

(7) "Streams."—The New York act of 1857, ch. 639, authorizing bridges over streams dividing towns, does not authorize bridges over bays, lakes, or other bodies of water, nor does it authorize causeways and bridges over marshes or such waters, they not being "streams" within the meaning of the statute. *In re Irondequoit*, 68 *N. Y.* 376.

## 2. Authority to Construct.

**10. Generally.\***—Railroad companies have lawful authority to build across streams, but must restore the stream to its former state or to such state as not unnecessarily to impair its usefulness. *Culver v. Chicago, R. I. & P. R. Co.*, 38 *Mo. App.* 130.

The prohibition to a railroad corporation to build a bridge over the waters of Charles river at Boston, or to place any obstruction therein, does not apply to an arm of the river that has been dammed off so as to form a basin for the storage of

\* See post, 45, 59-64, 69.

No express charter power required to build bridges, see note, 13 *Am. & Eng. R. Cas.* 172.

water, but only to the waters of the river below the dam and open to navigation, and was designed mainly to protect navigation. *Boston Water Power Co. v. Boston & W. R. Co.*, 23 Pick (Mass.) 360.

The Wisconsin act of 1872, ch. 119, § 11, authorizing a railroad company to construct its road "across, along, or upon any stream of water, watercourse, or highway," authorizes it to bridge the same. *Miller v. Prairie du Chien & McG. R. Co.*, 34 Wis. 533.

#### 11. Permission of commissioners.

—Commissioners were appointed by the commonwealth to superintend the filling and laying out of what is known as the Back Bay in Boston, and arrangement was made by which a water-power company was to fill and own a certain part thereof. The directions of the commissioners provided that a street was to be carried over a railroad by a bridge about thirty feet in length, the remainder to be filled up with clean gravel and hard earth, but that the "distances and dimensions of the bridge may be increased hereafter, if found \* \* \* desirable." Certain lots were sold to a railroad company which covenanted to carry out the agreement of the water-power company. The commissioners voted to allow the railroad company to construct a bridge not to exceed three hundred and sixty-seven feet long, whereupon a property-owner on the street filed a bill for an injunction. *Held*, that the power to make the change in the bridge was reserved to the commissioners, and that the bill could not be maintained. *Gardner v. Boston Water-Power Co.*, 9 Allen (Mass.) 466.

**12. Under contract with municipality.**—The city of Chester had power, under the special Pennsylvania act of March 25, 1873 (P. L. 376), to make a valid contract with the Philadelphia, W. & B. R. Co. whereby the city would grade off Pennell street so as to cross over a bridge at such a height as to permit the easy operation of the railroad under the street, provided the railroad company would construct a bridge there of a certain kind and character. *Philadelphia, W. & B. R. Co.'s Appeal*, 121 Pa. St. 44, 15 Atl. Rep. 476.

**13. Right to purchase bridge already built.**—A corporation authorized by law to build a bridge at a given point may buy one already built at the same point if suitable for their purpose. *Thompson v.*

*New York & H. R. Co.*, 3 Sandf. Ch. (N. Y.) 625.

A railroad company was chartered with power to build a bridge for their railway across a river. At or near the place where it had to cross, a private bridge had been erected by individuals duly authorized by law to build a bridge for their own private use, which was entirely convenient and of sufficient strength for the purposes of the railroad; and the company purchased the bridge of the owners, reserving to the latter the use of it as before. *Held*, that the owners were authorized to sell and the company to buy the bridge. *Thompson v. New York & H. R. Co.*, 3 Sandf. Ch. (N. Y.) 625.

Where the consent of the county authorities to the use of the bridge had been given, and the condition on which it was accorded was accepted and acted on by the company, it became a binding contract until the license was revoked by the only authority having power to revoke it. *Floyd County v. Rome St. R. Co.*, 77 Ga. 614, 3 S. E. Rep. 3.

The Georgia act of October 7, 1885, did not affect the right of the railroad company to the use of the bridge, which had previously accrued. That act was intended not to restrict the company's franchise, but to extend it upon the conditions named therein. *Floyd County v. Rome St. R. Co.*, 77 Ga. 614, 3 S. E. Rep. 3.

**14. Right to bridge river rather than establish ferry.**—A charter authorizing a railroad company to cross a river by bridge or ferry, "as may be most convenient," regards the convenience of both the navigation and the railroad interest; and, in the absence of any designation to the contrary, makes the railroad company the judges as to which will be the most convenient. That a bridge would be less convenient to navigation than a ferry does not deprive the company of the right to build a bridge. *Attorney-General ex rel. v. New York & L. B. R. Co.*, 24 N. J. Eq. 49.—FOLLOWING *Stephens & C. Transp. Co. v. Central R. Co.*, 34 N. J. L. 281.

#### 3. Duty to Construct.

#### 15. Generally.\*—A company owes no

\* See post, 41, 70.

Bridges over railroads, obligation to construct, see note, 39 AM. & ENG. R. CAS. 248.

Duty of railroad companies to build bridge over track and maintain farm crossings; who has a right to locate, see 26 AM. & ENG. R. CAS. 364, abstr.

duty of building a road or bridge on its right of way unless the same is rendered necessary by the construction of the railroad. *Ohio & M. R. Co. v. Bridgeport*, 43 Ill. App. 89.

Railroad companies are only bound to build and maintain such bridges and other structures as ordinary and reasonable men can foresee will be necessary to meet the ordinary contingencies and demands of nature. *Peoria & P. U. R. Co. v. Barton*, 38 Ill. App. 469.

Railroad companies are required to keep in proper repair public roads or private ways established by law where they cross the railroad, and to build suitable bridges or make proper excavations or embankments; but they are not required to build bridges for crossings which are neither public nor private ways established by law. *Cox v. East Tenn.*, V. & G. R. Co., 68 Ga. 446.

**16. Under contract with abutting landowner.**—A company contracted with the owner of land over which its road ran to build a bridge over its track at a specified point on said land within twelve months after the completion of the road. The road was not completed for several years and the bridge was never built. *Held*, that the owner of the land was not entitled to recover damages. *St. Louis, J. & C. R. Co. v. Lurton*, 72 Ill. 118.

In a suit against a railroad company for a failure to build a bridge over its road at a given point, in pursuance of a contract so to do, the measure of damages was held to be, not the difference in the value of property to be affected by the bridge, or the want of it, but the cost of building such a bridge, together with reasonable compensation to the other party to the contract, for his time and labor in procuring and managing its construction, and perhaps such damage as might be sustained during the time required to build it. *St. Louis, J. & C. R. Co. v. Lurton*, 72 Ill. 118.

A railway company which obtains a conveyance from a landowner for the purposes of its road, and binds itself thereby to erect and maintain a bridge of certain width over a road leading to such owner's property, is bound not to depart from those conditions, and another company claiming under it is equally bound. *Edinburgh & G. R. Co. v. Campbell*, 9 L. T. 151.

**17. At crossings of streets and**

**highways.\***—Under the Maine Rev. St., ch. 81, § 62, railroad companies are required to erect necessary bridges where their tracks pass over or under any highway. *State v. Gorham*, 37 Me. 451.

The lawful construction of a railroad upon the grade of a street does not exempt it from bridging when it becomes necessary. *State v. Minneapolis & St. L. R. Co.*, 35 Am. & Eng. R. Cas. 250, 39 Minn. 219, 39 N. W. Rep. 153.

Under New Hampshire Gen. Laws, ch. 161, § 3, a railroad company may be required to bridge a highway established but not constructed. *Worcester, N. & R. R. Co. v. Nashua*, 63 N. H. 593, 4 Atl. Rep. 298.

The duty of a railroad company to construct and keep in repair good and sufficient bridges or passages where any public road shall cross the same is continuous. *State (Reed, pros.) v. Camden*, 53 N. J. L. 322, 21 Atl. Rep. 565.

The duty of building necessary bridges at highway crossings which was imposed upon the Montclair Railroad Company by its charter devolves upon the new corporation which purchased the property and franchises of the old corporation at the foreclosure sale and reorganized under the New Jersey Railroad and Canal Act, § 56. *New York & G. L. R. Co. v. State*, 32 Am. & Eng. R. Cas. 186, 50 N. J. L. 303, 11 Cent. Rep. 555, 13 Atl. Rep. 1.

Under the New York general railroad act of 1850 it is the duty of railroad companies in constructing tracks across highways to restore them to their former state, or to such state as not to unreasonably impair their usefulness; and where a bridge over a railroad track becomes necessary, the company is bound to construct it and keep it in repair as long as the highway exists, or as long as the company continues to exercise and enjoy its franchise. *People ex rel. v. Troy & B. R. Co.*, 37 How. Pr. (N. Y.) 427.

The North Carolina R. Co. is not required, under its charter, to construct crossings and bridges over its track except where the same is crossed by public roads which are kept in repair at the public expense by overseers and laborers duly ap-

\* Authority to impose on railroad the duty to make bridges and crossings over new streets and highways, see note, 32 AM. ENG. R. CAS. 276.

pointed to work them. *Coon v. North Carolina R. Co.*, 65 *N. Car.* 507.

A road company incorporated under the general acts was held entitled to maintain an action against the Hamilton & Toronto Railway company for neglecting to make, within a reasonable time, a proper bridge over their railway where it crossed the plaintiff's road. *Streetsville Plank Road Co. v. Hamilton & T. R. Co.*, 13 *U. C. Q. B.* 600.—*FOLLOWING* *Rose v. Miles*, 4 *M. & S.* 101.—*DISTINGUISHED IN* *Hamilton & B. Road Co. v. Great Western R. Co.*, 17 *U. C. Q. B.* 567.

**18. Where several railroads cross a street.**—Each of several railroad companies crossing streets nearly at the same place may properly be required to construct the parts of the bridges above its own system of tracks, and the necessary approaches, without other apportionment between them of the cost of the entire bridge structure and approaches. *State v. Minneapolis & St. L. R. Co.*, 35 *Am. & Eng. R. Cas.* 250, 39 *Minn.* 219, 39 *N. W. Rep.* 153.

**19. Mandamus to enforce statutory duty.**—Where a railway company refuses to construct a bridge over a river, so as to leave the same width of water-way and a clear height of five feet above the level of the river, an adjoining landowner is entitled to a mandamus to compel it to comply with the statute, although by such statute he is given power to apply to a justice for an order enabling him to make the bridge at the expense of the company. *Reg. v. Norwich & B. R. Co.*, 4 *Railw. Cas.* 112, 3 *D. & L.* 385, 15 *L. J. Q. B.* 24.

Upon the trial of mandamus proceedings against two railroad companies to compel the restoration of highways crossed by their tracks, evidence was admissible in the proceeding against the one company as to the extent of the use of the street-crossing by the other company, showing the necessity for a bridge at the place in question. *State v. Minneapolis & St. L. R. Co.*, 35 *Am. & Eng. R. Cas.* 250, 39 *Minn.* 219, 39 *N. W. Rep.* 153.

The fact that it is necessary that the St. Paul, M. & M. R. Co. shall also bridge its tracks is not a fatal objection to a mandamus proceeding against the Minneapolis & St. L. R. Co., where the former company has been in fact required to construct the bridges over its tracks. *State v. Minneapolis & St. L. R. Co.*, 35 *Am. & Eng. R. Cas.*

250, 39 *Minn.* 219, 39 *N. W. Rep.* 153.—*FOLLOWING* *State v. St. Paul, M. & M. R. Co.*, 35 *Minn.* 131, 38 *Minn.* 246.

#### 4. Sufficiency.\*

**20. Generally.**—Railroad bridges over which trains are to pass should be constructed of the best and most durable materials that will insure the greatest safety to the travelling public. *Toledo, P. & W. R. Co. v. Conroy*, 68 *Ill.* 560.—*QUOTED IN* *Wilson v. Denver, S. P. & P. R. Co.*, 15 *Am. & Eng. R. Cas.* 192, 7 *Colo.* 101.

In building a bridge at the crossing of its track over a public street a railroad company is bound to construct it of such material and in such manner as to make and keep it safe for public travel. *Caldwell v. Vicksburg, S. & P. R. Co.*, 39 *Am. & Eng. R. Cas.* 245, 41 *La. Ann.* 624, 6 *So. Rep.* 217.

In constructing and maintaining its bridges a railway company is bound to take into account the fact that accidents may occur in the operation of its road, and to construct its bridges with reference thereto; and it is held to a very high degree of care in that respect. *Pershing v. Chicago, B. & Q. R. Co.*, 34 *Am. & Eng. R. Cas.* 405, 71 *Iowa* 561, 32 *N. W. Rep.* 488.

The degree of care required of a railroad company in constructing a bridge across a watercourse is such as to bring to bear such engineering skill as is ordinarily applied to works of that kind, in view of the size and habits of the stream, the character of its channel, and the declivity of the circumjacent territory forming the watershed. *Ohio & M. R. Co. v. Thillman*, 143 *Ill.* 127, 32 *N. E. Rep.* 529.

If the proprietors of a bridge allow a railroad company to lay tracks over it and to operate trains thereon, they must provide necessary guards against injuries liable to occur through the increased danger. *Peoria Bridge Assoc. v. Loomis*, 20 *Ill.* 235.—*QUOTED IN* *Chicago & R. I. R. Co. v. McKean*, 40 *Ill.* 218.

A bridge having been built by a company under the authority of the general railroad law, the township had power to erect any superstructure on it to render it safe, and collect the cost from the company. *Newlin Tp. v. Davis*, 77 *Pa. St.* 317.

The statutes of Connecticut (Rev. St. 323, 324, §§ 28, 30) do not require the rail-

\* See post, 40, 71.

road company to maintain the highway under the bridge so as to prevent the bridge from interfering with public travel. *Gray v. Danbury*, 29 *Am. & Eng. R. Cas.* 486, 54 *Conn.* 574, 10 *Atl. Rep.* 198.

A railroad company cannot be required to remove a bridge which is without fault in its plan or defect in its structure, while in good repair and safe for the passage of trains, simply because some engineer pronounces it not as good or convenient as some other kind. *Illick v. Flint & P. M. R. Co.*, 67 *Mich.* 632, 12 *West. Rep.* 443, 35 *N. W. Rep.* 708.—QUOTED IN *Ragon v. Toledo, A. A. & N. M. R. Co.*, 97 *Mich.* 265.

**21. Must obey statutory requirements.**—A bridge built under the authority of a statute must conform to the requirements of the law. *Bailey v. Philadelphia, W. & B. R. Co.*, 4 *Harr. (Del.)* 389.

Where a drawbridge is built across a river, under authority of a statute providing that the passageway for vessels between piers of the bridge shall be one hundred and sixty feet wide in the clear, the distance between piers is to be determined by measuring directly across the stream, and not by measuring along the bridge where it runs diagonally across the stream. *Missouri River Packet Co. v. Hannibal & St. J. R. Co.*, 1 *McCrary (U. S.)* 281, 2 *Fed. Rep.* 285.

A railway company in constructing bridges to carry its line across a turnpike is bound to make the arches conform to the description in the plans deposited with the clerk of the peace, and is not at liberty to build bridges having shorter spans. *Attorney-General v. Tewkesbury & M. R. Co.*, 1 *De G. J. & S.* 423, 32 *L. J. Ch.* 482.

**22. Must restore the stream and prevent overflow.**†—Where a railroad company is authorized to bridge a stream on condition that it restore the same to its former state, or so as to not impair its usefulness, a bridge so constructed as to impair the usefulness of the stream is as much a nuisance as if no legislative authority had been given. *Healy v. Joliet & C. R. Co.*, 2 *Ill. App.* 435.—QUOTING *Morgan v. King*, 35 *N. Y.* 454; *Culver v. Chicago, R. I. & P. R. Co.*, 38 *Mo. App.* 130.

In the construction of bridges and trestles crossing natural streams, and the approaches thereto, railroad companies must so con-

struct them that they will not obstruct the natural flow of water. *St. Louis, A. & T. H. R. Co. v. Winkelmann*, 47 *Ill. App.* 276.

Though a railroad company has under its charter the right to bridge a stream, it must do so in proper, skilful manner, leaving ample way for the passage of the water, so as to save riparian owners from overflow; and if it fail so to construct its bridge, and by reason of its bridge structure narrowing the natural channel, backwater is caused, overflowing the premises of a riparian owner and causing him damage, the company is liable. *Taylor v. Baltimore & O. R. Co.*, 39 *Am. & Eng. R. Cas.* 259, 33 *W. Va.* 39, 10 *S. E. Rep.* 29.—QUOTING *March v. Portsmouth & C. R. Co.*, 19 *N. H.* 372. *REVIEWING Lawrence v. Great Northern R. Co.*, 16 *Q. B.* 643.

The Omaha & R. V. R. Co. constructed a railway bridge across the Platte river, the piers being twenty feet apart from center to center. An ice gorge having formed above the bridge, by which the water of the river was thrown out of the channel, whereby the property of B was injured and destroyed—*held*, that there being sufficient evidence tending to prove that the openings between the piers were not sufficient to permit the free passage of such quantities of ice and water as might reasonably be expected to occur occasionally, a verdict in favor of B for \$6,000 damages would not be set aside. *Omaha & R. V. R. Co. v. Brown*, 20 *Am. & Eng. R. Cas.* 286, 16 *Neb.* 161, 20 *N. W. Rep.* 202.

**23. Floods and freshets.**—(1) *What floods must be provided for.*—A railway company in carrying their road across a water-course or channel are bound to provide for even those extraordinary floods which, by the exercise of the highest circumspection, may be anticipated. *Kansas Pac. R. Co. v. Miller*, 2 *Colo.* 442, 20 *Am. Ry. Rep.* 245.

Where the company located a bridge over a channel then containing no water, and wherein no flow of water was known to have occurred—*held*, that due diligence required an inquiry and examination as to its character and the declivity of the circumjacent country, to ascertain the quantity of water likely to flow there in the future; that if indications existed in the vicinity of former floods, e.g., driftwood and the like in the branches of bushes, or water-marks upon the trunks of trees, it was gross negligence to construct the bridge, with its approach of

\* See *post*, 68.

† See *post*, 48.

light and unsubstantial soil, reaching into the water-way. *Kansas Pac. R. Co. v. Miller*, 2 *Colo.* 442, 20 *Am. Ry. Rep.* 245.

A railway company is liable for damage done to property by the carrying away of its bridge by a flood of extraordinary and unusual violence, if the bridge was carried away because of its negligent and unskilful construction; but if it was constructed in such manner, and was in such condition of repair, as to allow the water of an ordinary flood to be carried off and to resist the force of the same, and was carried away solely by reason of the unusual height and destructiveness of the flood, the company is not liable. *Piedmont & C. R. Co. v. McKenzie*, 52 *Am. & Eng. R. Cas.* 667, 75 *Md.* 458, 24 *Atl. Rep.* 157.

Railway companies should construct their bridges and trestles so as to be secure and sufficient against usual and ordinary floods in that particular section of country; and even a defective condition of their bridges caused by a sudden and extraordinary freshet will not be excused, if there be time, in the exercise of reasonable care and attention, to discover the defect. Whether there was such time or not is a question of fact for the jury. *Knathla v. Oregon, S. L. & U. N. R. Co.*, 21 *Oreg.* 136, 27 *Pac. Rep.* 91.

The company is bound to exercise ordinary care, which is such care as is usually exercised under like circumstances by men of ordinary prudence in their own affairs. It is its duty to guard against such floods or freshets as men of ordinary prudence can foresee, but not against such extraordinary floods and accidental casualties as cannot reasonably be anticipated. *Ohio & M. R. Co. v. Thillman*, 143 *Ill.* 127, 32 *N. E. Rep.* 529.—*QUOTING* *Illinois C. R. Co. v. Bethel*, 11 *Ill.* App. 17.

(2) *What floods need not be provided for.*—In the location and construction of bridges and trestles a railroad company is required to bring to the work the engineering skill and knowledge generally known and applied in business, having regard to the size and nature of the stream, the character and features of the adjacent country which constitutes its watershed, the relative position and formation of the abutting land, its liability to overflows, and their probable extent and effect; but it is not bound to provide against unusual or extraordinary floods such as have never been known to occur before, and which could not reason-

ably have been anticipated by competent and skilful engineers. *Columbus & W. R. Co. v. Bridges*, 38 *Am. & Eng. R. Cas.* 136, 86 *Ala.* 448, 5 *So. Rep.* 864. *Peoria & P. U. R. Co. v. Barton*, 38 *Ill. App.* 469. *Piedmont & C. R. Co. v. McKenzie*, 52 *Am. & Eng. R. Cas.* 667, 75 *Md.* 458, 24 *Atl. Rep.* 157. *Knathla v. Oregon S. L. & U. N. R. Co.*, 21 *Oreg.* 136, 27 *Pac. Rep.* 91. *Ohio & M. R. Co. v. Thillman*, 143 *Ill.* 127, 32 *N. E. Rep.* 529.

Failure to provide, in building a bridge, against a flood which could not have been foreseen, or with the greatest caution or prudence reasonably anticipated, and which was greater and more destructive than had ever before happened within the memory of the inhabitants, imposes no liability. *Columbus & W. R. Co. v. Bridges*, 38 *Am. & Eng. R. Cas.* 136, 86 *Ala.* 448, 5 *So. Rep.* 864.—*QUOTING* *Pittsburgh, Ft. W. & C. R. Co. v. Gilleland*, 56 *Pa. St.* 445.

**24. Width of bridge.**—A railroad company is not responsible for damages resulting from the construction of a bridge narrower than the road at a crossing which is neither a public nor a private way established by law. *Cox v. East Tenn., V. & G. R. Co.*, 68 *Ga.* 446.

In an action for damages for injuries caused by plaintiff's team falling off a bridge constructed by a railroad company, it is proper, when asked to charge that there is no law which requires a railroad to build a bridge of any particular width, to reply that "it must be a safe structure." *Rembert v. South Carolina R. Co.*, 39 *Am. & Eng. R. Cas.* 252, 31 *So. Car.* 309, 9 *S. E. Rep.* 968.

The construction by a railroad corporation, whose road crosses a highway below grade, of a bridge of less width than the highway, is not *per se* a nuisance. *People v. New York, N. H. & H. R. Co.*, 10 *Am. & Eng. R. Cas.* 230, 89 *N. Y.* 266.

**25. Covered and overhead bridges.\***—A covered bridge along the line should be built of such height that brakemen, who are required to go on top of freight cars while going over the bridge, may pass through under the roof without danger to their personal safety. *Chicago & A. R. Co. v. Johnson*, 116 *Ill.* 206, 4 *N. E. Rep.* 381.—*FOLLOWED AND QUOTED* in *Cleveland, C. & St. L. R. Co. v. Walter*, 45 *Ill. App.* 642. *REVIEWED* in *St. Louis, Ft. S. & W.*

\* See *post*, 103.



R. Co. v. Irwin, 37 Kan. 701, 16 Pac. Rep. 146.—*Cleveland, C., C. & St. L. R. Co. v. Walter*, 147 Ill. 60, 3 N. E. Rep. 529.—FOLLOWING *Chicago & A. R. Co. v. Johnson*, 116 Ill. 206.

A railroad company cannot, under any circumstances, construct a bridge over its track so low that brakemen on top of the train in discharge of their duties cannot avoid danger by bending or stooping. *Louisville & N. R. Co. v. Hall*, 39 Am. & Eng. R. Cas. 298, 87 Ala. 708, 4 L. R. A. 710, 6 So. Rep. 277.

When in crossing a highway it becomes necessary for a railroad company to construct a bridge across its track, it is its duty, if reasonably practicable, to place the structure at such an elevation that trains can pass under it without injury to persons employed upon them. But if the conformation of the ground is such as to render the elevation impossible, or as to cause inconvenience to the public in the use of the bridge, or greatly increase the expense to the railroad company, the bridge may be so constructed as to extend below the line of absolute safety. *Louisville & N. R. Co. v. Hall*, 39 Am. & Eng. R. Cas. 298, 87 Ala. 708, 4 L. R. A. 710, 6 So. Rep. 277.

Where a railroad company built a bridge over a highway, and was itself guilty of no negligence, and the bridge was built upon such plans and at such height as the borough required, the company is not bound to prevent the highway from being raised, nor to preserve the original space between it and the bridge. *Gray v. Danbury*, 29 Am. & Eng. R. Cas. 486, 54 Conn. 574, 10 Atl. Rep. 198.

**26. When need not provide for other than railway traffic.**—Defendants were chartered with power to build a bridge both for railroad traffic and ordinary travel. A bill filed by the attorney-general stated that the bridge had been completed for railway traffic and leased to a company; that a foot-passage had been constructed, but the public were not allowed to cross thereon, and that no carriageway had been constructed, the company having abandoned the idea of opening it for ordinary travel. *Held*, on demurrer, that a court of equity could not grant a prayer of the bill so far as it asked that the bridge be abated as a nuisance by reason of not being completed; but that it did make a case for equitable relief so far as it prayed that the

footway be opened to the public. *Attorney-General v. International Bridge Co.*, 27 Grant Ch. (Ont.) 37.

It was proper that said bill be filed by the attorney-general, and that the railroad company using the bridge be made a defendant. *Attorney-General v. International Bridge Co.*, 27 Grant Ch. (Ont.) 37.—FOLLOWING *Attorney-General v. Niagara Falls I. Bridge Co.*, 20 Grant Ch. (Ont.) 34.

**27. Proof of insufficiency.**—*Prima facie*, the fact that a bridge gives way when a train is passing over it shows negligence. *Bedford, S., O. & B. R. Co. v. Rainbolt*, 21 Am. & Eng. R. Cas. 466, 99 Ind. 551.

The burden of proof is on plaintiff to show that the bridge does not conform to the requirements of the law. *Silver v. Missouri Pac. R. Co.*, 44 Am. & Eng. R. Cas. 467, 101 Mo. 79, 13 S. W. Rep. 410.

#### 5. Rebuilding.

**28. Generally.**—A corporation, purchaser of canals and public works of the state, "subject to all contracts and arrangements heretofore made by act of Pennsylvania assembly, or otherwise for or in respect to the use of such works;" and required to "carry out the same with all persons interested therein in the same manner as the commonwealth or its agents were required to do by law," is bound to rebuild a bridge, necessary to the public, which had been erected by the state over the canal when made, but which had fallen down since the purchase. *Pennsylvania R. Co. v. Duquesne Borough*, 46 Pa. St. 223.—REVIEWED IN *District of Columbia v. Washington & G. R. Co.*, 4 Am. & Eng. R. Cas. 161, 1 Mackey (D. C.) 361.

While the state owned the canal the question of the necessity of the bridge was for the canal commissioners alone, because of the immunity of the state from suit; but when it passed to a private corporation the question of necessity and consequent duty became one of a private right, and passed into the jurisdiction of the courts. *Pennsylvania R. Co. v. Duquesne Borough*, 46 Pa. St. 223.

Though the state could not be compelled to rebuild the bridge because of its state character, the purchaser of the public works has not that immunity; for a duty which cannot be enforced by action because owed by the state, becomes a subject of action when transferred to private persons.

*Pennsylvania R. Co. v. Duquesne Borough*, 46 Pa. St. 223.

**29. Rebuilt by town or county.**—A railroad company having in the construction of its road changed the location of a township road, and having erected a bridge over a creek for a new public road, and refused to repair and maintain it, the township rebuilt it. *Held*, that the company was liable to the township for the cost of the bridge. The company having originally built the bridge to meet the necessities of the public, the duty devolved upon it to maintain and repair it. *Pennsylvania R. Co. v. Borough of Irwin*, 85 Pa. St. 336, 18 Am. Ry. Rep. 562.

The board of commissioners of a county is the proper party to bring an action to reimburse the county for expenses incurred by such board in rebuilding a bridge upon a county road within the limits of a village, which bridge had been so far wrongfully injured by a railroad company in the construction of its railroad across such county road as to require the construction of a new bridge. *Perry County v. Newark, S. & S. R. Co.*, 43 Ohio St. 451, 2 N. E. Rep. 854.—DISTINGUISHING *Lawrence R. Co. v. Com'rs of Mahoning County*, 35 Ohio St. 1.—DISTINGUISHED IN *Com'rs of Mahoning County v. Pittsburgh & W. R. Co.*, 45 Ohio St. 401.

**30. "To the satisfaction of board of trade."**—Where a railway bridge is blown down and an act is passed authorizing the company to construct a new one, but requiring it to remove the ruins and debris of the old bridge to the satisfaction of the board of trade, this is an absolute obligation, and the board of trade have no discretionary power to dispense with the performance of any part of it; the import of the expression, "to the satisfaction of the board of trade," is, that though not bound to submit its plans of removal, including the time and manner, yet, as a matter of prudence, the company ought to do so. *North British R. Co. v. Perth, Provost of, L. R.* 10 App. Cas. 59.

**6. Duty to Keep in Good Condition and Repair.\***

**31. Generally.**—Where a railway crosses a city street below grade, and a bridge and approaches are erected by the company to carry the travel upon the street

above the track, it is the duty of the company to keep both the bridge and the approaches in a safe condition. *Newton v. Chicago, R. I. & P. R. Co.*, 23 Am. & Eng. R. Cas. 298, 66 Iowa 422, 23 N. W. Rep. 905.—FOLLOWING *Farley v. Chicago, R. I. & P. R. Co.*, 42 Iowa 237.

If a railroad company accepts permission granted to it by the highway commissioners to construct a bridge over a crossing, the duty is thereby imposed upon it of keeping the same in proper repair. *Hayes v. New York C. & H. R. R. Co.*, 9 Hun (N. Y.) 63.

Under the New York act of 1850, ch. 140, § 24, a railroad company carrying a highway over its track, as therein authorized, is bound to keep the bridge in proper repair, and is liable to indictment for a failure to do so. *People v. New York C. & H. R. R. Co.*, 74 N. Y. 302; modifying 12 Hun 195.

A railway company must keep its bridge over the track in such a condition as not to be dangerous to any one using it in a lawful manner. *Lay v. Midland R. Co.*, 34 L. T. 30; reversing 30 L. T. 529.

A company must keep its railroad bridges in such condition and repair as to make them safe for the travelling public. *Caldwell v. Vicksburg, S. & P. R. Co.*, 39 Am. & Eng. R. Cas. 245, 41 La. Ann. 624, 6 So. Rep. 217.

The bridgeway over the Missouri river at Kansas City is a public highway, being held and operated under a franchise granted for the purpose of a public roadway for the transportation of passengers over the river; and the company owning it is under as much obligation to keep it in a reasonably safe condition as if it were a ferry. *Pembroke v. Hannibal & St. J. R. Co.*, 32 Mo. App. 61.

**32. Scope and extent of the rule.**—The duty on the part of the railroad company of keeping in repair bridges where a public road crosses the track is continuous. *State (Reed, pros.) v. Camden*, 53 N. J. L. 322, 21 Atl. Rep. 565.

The duty of a railway company is not discharged by trusting, without inspecting and testing, to the reputation of manufacturers and the external appearance of materials used in the construction of bridges. The law requires that before the lives of passengers are trusted to the safety of its bridges the company shall carefully and skillfully test and inspect the materials it uses in such structures; and after the bridges are con-

\* See post, 79, 85.

structed it is the duty of the company to test them from time to time to ascertain whether they are being impaired by use or exposure to the elements. *Louisville, N. A. & C. R. Co. v. Snyder*, 37 *Am. & Eng. R. Cas.* 137, 117 *Ind.* 435, 20 *N. E. Rep.* 284, 3 *L. R. A.* 434.

Under the New York general railroad act of 1850, where a bridge becomes necessary where the railroad crosses a highway, and it is constructed, the company must keep it in repair as long as the highway exists or as long as the company continues to exercise and enjoy its franchise. Such duty is not avoided by mere abandonment of the road and the removal of the track. *People, ex rel. v. Troy & B. R. Co.*, 37 *How. Pr. (N. Y.)* 427.

Where a railway company erects its track over a road by means of a bridge, it is bound by the Railways Clauses Act 1845 to keep both bridges and road and all approaches in repair. *North Staffordshire R. Co. v. Dale*, 8 *El. & Bl.* 836, 4 *Jur. N. S.* 631, 27 *L. J. M. C.* 147.

And in such a case repair includes the metalling of the road on both bridge and approaches. *North of England R. Co. v. Langbaugh*, 24 *L. T.* 544.

The statutory duty of a railway company to keep in repair all bridges either under or over its track includes the duty to keep in repair the roadway of a bridge constructed over a track, although such roadway has always been maintained and repaired by the inhabitants of the parish. *Reg. v. South E. R. Co.*, 32 *L. T.* 858.

A company owes no duty, however, to keep in repair a road or bridge on its right of way, unless it is rendered necessary by the construction of the railroad. *Ohio & M. R. Co. v. Bridgeport*, 43 *Ill. App.* 89.

**33. Under special statutes.\*—(1) Maine.**—Under Maine Rev. St. ch. 81, § 62, it is the duty of railroad companies to erect necessary bridges where their tracks pass over or under any turnpike road, canal, or highway, and to keep the same, with their approaches and abutments, in proper repair. *State v. Gorham*, 37 *Me.* 451.

(2) *Massachusetts.*—Where a railroad company, under Massachusetts Rev. St. ch. 30, § 72, constructs a bridge, with abutments, under or over a turnpike road, canal, highway, or other way, it is under legal obliga-

tion to keep the whole structure in repair, though a portion of it may be outside of the boundaries of its railroad. *White v. Quincy*, 97 *Mass.* 430. — **DISTINGUISHING** *Stearns v. Old Colony & F. R. R. Co.*, 1 *Allen (Mass.)* 493. **QUOTING** *Parker v. Boston & M. R. Co.*, 3 *Cush. (Mass.)* 107.

(3) *North Carolina.*—The provision of Bat. N. Car. Revisal, ch. 104, § 36, providing that "railroad companies, plank-road, and turnpike companies each shall keep up at their own expense all bridges on or over county or incorporated roads which they have severally made necessary to be built in establishing their respective roads," does not apply to railroads built before the passage of the statute. *State v. Wilmington & W. R. Co.*, 74 *N. Car.* 143.

Section 27 of the charter of the Wilmington & Weldon Railroad Company does not require that company to make and repair bridges made necessary by roads laid out subsequent to the construction of said railroad. *State v. Wilmington & W. R. Co.*, 74 *N. Car.* 143.

(4) *Pennsylvania.*—Under the Pennsylvania act of April 21, 1858, providing for the sale of the state canals, the Wyoming Canal Co., as the assignee of the Sunbury & E. R. Co., was bound to keep in repair a private bridge crossing a canal, as had been done by the commonwealth, who built the bridge for the owner of the farm when the canal was made; subsequently the Lackawanna & B. R. Co., duly authorized by law, built their road on the banks of the canal where the bridge crossed, and so altered the bridge as to increase the cost of keeping it in repair; the bridge becoming unsafe, the canal company refused to repair, whereupon suit was brought by the owner of the farm. *Held*, that the canal company was not relieved from its obligation to keep the bridge in repair by any acts of the railroad company in the location or construction of their road. *Ammerman v. Wyoming Canal Co.*, 40 *Pa. St.* 256.

(5) *English statutes, generally.*—A special act requiring a railway company, when its track crosses a turnpike road, to construct a proper bridge to carry the turnpike road over its track, and to keep in repair the road fences for twelve months, does not restrict to a period of twelve months from the completion of the work the company's liability to keep the bridge in repair. *Newcastle-under-Lyne & Leek Turnpike Road (Trus-*

\* See ante, 3.

*tees*) v. *North Staffordshire R. Co.*, 5 H. & N. 160; *s. c. nom. Leech v. North Staffordshire R. Co.*, 29 L. J. M. C. 150, 8 W. R. 216.

Where a person is authorized by private act to make a road under a railway, and to maintain a bridge to the satisfaction of the company's engineer, the company cannot without giving such person notice make repairs and hold him liable for the expense, although the necessity for such repairs could only be ascertained by entry on and examination of the bridge. *London & S. W. R. Co. v. Flower*, 45 L. J. C. P. 54, 33 L. T. 687.

(6) *Locomotive Act*, 24 & 25 Vic. ch. 70, § 7.—The Locomotive Act, 24 & 25 Vic. ch. 70, § 7, relating to the repair of bridges damaged by reason of any locomotive passing over or coming into contact with the same, does not apply to bridges repairable by the inhabitants of the county. *Reg. v. Kitchener*, 29 L. T. 697, 12 Cox C. C. 522, L. R. 2 C. C. 88, 43 L. J. M. C. 9, 22 W. R. 134.

(7) *Railways Clauses Consolidation Act*, 8 Vic. ch. 20, §§ 46, 65.—Where a railway crosses a highway, and the road is carried over the railway by means of a bridge, in accordance with the provision of § 46 of the Railways Clauses Consolidation Act 1845, the railway company are bound to keep in repair the roadway upon the bridge, such roadway being part of the bridge which by the section the company are to maintain. *Mayor, etc., of Bury v. Lancashire & Y. R. Co.*, 42 Am. & Eng. R. Cas. 56, 20 Q. B. D. 485; affirmed in 14 App. Cas. 417.—*FOLLOWING North Staffordshire R. Co. v. Dale*, 8 El. & Bl. 836.

Where § 65 of the Railways Clauses Consolidation Act 1845 was expressly varied by the special act of a railway company, providing that if after notice the company does not with reasonable expedition repair a bridge over a turnpike road the surveyor and the trustees may repair and recover the costs, yet it revived on the cessation of the turnpike trust, and an order to repair the bridge may be made under it. *London, C. & D. R. Co. v. Wandsworth Board of Works*, 42 L. J. M. C. 70, L. R. 8 C. P. 8.

**34. Notice or knowledge of defects.**—Railroad companies are supposed to know the condition of their bridges, and it is not necessary to show that a company had knowledge of a defective bridge in order to recover for injuries received in

consequence of such defect. *South & N. Ala. R. Co. v. McLendon*, 63 Ala. 266.

It seems that the happening of a violent rainstorm is sufficient to put the foreman of a section of railroad upon notice that the track may be out of repair, making it his duty to proceed to inspect it. *St. Louis & S. F. R. Co. v. George*, 85 Tex. 150, 19 S. W. Rep. 1036.

A violent storm occurring near the sources of a channel or water-way, ordinarily dry, was observed at a station on the railway, nine miles distant from a bridge, by which the road crossed the channel in question. *Held*, that diligence required the agents of the company to examine the bridge after the storm and before the passage of trains. *Kansas Pac. R. Co. v. Miller*, 2 Colo. 442, 20 Am. Ry. Rep. 245.

Railroad bridges should be subjected periodically to the closest examination, so that the company may be able to perform its duty with reference to keeping them in good condition and repair. *Toledo, P. & W. R. Co. v. Conroy*, 68 Ill. 560.

Where a railroad bridge was a trestle-work constructed of timbers fifteen years before an accident thereon, resulting in the loss of life, and many of the timbers were rotten at the heart, and some of the tenons had rotted off, and the company had been notified of its unsafe condition before, and had made some slight repairs at one end only, without thorough examination—*held*, that the company were negligent to such a degree as to merit the severest censure. Actual knowledge of the defects is not necessary, but it is sufficient if the company might have been informed by the use of such diligence as the law requires. *Toledo, P. & W. R. Co. v. Conroy*, 68 Ill. 560.

Where a bridge is weakened by a sudden and unprecedented flood, and there is no time or opportunity for inspecting it, the railroad company is not responsible for an injury resulting from its giving way beneath a train run with proper care and skill; but it is otherwise if its unsafe condition may reasonably be discovered in time to avoid danger. *Louisville, N. A. & C. R. Co. v. Thompson*, 27 Am. & Eng. R. Cas. 88, 107 Ind. 442, 57 Am. Rep. 120, 8 N. E. Rep. 18, 9 N. E. Rep. 357.—*DISTINGUISHING Pittsburgh, Ft. W. & C. R. Co. v. Gilleland*, 56 Pa. St. 445; *Flori v. St. Louis*, 69 Mo. 341, 33 Am. Rep. 504; *Livezey v. Philadelphia*, 64 Pa. St. 106, 3 Am. Rep. 578; *Nashville*

& C. R. Co. v. David, 6 Heisk. (Tenn.) 261, 19 Am. Rep. 594.

**35. Expenses of repairing.**—The plaintiff company repaired a bridge owned by the defendant, although the defendant had had no notice nor any knowledge or means of ascertaining that the repairs were necessary. It was held, that the company was not entitled to recover expenses so incurred. *London & S. W. R. Co. v. Flower*, L. R. 1 C. P. D. 77. Compare *Ammerman v. Wyoming Canal Co.*, 40 Pa. St. 256.

**36. Duty of city or town to repair.**—The statutory duty imposed upon a railroad to restore streets over which it constructs its road to their former condition, and to maintain proper bridges where the same are necessary, does not relieve a city from the duty to keep the streets in a safe condition, nor relieve it from liability from injuries resulting from defects therein. *Tierney v. Troy*, 41 Hun (N. Y.) 120, 4 N. Y. S. R. 15.

Where a statute enjoins upon several towns and a railroad company the joint duty of providing for keeping a bridge in repair, and one of the towns is charged with the duty of superintending necessary repairs, the railroad company cannot maintain an action against such town to recover back moneys which it has been compelled to pay out as damages for injuries caused by reason of the bridge being out of repair. *Malden & M. R. Co. v. Charleston*, 8 Allen (Mass.) 245.

A town is not responsible for a defect or want of repair in a bridge, whereby a public highway passes over a railroad, the proprietors of which are bound by law to keep the bridge in repair. *Sawyer v. Northfield*, 7 Cush. (Mass.) 490.—DISTINGUISHED IN *Davis v. Leominster*, 1 Allen (Mass.) 182.

**37. Duty of canal company to repair.**—The owner of the farm for whose use the bridge was built could maintain an action against the canal company for neglecting to repair it, even though the railroad company might be liable to keep it up, and might also be responsible in damages to the canal company for injury done requiring greater care and expense in keeping the bridge in repair. *Ammerman v. Wyoming Canal Co.*, 40 Pa. St. 256.

**38. Duty of purchasing company to repair.**—Where one railroad company buys from another its road, including a completed bridge, it owes to its servants operating the road the duty not only of

maintaining the bridge in as good repair as when it was acquired, but also of repairing and supplying all patent defects in its original construction. If it fails to perform this latter duty, and an injury is occasioned to a servant by reason of such patent defect, the company is liable in damages. *Vosburgh v. Lake Shore & M. S. R. Co.*, 15 Am. & Eng. R. Cas. 249, 94 N. Y. 374, 46 Am. Rep. 148; affirming 26 Hun 671, mem.—DISTINGUISHING *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311.

The duty of keeping in repair necessary bridges at highway crossings, which was imposed upon the Montclair R. Co. by its charter, devolves upon a corporation which purchases the property and franchises of said company at a foreclosure sale, under § 56 of the New Jersey railroad and canal act. *New York & G. L. R. Co. v. State*, 32 Am. & Eng. R. Cas. 186, 50 N. J. L. 303, 13 Atl. Rep. 1.

A railroad company, claiming under another company, is bound by the conditions in a deed of conveyance to the latter, referring to the maintenance and keeping in repair of a bridge of a certain width over the track. *Edinburgh & G. R. Co. v. Campbell*, 9 L. T. 157.

#### 7. Approaches.\*

**39. Generally.**—A portion of a street lowered for the purpose of allowing passage under a railroad bridge is not an "approach" to the bridge, so as to make the company liable for injuries resulting from a failure to keep approaches to their bridges in proper repair, and exonerating the city from liability, within the meaning of Mass. Pub. St. ch. 112, § 128. *Whitcher v. Somerville*, 138 Mass. 454.

The city of Camden has power by its charter and the New Jersey statute relating to railroads and canals (Rev. p. 944, § 163) to pass an ordinance vacating part of a public street and contracting with a railroad company for an elevated approach, in the remaining part of the street, to the abutments of a bridge to be constructed across railroad tracks laid in another street, and for a depression of said tracks, giving compensation to abutting landowners sustaining peculiar damages to their private rights. *State (Reed, pros.) v. Camden*, 53 N. J. L. 322, 21 Atl. Rep. 565.

\* See ante, 4.

In constructing a railroad bridge it became necessary to elevate the track over low land for a considerable distance before reaching the bridge. In times of high water the river spread over this low land, and it was necessary to protect the roadbed by rock work. A dispute arose between the company and its bridge contractors as to what part of this work was approaches to the bridge and what part a mere dyke. *Held*, that the opinion of a practical engineer on the question was proper evidence, and was entitled to weight with the jury. *Union Pac. R. Co. v. Clopper*, 131 U. S. 192 *app'x*, 26 *Law Ed.* (U. S.) 243.

**40. Sufficiency.**—It is the duty of a railroad company in constructing a bridge over which foot-passengers are to travel, and in making the lateral embankments adjoining the highway, to so construct them as not to render the approach to the bridge along the highway dangerous for passengers by day or night; and a failure to perform this duty will render it liable to a party who may be injured by falling over the embankment, provided he used reasonable and ordinary care to avoid the injury. *Baltimore & O. R. Co. v. Boteler*, 38 Md. 568, 10 *Am. Ry. Rep.* 506.

Where a statute provides that no approach to a bridge over a railroad track or at a grade crossing shall be over five degrees, a failure to comply with the statute is presumptive evidence of negligence; but still the company will not be liable for an injury which is not the result of the unlawful grade. *Kyne v. Wilmington & N. R. Co.*, (Del.) 14 *Atl. Rep.* 922.

**41. Duty to construct.**—Minnesota special act 1879, ch. 1885, authorizing the Minneapolis & St. Louis Railroad Company to construct branch lines and tracks, and requiring the city to build approaches to necessary street bridges, is not applicable to the already existing line of road. *State v. Minneapolis & St. L. R. Co.*, 35 *Am. & Eng. R. Cas.* 250, 39 *Minn.* 219, 39 *N. W. Rep.* 153.

Under the special Pennsylvania act of March 25, 1873, P. L. 376, the city of Chester had power to make a lawful contract with the P. W. & B. R. Co., by which, in consideration of a bridge of a specified character on Pennell street over the railroad crossing, to be erected and donated by the company, the grade of the street should be fixed and established so that the street

when opened and used over said bridge should cross the railroad at such a height as to permit the free operation of the railroad thereunder; by such contract the city is bound as if it were an individual, and the rights secured to the company thereby are inviolable. *Philadelphia, W. & B. R. Co.'s Appeal*, 121 Pa. St. 44, 15 *Atl. Rep.* 476.

The slope of the approach to a bridge carrying a road over a railway must not exceed that limited by statute, and it is no answer to say that the statutory requisition cannot be complied with without stopping the railway, owing to an injunction having been obtained by a person on whose land it was necessary that the company should encroach in order to make the statutory slope. *Attorney-General v. Mid-Kent R. Co.*, L. R. 3 Ch. 100, 16 *W. R.* 258.

**42. Duty to keep in good condition.**—(1) *Generally.*—Where a company has the duty cast upon it of keeping a bridge which it owns in repair, it must also keep the approaches to the same in a safe condition. *Newton v. Chicago, R. I. & P. R. Co.*, 23 *Am. & Eng. R. Cas.* 298, 66 *Iowa* 422, 23 *N. W. Rep.* 905.

Where under Maine Rev. St. ch. 81, § 62, the company is required to erect and keep in repair bridges where the track crosses a highway, the company's duty extends to keeping in repair the approaches to the bridge. *State v. Gorham*, 37 *Me.* 451.

A railroad company is bound, under the New York act of 1850, ch. 140, § 24, to keep the approaches to its bridges in proper repair. *People v. New York C. & H. R. R. Co.*, 74 *N. Y.* 302; *modifying* 12 *Hun* 195.

Where a railroad company is authorized by the highway commissioners to construct a bridge over a crossing, it is under the same duty to keep the approaches to the bridge in proper repair that it is as to the bridge itself. *Hayes v. New York C. & H. R. R. Co.*, 9 *Hun* (N. Y.) 63.—**DISTINGUISHING** *New Haven v. New York & N. H. R. Co.*, 39 *Conn.* 128. **REVIEWING** *North Staffordshire R. Co. v. Dale*, 8 *El.* & *Bl.* 836.

(2) *Scope and extent of this duty.*—The duty of a railroad company does not end with the construction of approaches to a bridge and crossings, and keeping the same in repair. When there is a change of conditions it is bound to conform to the new circumstances and conditions as they arise,



and to alter such places from time to time as it becomes necessary. *Ohio & M. R. Co. v. Bridgeport*, 43 Ill. App. 89.

Where a railroad passes through a cut and the company constructs a bridge over the track for the purpose of a highway, under the duty imposed by statute to keep abutments in repair, the company is bound to repair the entire distance of an excavation made in crossing the highway as approaches to the bridge. *Titcomb v. Fitchburg R. Co.*, 12 Allen (Mass.) 254.

Where a railroad company maintains a bridge which, with its approaches, is part of a highway, it is liable for an injury happening through a defect in the approach which has been widened after the bridge was built, through the injury occurred outside of the approach as originally constructed. *Carter v. Boston & P. R. Corp.*, 139 Mass. 525, 2 N. E. Rep. 101.

If the railroad is charged with the duty of maintaining the approaches to a bridge in safe condition for public travel, it is the party ultimately liable. Its duty is absolute and may be enforced not only by the township, but also, for his own relief, by any person specially injured by neglect of it. *Gates v. Pennsylvania R. Co.*, 150 Pa. St. 50, 24 Atl. Rep. 638.

If the railroad company is not charged with the exclusive care and maintenance of such approaches, still, if it undertakes the duty to care for and maintain them, it is liable for negligence in its performance. *Gates v. Pennsylvania R. Co.*, 150 Pa. St. 50, 24 Atl. Rep. 638.

(3) *Under English acts.*—Under the Railways Clauses Consolidation Act 1845, a railway company is bound at all times to keep the approaches to its bridge in repair. *North Staffordshire R. Co. v. Dale*, 8 El. & Bl. 836, 4 Jur. N. S. 631, 27 L. J. M. C. 147. *North of E. gland R. Co. v. Langbaugh*, 24 L. T. 544.

Under § 46 of the Railways Clauses Consolidation Act 1845, a railway company is bound at all times to keep in repair the approaches to a bridge carrying a turnpike road over its track. *Newcastle-under-Lyne & Leek Turnpike Road (Trustees) v. North Staffordshire R. Co.*, 5 H. & N. 160; s. c., nom. *Leach v. North Staffordshire R. Co.*, 29 L. J. M. C. 150, 8 W. R. 216.

The Railways Clauses Consolidation Act 1845 does not impose on a railway company which carries its railway over a highway by

means of a bridge any liability to keep in repair the immediate approaches on each side of the bridge even though the company has lowered the level of the old highway in making such approaches. *London & N. W. R. Co. v. Skerton*, 33 L. J. M. C. 158, 5 B. & S. 559, 12 W. R. 1102, 10 L. J. 648.

#### 8. Viaducts.

**43. Generally.**—A verdict in favor of adjacent lot-owners against a railroad company, for damages caused by the erection of a viaduct in the street, under the direction of the city, will not be allowed to stand because the railroad company paid a certain proportion of the cost of the viaduct in consideration that it was allowed to lay a track and operate trains over it, where the evidence does not show what part of the damages assessed was caused by the building of the viaduct and what by the laying of the track and the operation of trains. *Atchison, T. & S. F. R. Co. v. Lens*, 35 Ill. App. 330.

Where a railway company entered into a contract with a city, by which the former agreed to pay a given sum on the cost of a viaduct proposed to be constructed in a street, there being no illegal motive in tendering such aid to the city, it was held, that the company could not be held jointly liable with the city in tort for a private injury to adjoining property caused by the viaduct. *Culbertson & B. P. & P. Co. v. Chicago*, 111 Ill. 651.—APPLIED in *Peoria G. L. & C. Co. v. Peoria T. R. Co.*, 146 Ill. 372.

**44. Ownership.**—A city alone has authority to construct a viaduct in a street, and when one is so constructed by the city, even when done under the joint superintendence of a public official of the city and the chief engineer of a railroad company which paid a part of the price of the improvement, it was held that the viaduct was still public property belonging to the city alone. The aid furnished by the railway in such case may be treated as a mere private donation. *Culbertson & B. P. & P. Co. v. Chicago*, 111 Ill. 651.

**45. Authority to construct.**—The Delaware and Bound Brook Railroad Company, in erecting piers upon the land under water in the Delaware river to the middle of the stream, for the erection of a viaduct for a railroad track to connect with the track of the North Pennsylvania Railroad Company, have not violated the 36th section of the general railroad law, prohibiting cor-

porations formed under that law from taking any land under water belonging to the state, unless the consent of the riparian commissioners shall first have been obtained. *Attorney-General v. Delaware & B. B. R. Co.*, 27 N. J. Eq. 1; affirmed in 27 N. J. Eq. 631.

The viaduct built by the Delaware and Bound Brook Railroad Company from the Jersey shore to the middle of the river, to meet part of the same structure built by the North Pennsylvania Railroad Company from the Pennsylvania shore, held to be authorized by the 36th section of the New Jersey general railroad law, conferring power upon corporations organized under it to build a viaduct "across any navigable or other river, stream, or bay in this state." *Attorney-General v. Delaware & B. B. R. Co.*, 27 N. J. Eq. 1; affirmed in 27 N. J. Eq. 631.

The viaduct thus built by the Delaware & Bound Brook Railroad Company held not to interfere with the navigation of the river and not to be a nuisance in fact. *Attorney-General v. Delaware & B. B. R. Co.*, 27 N. J. Eq. 1; affirmed in 27 N. J. Eq. 631.

The viaduct so constructed is not a toll bridge, but merely the railroad connection of two railroads—a highway, by railroad, over the river. The company so operating it is not chargeable with a usurpation of a franchise to take tolls. *Attorney-General v. Delaware & B. B. R. Co.*, 27 N. J. Eq. 1; affirmed in 27 N. J. Eq. 631.

The construction of a viaduct, to be exclusively used for the passage of locomotives and cars, is not a bridge within the meaning of a bridge company's charter, granting it the exclusive right and franchise of maintaining a bridge and collecting tolls for travel thereon. *Proprs. of Bridges v. Hoboken L. & I. Co.*, 13 N. J. Eq. 81; affirmed in 13 N. J. Eq. 503.

## II. ACTIONS FOR INJURIES AT OR NEAR BRIDGES.

### 1. Injuries to Property.

**46. Generally.**—A bridge with lateral embankments, erected by a railroad corporation for the purpose of raising a highway and carrying it over their road, is as much a part of the structure authorized by their charter as the railroad itself; and any person injured by the erection of such bridge and embankments is entitled to recover his

damages thereby occasioned, in the manner provided by the Massachusetts Rev. St. c. 39, § 56. *Parker v. Boston & M. R. Co.*, 3 Cush. (Mass.) 107.—QUOTED IN *White v. Quincy*, 97 Mass. 430.

The erection of bridge abutments upon the side of an unfrequented country road, which are not presently used or needed for use, but are overgrown with bushes and weeds, will not inflict a serious public injury of the character which will induce this court to interfere by preliminary injunction. *Raritan Tp. v. Port Reading R. Co.*, 50 Am. & Eng. R. Cas. 169, 49 N. J. Eq. 11, 23 Atl. Rep. 127.

An action will not lie against a railroad company for consequential damages caused by their erection of a bridge over their railroad, done under New Hampshire Rev. St. ch. 142, § 4. *Towle v. Eastern R. Co.*, 17 N. H. 519.—DISTINGUISHED IN *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504.

The board of county commissioners of Mahoning county can only maintain such actions as are authorized by statute, and cannot, under §§ 860, 863, and 4938, Ohio Rev. St., giving them general power to erect and maintain bridges, maintain an action against a railroad which, in constructing its road under one end of the bridge, excavated dirt near one of the abutments, in such a way as to render it insecure and to damage the bridge and render it unsafe for travel. *Com'rs Mahoning County v. Pittsburgh & W. R. Co.*, 45 Ohio St. 401, 15 N. E. Rep. 468.—DISTINGUISHING *Perry County v. Newark, S. & S. R. Co.*, 43 Ohio St. 451.

**47. Obstructing access to highway.**—A railway company were sued for erecting a bridge over and along a public highway running through the plaintiff's land and crossed by their line of railway running under such bridge, and for the injury thereby occasioned to the plaintiff's land in obstructing the access to the highway, etc. There was, however, sufficient room left for access at one end of the bridge. The jury found for the defendants, on the ground that no damage had been sustained, and the court refused to disturb the verdict. *McDonell v. Ontario, S. & H. R. Co.*, 11 U. C. Q. B. 271.

**48. Obstructing flow of water—Flooding lands.**—A railroad company building a bridge across a river in such

\* See ante, 22.

manner as to obstruct the passage of the water are liable for flooding adjacent lands, unless they show that they have taken reasonable precautions to prevent unnecessary damage to his land. *Mellen v. Western R. Co.*, 4 Gray (Mass.) 301.—DISTINGUISHED IN *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504.

A company bridging a stream is liable to the owner of a water-mill above who is injured by the bridge being so constructed as to prevent the water from flowing from the mill as freely as it had formerly done, but is not liable for increased expense in getting logs up the stream to his mill, whether the stream is navigable for rafts and boats, or not. *Blood v. Nashua & L. R. Co.*, 2 Gray (Mass.) 137.—DISTINGUISHED IN *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504.

A complaint against a railroad company for flooding the plaintiff's land alleged that the same was caused by the building of a railroad bridge across a creek too low and the placing of the piling so close as to obstruct the stream and dam up the water on plaintiff's land. *Held*, that it was error to charge that the company was liable if the injury was caused by "negligence, carelessness, or improper construction of the bridge." There was no right to recover unless the bridge was defective in the particulars specified in the complaint. *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 20 Am. & Eng. R. Cas. 103, 83 Mo. 271, 53 Am. Rep. 581.—APPROVED IN *Jones v. St. Louis, I. M. & S. R. Co.*, 84 Mo. 151; *Moss v. St. Louis, I. M. & S. R. Co.*, 85 Mo. 86. DISTINGUISHED IN *Brink v. Kansas City, St. J. & C. B. R. Co.*, 17 Mo. App. 177. REVIEWED IN *Sullens v. Chicago, R. I. & P. R. Co.*, 74 Iowa 659, 7 Am. St. Rep. 501, 38 N. W. Rep. 545; *Martin v. Benoist*, 20 Mo. App. 262.

Where, however, there is lawful authority for the construction of a bridge or other structure over such stream, the person building it is liable only in case of negligence or unskillfulness in the manner of doing the work, to one suffering injury from its interference with the running water. *Abbott v. Kansas City, St. J. & C. B. R. Co.*, 20 Am. & Eng. R. Cas. 103, 83 Mo. 271, 53 Am. Rep. 581.

The erection and maintenance of a bridge in such a position that it forms an obstruction to the flow of waters and causes a periodical overflow of the adjacent lands is a continuing nuisance, in consequence of

which a recovery is limited to damages which may have accrued before an action is brought; and a judgment in one action is not a bar to a second action brought for damages sustained thereafter. *Omaha & R. V. R. Co. v. Standen*, 34 Am. & Eng. R. Cas. 179, 22 Neb. 343, 35 N. W. Rep. 183.

A railroad company is liable in damages for building a bridge across a river, with a pier turned obliquely to the course of the river in such a manner as to turn the water of the stream, in time of freshets, upon the plaintiff's grass-land, thereby throwing sand and earth upon it, and gully and washing away the same, it appearing that the bridge could, at an additional expense, have been erected, with safety to the railroad, in such a manner as not to injure said land. *Held* further, that the plaintiff was not estopped from maintaining his action for the damage so caused to his land by reason of having previously, by deed, conveyed to the said railroad corporation a portion thereof for the purposes of a railroad, and, in consideration of the purchase-money, released all claim for damages which might be awarded by commissioners, inasmuch as the commissioners could have appraised and awarded only such damages as would have resulted from the construction of the road in a legal and proper manner. *Spencer v. Hartford, P. & F. R. Co.*, 10 R. I. 14, 6 Am. Ry. Rep. 150.

A railroad company, although authorized by law to construct its road across a stream, is liable for damage done to lands adjacent thereto by the construction of a bridge which causes the water and ice to gorge and overflow such land; and in the selection of the character of bridge to be built, due regard must be had to the rights of the adjacent landowners, as well as to the safety of the public who may travel over its road, or who may require the use of the same for the transportation of property. *McClenghan v. Omaha & R. V. R. Co.*, 37 Am. & Eng. R. Cas. 245, 25 Neb. 523, 41 N. W. Rep. 350.—EXPLAINING *Sioux City & P. R. Co. v. Finleyson*, 16 Neb. 578. FOLLOWING *Omaha & R. V. R. Co. v. Brown*, 14 Neb. 170. QUOTING *Brown v. Cayuga & S. R. Co.*, 12 N. Y. 486.

In an action for flooding plaintiff's land by building bridges and embankments, the jury should be instructed that, if they find, from the evidence, that the embankments and abutments were necessary to the safety

of passengers and property passing over the road, and that it was built, constructed, and erected with care, skill, and prudence, not only as to the safety of persons and property passing over the road, but also for the protection and safety of the property-holder, they must find for defendant. *Terre Haute & I. R. Co. v. McKinley*, 33 Ind. 274.

**49. Collisions with the bridge piers.**—Where the owners of vessels sue to recover for damages thereto caused by the imperfect construction of a railroad bridge, and no question is made as to the probable profits of the voyage, the proper measure of damages is the chartered value of the boat during the time it is detained and the cost of necessary repairs. *Missouri River Packet Co. v. Hannibal & St. J. R. Co.*, 20 Am. & Eng. R. Cas. 275, 79 Mo. 478.

A pilot who has mistaken his course, and, not knowing where his boat is, attempts the dangerous passage of a bridge at night at the highest rate of speed and without any lookout is guilty of negligence. And if, under such circumstances, he collides with a barge moored to a bridge pier for the purpose of constructing the bridge, which is out of the usual channel of navigation, and by the collision his own boat is lost, the owners of the boat cannot recover, although the barge was without a light. *Baltimore & O. R. Co. v. Wheeling, P. & C. Transp. Co.*, 32 Ohio St. 116.

Approaching places of danger, such as the piers of a bridge, during the nighttime, a lookout is indispensable upon a steamboat. An omission in this regard is such negligence as will prevent a recovery, unless it clearly appears that a lookout could not by any possibility have prevented disaster. *Baltimore & O. R. Co. v. Wheeling, P. & C. Transp. Co.*, 32 Ohio St. 116.

A barge laden with coal while passing under a railroad bridge struck a submerged log lodged in a pier of the bridge, and was wrecked. *Held*, that, as the piers were constructed in accordance with approved methods, the railroad company was not liable. *Ward v. Louisville & N. R. Co.*, (Tenn.) 3 Am. & Eng. R. Cas. 506.

Where plaintiff's vessel was damaged by reason of a sunken pontoon, kept in the channel of the river by the railroad company, having changed the course of the current so that the vessel was thrown against a bridge pier unlawfully constructed and maintained by the defendants, and the acci-

1 D. R. D.—45.

dent was due to both causes, there should be a recovery for the injury sustained. *Missouri River Packet Co. v. Hannibal & St. J. R. Co.*, 1 McCrary (U. S.) 281; 2 Fed. Rep. 285.—**DISTINGUISHED IN** *Silver v. Missouri Pac. R. Co.*, 101 Mo. 79. **QUOTED IN** *Missouri River Packet Co. v. Hannibal & St. J. R. Co.*, 20 Am. & Eng. R. Cas. 275, 79 Mo. 478.

Where a railway company, having lawful authority so to do, crosses a public navigable stream or watercourse with its road, erecting in a proper manner the proper and necessary structures for such crossing, occupying therewith the space and no more than the space permitted to it, and so erects and uses such structures as that they shall not unnecessarily abridge or destroy the usefulness of such stream to the public as a navigable highway, using in a proper manner a movable drawbridge by which it crosses that part of such stream left open for the public navigation thereof, it is not liable for injuries resulting to vessels navigating such stream from coming in contact with obstructions in the open space or channel of water under such drawbridge, when such obstructions are present without fault on such company's part. The open space left to be temporarily spanned from time to time by the railway's drawbridge is left not only to the free use, but to the control and care of the public; and the railway company is under no more obligation to keep it free of obstructions, present without its agency, than it is to care for any other part of the channel of such stream. *Pensacola & A. R. Co. v. Hyer*, 32 Fla. 539, 14 So. Rep. 381.

## 2. Personal Injuries.

**50. Generally.\***—A bridge at which an injury occurred was thirty or forty feet long and sixteen feet high, was in the limits of a city, and over a public street in the immediate vicinity of the railroad. It had been covered by defendants, but was uncovered at the time of the accident for repairs, and plaintiff, in attempting to get upon the cars at midnight, fell through the bridge. *Held*, that it was the duty of the company to have the bridge covered or, if uncovered for repairs, so protected as to prevent such injuries. *Chicago & N. W. R. Co. v. Fillmore*, 57 Ill. 265, 10 Am. Ry. Rep. 462.

\* Personal injuries resulting from negligence in the construction of bridges, see note, 27 AM. & ENG. R. CAS. 314.

For a failure to perform its duty as to the constructing and keeping in repair of its bridges a company is responsible to a traveller who sustains personal injury by reason of the defective condition of a bridge. *Caldwell v. Vicksburg, S. & P. R. Co.*, 39 *Am. & Eng. R. Cas.* 245, 41 *La. Ann.* 624, 6 *So. Rep.* 217.

It being the duty of a railroad company in constructing its bridge to make the lateral embankments adjoining the highway so as not to render them dangerous to foot-passengers by day or night, a failure to perform this duty will render the company liable to a passenger injured there, even though he may have accidentally deviated from the highway. *Baltimore & O. R. Co. v. Boteler*, 38 *Md.* 568, 10 *Am. Ry. Rep.* 506.

A railroad company in repairing a bridge put down a plank, the edges of which stood above those on either side, and failed to bevel it down, and in walking across the bridge plaintiff struck his foot against the edge of the plank and fell and was injured. *Held*, in a suit to recover for the injury, that both the negligence of the defendant and the contributory negligence of the plaintiff were questions for the jury. *Kelly v. New York C. & H. R. R. Co.*, 29 *N. Y. S. R.* 646, 9 *N. Y. Supp.* 90, 56 *Hun* 639.

A street-railway company which uses approaches in the street to its bridge, constructed of plank, is liable to one who is injured while passing along the street by falling over a board which has become loose and is allowed to project into the street. *Murphy v. Suburban Rapid Transit Co.*, 40 *N. Y. S. R.* 228, 15 *N. Y. Supp.* 837.

**51. Injuries to passengers.**—In the absence of proof that the safety of a properly constructed railroad bridge may depend upon the soundness of a single iron rod, the jury should not be instructed that if the bridge broke down because of a defect in such single rod, which was not discoverable, and the injury to a passenger resulted therefrom, there could be no recovery. *Bedford, S., O. & B. R. Co. v. Rainbolt*, 21 *Am. & Eng. R. Cas.* 466, 99 *Ind.* 551.

The inability of the company, for want of means, to build a better bridge constitutes no defense, for the company ought not to have undertaken to carry passengers until it could do so with safety. *Oliver v. New York & E. R. Co.*, 1 *Edm. Sel. Cas. (N. Y.)* 589.

Where a passenger sues for an injury re-

ceived by being precipitated through a bridge which was being repaired, it is not sufficient to rebut the presumption of negligence on the part of the carrier, to show that it was using the means and appliances ordinarily employed by prudent persons in making such repairs, without also showing that they are ordinarily sufficient, and that they were without known or discoverable defect, and were used with the utmost practical care and diligence. *Louisville, N. A. & C. R. Co. v. Pedigo*, 27 *Am. & Eng. R. Cas.* 310, 108 *Ind.* 481, 8 *N. E. Rep.* 627.

Plaintiff, who was a passenger on one of defendant's cars, while crossing a canal bridge was injured by the breaking of an attachment to the bridge, which was defective when placed in position, the defect being discoverable by the maker in the process of manufacture, but not discoverable from any examination that could be made by any person using the bridge for crossing. The plan and method of construction of the bridge were approved by and it was built under the direction and supervision of the proper state officers; it had been in position and use for over a year, and nothing had occurred to raise a doubt as to its entire safety. *Held*, that an action was not maintainable against defendant to recover damages for the injury. *Birmingham v. Rochester, C. & B. R. Co.*, 137 *N. Y.* 13, 32 *N. E. Rep.* 995, 49 *N. Y. S. R.* 888; reversing 63 *Hun* 635, 45 *N. Y. S. R.* 724, 18 *N. Y. Supp.* 649.

In an action for injuries to a passenger caused by a bridge breaking down, it is a question for the jury whether the company engaged the services of competent engineers, who had adopted the best methods and had used the best material. If the company has done this it is not liable; but the mere fact that it has engaged the services of such a person will not relieve it from the consequences of an accident arising from a deficiency in the work. *Grote v. Chester & H. R. Co.*, 2 *Exch.* 251, 5 *Railw. Cas.* 649.

**52. Injuries to employees.**\*—Railroad companies in providing for the safety of their employés are not required to an-

\* Injuries to train-hands from overhead bridges, see note, 41 *AM. & ENG. R. CAS.* 256.

Liability of company for injuries to employés caused by overhead bridges, see note, 53 *AM. REP.* 699.

Killing a brakeman by reason of a defective bridge, see 33 *AM. & ENG. R. CAS.* 385 *abstr.*

ticipate and guard against every possible danger, but only such as are likely to occur. So a company is not liable for the death of a brakeman whose train was stopped on a bridge at night, which was being repaired, and who fell through and was killed. *Koontz v. Chicago, R. I. & P. R. Co.*, 18 *Am. & Eng. R. Cas.* 85, 65 *Iowa* 224, 54 *Am. Rep.* 5, 21 *N. W. Rep.* 577.

Where a servant of a railway is killed in consequence of the giving way of a wooden bridge, which is defective through age, the company cannot escape liability by showing that the bridge was constructed properly in the first place, and that it employed skilful and competent subordinates to inspect and repair its bridges. *Toledo, P. & W. R. Co. v. Conroy*, 68 *Ill.* 560.

Where there has been an unusually severe storm since a bridge was inspected, the question whether a railroad company is negligent in sending out a work-train without making inspection as to the condition of the bridge over which such train must pass, is for the jury. *Conlon v. Oregon, S. L. & U. N. R. Co.*, 53 *Am. & Eng. R. Cas.* 356, 23 *Oreg.* 499, 32 *Pac. Rep.* 397.

**53. Frightening teams.**—Where no defect of construction in a railroad bridge crossing a city street is shown, but, on the contrary, it was the work of competent engineers, approved by the chief engineer and surveyor of the city, and was in pursuance of an ordinance of councils authorizing it, the company cannot be held responsible for injuries resulting from the frightening of horses by the operation of its road over the bridge without negligence and without malice. *Ryan v. Pennsylvania R. Co.*, 132 *Pa. St.* 304, 19 *Atl. Rep.* 81.

**54. Who may be sued—Parties defendant.**—Where a railroad company has constructed a bridge over a street of the proper height, it is not bound to raise the bridge from year to year as the street may be raised by the municipality, by placing gravel or earth thereon; and as the municipality alone could make repairs to the streets, it alone is liable for an injury received by a party while passing under the bridge by reason of the earth having been raised, so as to cause him to come in contact with the bridge overhead. *Gray v. Danbury*, 29 *Am. & Eng. R. Cas.* 486, 54 *Conn.* 574, 10 *Atl. Rep.* 198.

*Conn. Rev. St.* 232, § 10, does not make a railroad company liable where the injury

resulted from the negligence of the party bound to keep the highway in repair. *Gray v. Danbury*, 29 *Am. & Eng. R. Cas.* 486, 54 *Conn.* 574, 10 *Atl. Rep.* 198.

Where a railroad company is authorized to maintain a bridge over a highway, and it becomes necessary to rebuild, and the company is not, in the opinion of the town selectmen, proceeding with necessary despatch, their whole duty is discharged by urging the company to proceed with more haste, and then applying to the district attorney and county commissioners, and filing a complaint with the railroad commissioners; and after doing so the town is not liable to a traveller injured on the highway under Mass. Pub. St. ch. 52, § 18; and the selectmen have no right to forcibly tear down and remove a temporary bridge erected by the company which they claim obstructs the highway. *Flanders v. Norwood*, 141 *Mass.* 17, 5 *N. E. Rep.* 256.

Where a railroad company is charged with the duty of keeping in proper repair a bridge and the approaches thereto, which form part of a highway, the town is not liable for injuries resulting from defects therein, though it may have contributed within six years to keeping the same in repair. *Wilson v. Boston*, 117 *Mass.* 509.—*QUALIFYING Commonwealth v. Deerfield*, 6 *Allen (Mass.)* 449.

A railroad company upon constructing their road along the bank of a stream built a bridge for travel over it, and closed up a fording previously used. *Held*, that the bridge became a public highway, and the township was liable for injury arising from its being negligently out of repair. *Tp. of Newlin v. Davis*, 77 *Pa. St.* 317.

Where a railroad appropriates a part of a public road and builds a bridge over its roadbed as a substitute for the part of the road appropriated, the railroad and the township do not stand in any relation to which the rule of *respondet superior* applies. They are independent parties, each charged with a duty to the public involving liability to an individual specially injured by a neglect of such duty. Neither can escape liability by alleging the primary liability of the other. *Gates v. Pennsylvania R. Co.*, 150 *Pa. St.* 50, 24 *Atl. Rep.* 638.

**55. Contributory negligence.**—  
(1) *What is.*—In the construction of a railroad across private property the company raised an embankment at a travelled



road, which had never been established or maintained as a public highway, and constructed a three-span trestle a short distance away, under which the public passed thereafter, generally going under the middle span as it was higher than the others. Plaintiff, to avoid the mud under the middle span, attempted to cross under one of the end spans on a loaded wagon and struck the trestle, on account of its being low, and was injured. The company had done nothing to indicate that the passage under the trestle was opened as a highway. *Held*, in an action to recover for the injury, that the company was entitled to an instruction to the jury that, if they believed from the evidence that the company did not construct the trestle for the purpose of an undergrade crossing, and did nothing to induce plaintiff to believe that it was so intended, they must find for the company. *Gulf, C. & S. F. R. Co. v. Montgomery*, 85 *Tex.* 64, 19 *S. W. Rep.* 1015.

In such case, even if it appeared that the railroad company intended the place as a public crossing, to entitle the plaintiff to recover it must have appeared that the place where the injury occurred was included, it appearing that the middle span was a safer place. *Gulf, C. & S. F. R. Co. v. Montgomery*, 85 *Tex.* 64, 19 *S. W. Rep.* 1015.

Where plaintiff goes upon a railroad bridge, contrary to directions and knowing that it is defectively constructed, he cannot recover from the company for injuries received. *Carney v. Carquet R. Co.*, 29 *New Brun.* 425.

(2) *What is not.*—Where a person, travelling on horseback, attempted to cross a bridge constructed and maintained by a railroad company as a portion of a crossing over its right of way, and such bridge was the only practicable crossing for him in the direction in which he was travelling, he was not guilty of negligence contributing to injuries caused through defects in such bridge, although he attempted to cross in the knowledge of such defects. *Gulf, C. & S. F. R. Co. v. Gasscamp*, 34 *Am. & Eng. R. Cas.* 6, 69 *Tex.* 545, 7 *S. W. Rep.* 227.

It is the duty of a railway company to keep a bridge over its track in such a state as not to be dangerous to any one using it in a lawful manner, and a child four years of age, falling through an opening in the ornamental ironwork with which the bridge

was fenced, is not guilty of contributory negligence. *Lay v. Midland R. Co.*, 34 *L. T.* 30 *Ex. D.*; *reversing s. c.*, 30 *L. T.* 529.

(3) *Question of fact.*—The question whether a party in attempting to cross a bridge on a totally dark night without any light was wanting in proper care and diligence is one of fact and not of law. *Swift v. Newbury*, 36 *Vt.* 355.

**56. Declaration.**—Where a railroad company is bound to keep a bridge forming part of a highway in a town in repair, notice to it that a person has been injured "by a defect in the bridge" is not sufficiently explicit in designating the cause of the injury, as is required by Mass. St. of 1877, ch. 234, § 3; and a complaint against the company, in an action to recover for injuries by reason of such defect, is bad on demurrer that alleges the cause of action in such general way. *Dickie v. Boston & A. R. Co.*, 8 *Am. & Eng. R. Cas.* 203, 131 *Mass.* 516.

Before a person can maintain an action against a company for injuries received by means of a defective bridge forming part of a highway, and which the company is bound to keep in repair, he must give the notice required by Mass. St. of 1877, ch. 234, § 3; and a declaration which does not aver the giving of such notice is bad on demurrer. *Dickie v. Boston & A. R. Co.*, 8 *Am. & Eng. R. Cas.* 203, 131 *Mass.* 516.

**57. Evidence.**—Where a company is sued for the death of a passenger caused by a bridge giving way, proof of a new bridge being subsequently constructed in a different manner is an admission that the one causing the injury was improperly constructed; but it does not amount to an admission that the defects were due to negligence. *Kansas Pac. R. Co. v. Miller*, 2 *Colo.* 442, 20 *Am. Ry. Rep.* 245.

Where a railway was sought to be charged with the death of a person resulting from a defective bridge, the company's bridge builder's opinion, as an expert, whether the accident was caused by defects in the bridge or not, was not admissible, the condition of the bridge being shown by other witnesses, they testifying to facts. *Toledo, P. & W. R. Co. v. Conroy*, 68 *Ill.* 560.

If a brick falls from a railway bridge over a highway, and injures a person passing beneath, there is *prima-facie* evidence from which the jury may infer negligence on the part of the company in keeping the bridge. *Kearney v. London, B. & S. C. R. Co.*, *L. R.*

5 *Q. B.* 411, 30 *L. J. Q. B.* 200, 18 *W. R.* 1000, 22 *L. T.* 886; *affirmed* 40 *L. J. Q. B.* 285, *L. R.* 6 *Q. B.* 759, 24 *L. T.* 913, 20 *W. R.* 24.

**58. Instructions.**—In a suit against a railway to recover for a personal injury received in consequence of a defective bridge, an instruction which seeks to make defendant's liability depend upon actual knowledge of the defects, and leaves out of view the obligation resting upon the company to use all reasonable means to acquire knowledge of the condition of its road, bridges, and other structures, is properly refused. *Toledo, P. & W. R. Co. v. Conroy*, 68 *Ill.* 560.

### III. BRIDGES OVER NAVIGABLE WATERS.

#### 1. In General.

**59. Authority to construct, generally.**—The right to bridge a navigable stream must be clearly and explicitly given; and it will not be implied simply because a navigable stream intervenes between the terminal points of the chartered right of way of a railroad. In such case the road must be carried across the stream upon such structures or in such a manner as not to seriously impair the usefulness of the stream for the purpose of navigation. *Little Rock, M. R. & T. R. Co. v. Brooks*, 39 *Ark.* 403, 17 *Am. & Eng. R. Cas.* 152.

The power conferred on a railroad company to build a main line involves the right to build branches and sidings to carry out the purpose of the company's charter, and in doing so it has the same rights in occupying a navigable stream that it has in the construction of the main line; and where the right to bridge a stream exists, it can occupy it longitudinally as well as at right angles or otherwise in building branches. *Schofield v. Pennsylvania S. V. R. Co.*, 2 *Pa. Dist.* 57.

The right to build a bridge across a navigable stream must be given by the sovereign power by special or general act. *Works v. Junction R. Co.*, 5 *McLean (U. S.)* 425.

A power to a railroad company to construct its road "over" a navigable stream implies the power of bridging the stream. *Works v. Junction R. Co.*, 5 *McLean (U. S.)* 425. Compare *Miller v. Prairie du Chien & McG. R. Co.*, 34 *Wis.* 533.

"Healy Slough" in the city of Chicago is not a navigable stream so as to render a

railroad company liable for bridging the same. *Healy v. Joliet & C. R. Co.*, 116 *U. S.* 191, 6 *Sup. Ct. Rep.* 352.

**60. Authority to construct given by congress.**—(1) *Generally.*—The control of congress over interstate commerce includes the power to regulate the bridging of navigable rivers running through two or more states. *Gilman v. Philadelphia*, 3 *Wall. (U. S.)* 713.—FOLLOWED IN *Rhea v. Newport News & M. V. R. Co.*, 52 *Am. & Eng. R. Cas.* 657, 50 *Fed. Rep.* 16. QUOTED IN *Easton v. New York & L. B. R. Co.*, 9 *Phila. (Pa.)* 475.

The general government has a right to prevent the bridging of navigable rivers in any manner except as prescribed by congress, and for this purpose may bring suits in the federal courts. *United States v. Milwaukee & St. P. R. Co.*, 5 *Biss. (U. S.)* 410.

The declarations in an act of congress that the bridge should not interfere with the free navigation of the river beyond what was necessary to carry into effect the rights and privileges thereby granted, as well as the grant of the right to build the bridge, include the right to maintain such structures as are essential parts of it. *Silver v. Missouri Pac. R. Co.*, 44 *Am. & Eng. R. Cas.* 467, 101 *Mo.* 79, 13 *S. W. Rep.* 410.

The question was made whether a certain body of water was a navigable stream within the meaning of the act of congress admitting the state into the union, providing that all navigable waters within the state should remain public highways and free, so as to prevent the state from authorizing a railroad company to bridge it without constructing a draw. It appeared that congress had declared the road a post-route, and had expressly provided that the company should construct drawbridges over other bodies of water, but made no mention of the one in question, and that in surveying the government lands the body of water was included, and that above the bridge it was only valuable for floating logs for one and a half miles, and was only used by one person. *Held*, sufficient to show that it was not a navigable stream. *Peters v. New Orleans, M. & C. R. Co.*, 56 *Ala.* 528.

(2) *Particular acts of congress.*—The act of congress of June 16, 1886, authorizing a railroad bridge across Staten Island Sound, and establishing the same as a post road, is within the general power of congress to regulate commerce. *Stockton v. Baltimore*

*Green & B. R. Nav. Co., 1 Int. Com. Rep. 411, 32 Fed. Rep. 9.*

The right given to the Pac. Railroad Company in its original charter by implication to bridge the Missouri river between Omaha and Council Bluffs, and expressly conferred by the act of Congress of July 2, 1874, was not repealed, but increased, recognized, and regulated by the act of February 24, 1871, entitled "An act to authorize the Union Pacific Railroad Company to issue its bonds to construct a bridge across the Missouri river at Omaha, Neb., and Council Bluffs, Iowa." *United States v. Union Pac. R. Co., 4 Dill. (U. S.) 479.*

A railroad road company was enjoined from erecting a bridge across a navigable river. Pending the case and after a preliminary injunction had issued, congress passed an act legalizing the structure. *Held:* (1) that it was competent for congress to legalize the bridge under its power to regulate commerce; (2) that the act gave the rule of decisions for the court at a final hearing. *Gray v. Chicago, I. & N. R. Co., 10 Wall. (U. S.) 454.*

**61. Authority given by state statutes.**—(1) *Generally.*—The states may authorize the construction of bridges over navigable rivers within their boundaries, until congress intervenes and supersedes the authority. The power of congress is exclusive only as to matters that are national in their character and require uniform regulations. *Cardwell v. American River Bridge Co., 113 U. S. 205, 5 Sup. Ct. Rep. 423.*—*FOLLOWED IN* *Hamilton v. Vicksburg, S. & P. R. Co., 119 U. S. 280;* *Rhea v. Newport News & M. V. R. Co., 52 Am. & Eng. R. Cas. 657, 50 Fed. Rep. 16.*

States may authorize the bridging of navigable streams, if such authorization does not conflict with the United States constitution and laws. *Wilson v. Blackbird Creek Marsh Co., 2 Pet. (U. S.) 245.*—*FOLLOWED IN* *Rhea v. Newport News & M. V. R. Co., 52 Am. & Eng. R. Cas. 657, 50 Fed. Rep. 16.* *QUOTED IN* *Easton v. New York & L. B. R. Co., 9 Phila. (Pa.) 475.*

A state legislature may authorize the building of a bridge or other structure tending to obstruct the navigation of a navigable river which is altogether within its own own boundary, so long as congress does not interfere. *Green & B. R. Nav. Co. v. Chesapeake, O. & S. W. R. Co., 37 Am. & Eng. R. Cas. 238, 88 Ky. 1, 10 S. W. Rep. 6.*

—*FOLLOWING* *Green & B. R. Nav. Co. v. Palmer, 83 Ky. 646.* *QUOTING* *Hamilton v. Vicksburg, S. & P. R. Co., 119 U. S. 280.*—*FOLLOWED IN* *Rhea v. Newport News & M. V. R. Co., 52 Am. & Eng. R. Cas. 657, 50 Fed. Rep. 16.*

When a navigable river is entirely within the boundaries of a state, the state legislature may authorize the building of a bridge or other structure which tends to obstruct the navigation, and such power is only limited by the constitutional provision conferring upon congress the right to regulate commerce between the states, when congress has declared that such obstructions are an unlawful exercise of the power of the state. *Green & B. R. Nav. Co. v. Chesapeake, O. & S. W. R. Co., 37 Am. & Eng. R. Cas. 238, 88 Ky. 1, 10 S. W. Rep. 6.*—*QUOTING* *Hamilton v. Vicksburg, S. & P. R. Co., 29 Am. & Eng. R. Cas. 490, 119 U. S. 280.*

Where the law gave defendant, a railroad company, the right to construct its road between certain termini, by which it became necessary to cross a navigable river, the right to use such river in a reasonable manner naturally followed. *Schofield v. Pennsylvania S. V. R. Co., 2 Pa. Dist. 57.*—*DISTINGUISHING* *Edgewood R. Co.'s Appeal, 79 Pa. St. 257.*

The authority to build a bridge over a navigable stream is implied from the power to construct a railroad over such stream. *Works v. Junction R. Co., 5 McLean (U. S.) 425.*

The right to cross a navigable river by a railroad bridge must be given by the sovereign power, by a general or special act. Where this is not done, neither the state board of public works of Ohio nor the acting commissioner thereof can approve of the building of a bridge over it. *Works v. Junction R. Co., 5 McLean (U. S.) 425.*

(2) *California.*—The State of California was admitted into the Union by an act containing a provision to the effect that its navigable waters should be "common highways and forever free." *Held,* that this did not prevent the state from conferring authority upon a company to bridge a navigable stream. *People v. Potrero & B. V. R. Co., 67 Cal. 166, 7 Pac. Rep. 445.*

(3) *Kentucky.*—The state of Kentucky, having improved the navigation of the Green and Barren rivers by means of locks and dams, incorporated a navigation com-

pany and leased to it "the Green and Baren river line of navigation, together with the grounds, houses, etc., and all the franchises thereunto belonging or appertaining." The lessee was required to keep the line of navigation in repair and to permit water-craft to navigate the rivers upon the payment of tolls. *Held*, that the navigation company only acquired an exclusive right to the use of the locks and dams and other improvements, that its interest in the right of navigation was the same as belonged to the public generally, and that the state might, without impairing any contract entered into by it, authorize a railroad company to construct a bridge across the river. *Green & B. R. Nav. Co. v. Chesapeake, O. & S. W. R. Co.*, 37 *Am. & Eng. R. Cas.* 238, 88 *Ky.* 1, 10 *S. W. Rep.* 6.

The repair of the bridge having become necessary, the railway company gave notice to the navigation company of its intention to execute the necessary repairs. The repairs were made at a time of the year when the work was likely to interfere with navigation least, and no unreasonable delay took place. *Held*, that the railroad company was not bound to adopt an unusual and expensive course in executing the repairs for the purpose of leaving the navigation entirely free, and that any loss sustained by the navigation company from the interruption was *damnum absque injuria*. *Green & B. R. Nav. Co. v. Chesapeake, O. & S. W. R. Co.*, 37 *Am. & Eng. R. Cas.* 238, 88 *Ky.* 1, 10 *S. W. Rep.* 6.

(4) *South Carolina*.—A statute provided that a railroad company might bridge a navigable river, although the bridge might not be of sufficient height to permit steamboats to pass without lowering their smoke-stacks, but that the company should pay all the expense which any steamboat might incur by reason of any alterations which might be rendered necessary and by the necessity of lowering the smoke-stacks of such steamers. *Held*, that, under this statute, owners of steamboats could not recover such damages as resulted to them which were common to the public generally, or for expenses incurred by having to keep boats both above and below the bridge, or for other expenses not coming within the terms of the statute; and the fact that the owners of such boats were a corporation would give them no greater rights than were given to individuals.

*South Carolina Steamboat Co. v. South Carolina R. Co.*, 30 *So. Car.* 539, 4 *L. R. A.* 209, 9 *S. E. Rep.* 650.—**DISTINGUISHING** *Crouch v. Charleston & S. R. Co.*, 21 *So. Car.* 495.

(5) *Wisconsin*.—The Wisconsin legislature may authorize the construction of bridges across the navigable waters leading into the Mississippi river, but such bridges must be so constructed and maintained as not materially or unnecessarily to obstruct navigation. *Sweeney v. Chicago, M. & St. P. R. Co.*, 20 *Am. & Eng. R. Cas.* 268, 60 *Wis.* 60, 18 *N. W. Rep.* 756.

**62. Authority given by 20 Vle. ch. 12.**—At the time a railroad company built a fixed bridge across a navigable river the law made such bridges unlawful, but before a bill was filed to remove the bridge, the law was changed so as, *inter alia*, to provide that it should not be lawful for a railway company to substitute any swing, draw, or other movable bridge in the place of any fixed bridge, without the consent of the governor in council. *Held*, that the law legalized the bridge and that the bill would not lie. *Cull v. Grand Trunk R. Co.*, 10 *Grant Ch. (U. C.)* 491.

It would seem that in such a case the bill should be by the attorney-general, the statute referred to having been passed for the general benefit of the public. *Cull v. Grand Trunk R. Co.*, 10 *Grant Ch. (U. C.)* 491.

**63. Authority given by municipal ordinance.**—A bridge built by a railway company over a navigable stream within the limits of a city, for the use of the railroad, under an ordinance of the city granting permission and providing the manner in which it should be built, may be regarded as having been constructed by the city, and as falling fairly within the power given to it to construct and repair bridges and regulate the use thereof. *McCartney v. Chicago & E. R. Co.*, 29 *Am. & Eng. R. Cas.* 326, 112 *Ill.* 611.

**64. Authority given by company's charter.**—A provision in the charter of a railroad company to build by a designated route which crosses navigable streams, contains the implied right to the company to bridge the streams. *People v. Potrero & B. V. R. Co.*, 67 *Cal.* 166, 7 *Pac. Rep.* 445.

A declaration, the gravamen of which was that the defendants had built a railroad bridge over navigable water—*held*, bad on demurrer, it appearing to the court, from the charter of the defendants and its sup-

plement, that they were authorized to extend their road over the waters in question, and to erect bridges over all navigable waters in the line of such extension. *Stephens & C. Transp. Co. v. Central R. Co.*, 33 N. J. L. 229.—DISTINGUISHED IN *Weber v. Morris & E. R. Co.*, 35 N. J. L. 409.

**65. Bridging river which is boundary between states.\***—Under its power to regulate interstate commerce, congress may authorize the bridging of a navigable river which forms the line between two states, though one of the states refuses to give its consent thereto. *Pennsylvania R. Co. v. Baltimore & N. Y. R. Co.*, 37 Fed. Rep. 129.

**66. Powers and duties of commissioners.**—Under the provisions of 3 Curwen, Ohio Rev. St. 1852, § 20, either the board of public works or the acting commissioner thereof, within his district, may approve the plan of a proposed bridge across a navigable stream, and as the law provides for no appeal in such case, the decision of such commissioner in favor of a proposed railroad bridge is final. *Works v. Junction R. Co.*, 5 McLean (U. S.) 425. Compare *Waterbury's Appeal*, 57 Conn. 84, 17 Atl. Rep. 355.

**67. Powers and duties of the secretary of war.**—Congress has the right to regulate the building of bridges across the Mississippi river, and it may delegate the power of so regulating them to the head of one of the departments of the general government, such as the secretary of war. *United States v. Milwaukee & St. P. R. Co.*, 5 Biss. (U. S.) 410.

Under the acts of congress of April 1 and June 4, 1872, the secretary of war has a right to declare that a bridge across the Mississippi river at any particular place shall not be built, having first determined that it would seriously affect navigation. *United States v. Milwaukee & St. P. R. Co.*, 5 Biss. (U. S.) 410.

The power of the secretary of war, under acts of congress, to consent to or disapprove of bridges across the waters of the Mississippi being undoubted, his disapproval in a given case will not be disregarded by the courts, though technically it is not in such form as it should have been, but where there

is sufficient to make his disapprobation apparent. *United States v. Milwaukee & St. P. R. Co.*, 5 Biss. (U. S.) 410.

Where the plans of a proposed bridge across the Ohio river, to be erected under the act of congress of December 17, 1872, have been submitted to the secretary of war and approved by a board of engineers appointed to examine them, with a dike 300 feet long, after the structure is nearly completed it is not competent for the secretary of war to order the company to construct a dike 918 feet long, and the company need not comply with such order. *United States ex rel. v. Pittsburgh & L. E. R. Co.*, 26 Fed. Rep. 113.

**68. Sufficiency—Must conform to the requirements of law.\***—When a company bridges a navigable stream under authority of law, the bridge must be constructed and maintained in conformity with the requirements of the law. *Bailey v. Philadelphia, W. & B. R. Co.*, 4 Harr. (Del.) 389.

Where a company is proceeding to erect a bridge across a navigable stream under an act of congress, the United States may maintain a suit to compel compliance with the terms of the statute, or to abate the bridge. *United States ex rel. v. Pittsburgh & L. E. R. Co.*, 26 Fed. Rep. 113.

Where authority from congress, or from a state, to bridge a navigable stream does not make the bridge a lawful structure unless it conforms to the law authorizing it. *Pennsylvania R. Co. v. Baltimore & N. Y. R. Co.*, 37 Fed. Rep. 129.

Under the act of congress of July 25, 1886, authorizing the construction of a bridge across the Missouri river at Kansas City, but providing that such bridge, if a drawbridge, shall be built "with spans of not less than 160 feet in length in the clear on each side of the central or pivot pier of the draw, and the pier of said bridge shall be parallel with the current of the river," the distance of the spans must be obtained by measuring along a line, between the piers, drawn perpendicularly to the faces of the piers and the current of the river; and a bridge measuring less than 160 feet between the piers, so calculated, although having a span of 160 feet measuring along the line of the bridge, is not a lawful structure. *Hannibal & St. J. R. Co. v. Missouri River*

\* Power of congress with respect to bridging navigable streams which are boundary lines between states, see 37 AM. & ENG. R. CAS. 244, *abstr.*

\* See *ante*, 21.

*Packet Co.*, 34 *Am. & Eng. R. Cas.* 157, 125 *U. S.* 260, 8 *Sup. Ct. Rep.* 874.

Where the charter of a railroad company requires it to construct a suitable bridge over any navigable stream that may be crossed, and requires that such bridge shall be located at a point convenient for navigation, in the absence of any allegation of want of care or good faith in the selection of the location of such bridge, the company is not liable at the suit of an individual who claims to have been damaged from a mislocation of the bridge. If the company has not exercised good faith in the matter the remedy is by a suit in the name of the state. *Stephens & C. Transp. Co. v. Central R. Co.*, 34 *N. J. L.* 280.—QUOTING *Clarke v. Birmingham & P. Bridge Co.*, 41 *Pa. St.* 147.—FOLLOWED IN *Attorney-General ex rel. v. New York & L. B. R. Co.*, 24 *N. J. Eq.* 49.

A statute authorizing a company to bridge a navigable river, but providing that the bridge should be at least 42 feet high, requires it to maintain the structure that height, in a case where the bed of the river is filled up after the bridge is constructed; and though a first bridge may be of the required height, a second bridge erected after the river is filled, which is not 42 feet high, is a violation of the statute. *State v. South Carolina R. Co.*, 28 *So. Car.* 23, 4 *S. E. Rep.* 796.

Special damages attending the nonconformity of a railroad bridge over a navigable stream with the requirements of the statute by virtue of which it was constructed are actionable. *Bailey v. Philadelphia, W. & B. R. Co.*, 4 *Harr. (Del.)* 389.

## 2. Drawbridges.

### a. In General.

**69. Authority to construct.**—Where a railroad company is authorized to erect a drawbridge over a navigable stream, persons interested in its navigation cannot because of any contract between the legislature and the plaintiffs maintain an action to prevent the erection of the bridge, on the alleged ground that it will inconvenience the navigation of the river. Each interest, as against the other, is entitled to all of a reasonable construction that the grant will justify. *Attorney-General ex rel. v. New York & L. B. R. Co.*, 24 *N. J. Eq.* 49.

The act of congress of February 20, 1811,

*inter alia* declaring that the Mississippi and its navigable tributaries should be highways and forever free, does not prohibit a state from authorizing a railroad company to erect a drawbridge over one of said streams. *Hamilton v. Vicksburg, S. & P. R. Co.*, 29 *Am. & Eng. R. Cas.* 490, 119 *U. S.* 280, 7 *Sup. Ct. Rep.* 206.—FOLLOWED IN *Rhea v. Newport News & M. V. R. Co.*, 52 *Am. & Eng. R. Cas.* 657, 50 *Fed. Rep.* 16. QUOTED IN *Green & B. R. Nav. Co. v. Chesapeake, O. & S. W. R. Co.*, 37 *Am. & Eng. R. Cas.* 338, 88 *Ky.* 1, 10 *S. W. Rep.* 6.

Where a bill is filed to restrain the erection, over a navigable stream, of a drawbridge which is intended to be both a common highway and to accommodate railroad traffic, the question for the court in determining whether an injunction should be granted is whether the navigation of the river will be seriously or materially impaired, taking into consideration the amount of traffic by water and also the number of trains and the amount of travel that will pass over the bridge. *Silliman v. Hudson River Bridge Co.*, 4 *Blatchf. (U. S.)* 74.

Under the acts of parliament referring thereto, the erection of the defendant's drawbridge over the Desjardins canal was sanctioned and recognized, and it must be assumed to have been lawfully erected, though the formalities required by §§ 136, 137, and 138 of the railway act may not have been complied with. *Desjardins Canal Co. v. Great Western R. Co.*, 27 *U. C. Q. B.* 363.

**70. Duty to construct.\***—Under the Mississippi act of February 7, 1867, it became the duty of the New Orleans, Mobile & Texas Railroad to build and maintain a drawbridge over Pearl river, wide enough to allow vessels sixty feet wide to pass; and there is nothing to relieve the company of the duty to maintain a draw in the act of congress of March 2, 1868, fixing the width of the draw of other bridges of the company, but saying nothing about the one over Pearl river. *New Orleans, M. & T. R. Co. v. Mississippi*, 20 *Am. & Eng. R. Cas.* 510, 112 *U. S.* 12, 5 *Sup. Ct. Rep.* 19.

Under New York act of 1846, chartering the Hudson River Railroad Company, and providing that where the road crosses any

\* Right of railroad company to bridge over navigable waters; duty to construct drawbridge, see 48 *AM. & ENG. R. CAS.* 76, *abstr.*



bay the company shall construct a draw-bridge, the term "bay" only includes such as have a general navigation, and does not include an indentation which at low water contains but a few inches, and only three or four feet at any time, and which is only used by one person in transporting sand across the river in the winter-time on the ice, and at other times by scows. *Getty v. Hudson River R. Co.*, 21 Barb. (N. Y.) 617.

It was sought by the owner of a lot of ground abutting upon "Healy Slough," by bill in chancery, to compel a railroad to remove a permanent bridge over the same and restore the water to its former condition by constructing a drawbridge or otherwise, so as not impair its usefulness and to enable complainants to navigate it from Chicago river to a canal or slip owned by them. It appeared that there was a space of ground, over which they had no control, which cut off the water connection. *Held*, that a court of chancery would not grant the prayer of the bill. *Joliet & C. R. Co. v. Healy*, 94 Ill. 416.

**71. Sufficiency.**—A bridge company built a bridge over the Missouri river, under authority of an act of congress, which provided that such bridge should not interfere with the free navigation of the river, beyond what was necessary in order to carry into effect the rights and privileges granted the act; that if built as a drawbridge it should be a pivot drawbridge, with the draw over the main channel of the river at an accessible and navigable point, and with spans of certain length on each side of the pivot pier, and that the piers should be parallel with the current. The bridge company built their bridge with two draw-rests, one above and the other below the pivot pier, and one hundred and forty feet distant from it. Afterwards the bridge company leased the bridge structure to the defendant. Three years after, plaintiff's boat, while attempting to go through the draw during a high stage of water, was driven against one of the piers by the current and sunk. The plaintiff charged that the piers were not parallel to the current, and that the draw-rests above the bridge caused a cross-current which drove the boat against the pier. *Held*, that if the bridge was so built that the piers were parallel to the usual and ordinary course of the current it was a sufficient compliance with the act, and that this question was properly one for the jury. *Silver v.*

*Missouri Pac. R. Co.*, 44 Am. & Eng. R. Cas. 467, 101 Mo. 79, 13 S. W. Rep. 410.

There being no evidence tending to show that the draw-rests were unauthorized structures, that issue should not have been submitted to the jury. *Silver v. Missouri Pac. R. Co.*, 44 Am. & Eng. R. Cas. 467, 101 Mo. 79, 13 S. W. Rep. 410.

Under the act of congress of July 26, 1866, authorizing the construction of certain bridges and providing that the spans on each side of a drawbridge built with a pivot should be at least 160 feet wide in the clear and parallel with the current of the river, in ascertaining whether a span is of the required length the measurement must be on a line running at right angles with the current. *Missouri River Packet Co. v. Hannibal & St. J. R. Co.*, 20 Am. & Eng. R. Cas. 275, 79 Mo. 478. *Attorney-General ex rel. v. New York & L. B. R. Co.*, 24 N. J. Eq. 49.

**72. Not deemed nuisances.\***—The erection of bridges over rivers, with proper draws, so constructed and placed as to do the least possible injury to navigation, has never been held to be a nuisance. The slight but unavoidable obstruction which such bridges occasion is a necessary evil which must be borne for the sake of the public good which demands it. *Attorney-General v. Paterson & H. R. Co.*, 9 N. J. Eq. 526.—DISTINGUISHED IN *Attorney-General ex rel. v. New York & L. B. R. Co.*, 24 N. J. 49. QUOTED IN *Raritan Tp. v. Port Reading R. Co.*, 49 N. J. Eq. 11. REVIEWED IN *Stevens v. Paterson & N. R. Co.*, 20 N. J. Eq. 126.

**73. Widening the draw.**—Where the commonwealth owns a drawbridge over a navigable stream its right to widen the draw is not affected by the fact that it has granted to a street-car company the right to run cars over the bridge, and that the same will be temporarily interrupted by widening the draw. *Middlesex R. Co. v. Wakefield*, 103 Mass. 261.

**74. Speed of train while on bridge.**—Where a railroad drawbridge over a navigable river is approached on one side by a very long trestle, and where the rules of a company and a statute, conceded by counsel to be applicable, require trains to "slow down to a speed of not more than four miles an hour before running on or crossing

\* See post, 88.

any drawbridge," the restriction as to speed applies to the bridge proper and not to the trestle or approach thereto. This is matter of construction for the court, and not a question of fact for the jury. If the speed of the train is so regulated that it will not be more than four miles an hour when it runs on the drawbridge, there is no violation of the rule or of the statute in approaching the bridge. *Savannah, F. & W. R. Co. v. Daniels*, 90 Ga. 608.

**b. Rights, Duties, and Liabilities with Respect to Passing Vessels.**

**75. Generally.**—Where a railroad bridge with its draw closed is an obstruction of a navigable river, parties using the river are not bound to notify the railroad company to open the draw every time they wish to pass through, nor are they bound to open the draw themselves, nor to use only such vessels as can pass under the bridge when the draw is closed. *Gates v. Northern Pac. R. Co.*, 64 Wis. 64, 24 N. W. Rep. 494.—QUOTING *Smith v. Chicago & N. W. R. Co.*, 23 Wis. 267. REVIEWING *Hooper v. Chicago & N. W. R. Co.*, 27 Wis. 81.

A railroad company authorized by its charter to erect a bridge over a navigable river, "provided that it does not unnecessarily impair the usefulness of the river to the public," and requiring it to construct a draw, is not entitled to an injunction to restrain towboats from passing the bridge with more than two boats in tow, at least before the company establishes its right by an action at law where defendant may have a trial by jury. *Texas & P. R. Co. v. Interstate Transp. Co.*, 45 Fed. Rep. 5.

**76. Duty to open draw.**—Under Massachusetts Pub. St. ch. 112, § 150, providing that the superintendent of a drawbridge shall at all hours of the day and night be ready to open it for the passage of vessels, but providing that "a railroad train shall be allowed fifteen minutes to cross a draw before and after it is due by its timetable, and any approaching train shall be allowed a further reasonable time to pass," a superintendent has no right to open the draw within the fifteen minutes provided by the statute. *Jennings v. Fitchburg R. Co.*, 146 Mass. 621, 6 N. Eng. Rep. 269, 16 N. E. Rep. 468.

A railway company which has bridged an unnavigable river is not required by § 15 of the Railways Clauses Act 1863 to open the

span of the bridge for a barge with a mast so constructed that it can be lowered. *West Lancashire R. Co. v. Iddon*, 49 L. T. 600, 48 J. P. 199.

A railway company which has employed a contractor to construct a bridge in conformity with the provisions of a statute forbidding the detention of vessels, is liable if, owing to some defect in the construction of the bridge, it cannot be opened and a vessel is prevented from passing. *Hole v. Sittingbourne & S. R. Co.*, 6 H. & N. 488, 30 L. J. Ex. 81, 9 W. R. 274, 3 L. T. 750.

A count in a declaration charging defendants with neglect and refusal to open a bridge and permit vessels to enter or leave a canal is defective, in not alleging that it was not at such times being actually used by defendants for the passage of their trains. *Desjardins Canal Co. v. Great Western R. Co.*, 27 U. C. Q. B. 363.

**77. Delay in opening draw.**—A railroad company which maintains a drawbridge over navigable waters must exercise reasonable care, not only not to impede the safe navigation of passing vessels, but also to obviate any unnecessary delay to such vessels; and where the character of the water-way demands it, it must employ and enforce a system of signals by which approaching vessels can be informed when a safe distance from the bridge whether they can proceed or must manoeuvre for delay. *Central R. Co. v. Pennsylvania R. Co.*, 58 Am. & Eng. R. Cas. 619, 59 Fed. Rep. 192.

The opening of a draw in a railroad bridge was so delayed after signals that those in charge of a tug navigating her in the exercise of their best judgment were unable to avoid a collision with the bridge, whereby the tow sustained injury. *Held*, that the railroad company was liable because of its neglect to seasonably open the draw or to give proper notice of its intention to do so when the tow was sufficiently far away to permit proper precautions to be taken for its safety. *Central R. Co. v. Pennsylvania R. Co.*, 58 Am. & Eng. R. Cas. 619, 59 Fed. Rep. 192.

Where a railroad company is authorized by an act of congress to construct a drawbridge over a navigable river, such act providing that it shall keep the draw "in efficient working condition at all times," the company is liable for delays to vessels caused by the draw being injured by a passing vessel, and consequently closed for several

days for repairs. *Jones v. Baltimore & P. R. Co.*, 4 *Mackey* (D. C.) 106.

**78. Right to close draw.**—The New Jersey act of 1874, providing that the owners of bridges may in certain cases obstruct navigation, does not authorize an entire obstruction by closing drawbridges, unless it be when work is being done on the bridges which requires that they be closed. *Lister v. Newark Plank Road Co.*, 36 *N. J. Eq.* 478.

Which means of travel—the highway across the stream or the highway up and down the stream—is to be preferred is a question which can only be decided by the legislature. So *held*, where the owners of a railroad bridge, with a draw, claimed the right to close the draw and stop the navigation of the river. *Lister v. Newark Plank Road Co.*, 36 *N. J. Eq.* 477.

The railway company had the control of a swing-bridge over a canal. Plaintiff's ship was navigating the canal at the same time that trains were about passing and re-passing the bridge. Notice was given of plaintiff's vessel being about to pass by blowing a horn and hailing, and notice was given by the railway company's servants by signal (the usual and customary one) that the bridge could not then be swung, and injury was received by plaintiff's vessel from the bridge remaining closed. *Held*, that as the requirements of the railway traffic compelled the bridge to be closed, the company were not then bound to open the bridge, and were not liable for the injury occasioned the vessel. *Turner v. Great Western R. Co.*, 6 *U. C. C. P.* 536.

**79. Injuries to vessels caused by defective draws.**—Knowledge on the part of persons navigating a river that a draw in a railroad bridge is defective will not relieve the owners of the bridge from all responsibility; neither is it such proof of contributory negligence as to authorize a court to order a nonsuit in an action for injuries to a vessel. *Crouch v. Charleston & S. R. Co.*, 29 *Am. & Eng. R. Cas.* 495, 21 *So. Car.* 495.—DISTINGUISHED IN *South Carolina Steamboat Co. v. South Carolina R. Co.*, 30 *So. Car.* 539.

*South Carolina Gen. St.* § 1115, providing a forfeiture of \$50 against all vessels, boats, or rafts passing under any bridge without dropping anchor and dragging through under the same, has no application where the owner of a vessel sues a company

owning a bridge for injuries received while navigating the river by reason of a defective draw. *Crouch v. Charleston & S. R. Co.*, 29 *Am. & Eng. R. Cas.* 495, 21 *So. Car.* 495.

**80. Running train into open draw.**—Where a railroad company negligently runs a train into an open draw, which it is bound to maintain, thereby obstructing the navigation of the river, it is liable to persons engaged in the navigation for delays caused thereby, though it uses due diligence to remove the obstruction. *Briggs v. New York C. & H. R. R. Co.*, 30 *Hun* (N. Y.) 291.

**81. Which of two vessels entitled to pass first.**—Massachusetts act of 1874, ch. 373, § 110, gives the superintendent of a drawbridge absolute power to decide which of two vessels shall pass the draw first, when the two apply at the same time; and if the company owning the bridge was authorized to construct it, it is not liable for the act of the superintendent in allowing one to pass before the other. *Commonwealth v. Chase*, 127 *Mass.* 7.

The absolute right of a superintendent of a drawbridge to decide which of two vessels shall pass the draw first, when the two apply at the same time, whether the same be sailing- or steam-vessels, as provided by Mass. act 1874, ch. 373, § 110, is not affected by the act of 1872, ch. 221, as that act only applies to opening drawbridges for the passage of vessels propelled by steam, and has no reference to delays of such vessels in consequence of the presence of sailing vessels, or by reason of accidental obstructions. *Commonwealth v. Chase*, 127 *Mass.* 7.

### 3. Obstructing Navigation.

**82. Generally.\***—It is the duty of owners of bridges across navigable streams to use reasonable diligence to prevent the accumulation of drift against the piers, either above or below the surface of the water, such as might endanger navigation; and a failure to keep their piers clear will render the owners liable for injuries to vessels which are navigated with proper care and skill. *St. Louis, I. M. & S. R. Co. v. Meese*, 44 *Ark.* 414.

\* Obstruction of navigation of vessels in rivers, see note, 29 *AM. & ENG. R. CAS.* 494.

Broken railroad bridge in a navigable river. Duty of company to remove debris, see 25 *AM. & ENG. R. CAS.* 285, *abstr.*

The owners of a wharf upon which rests the end of a railroad bridge, built across navigable water by authority of the legislature, cannot recover damages of the railroad company under Mass. Rev. St. ch. 39, § 56, for occupying with their bridge the space over the navigable channel, which would otherwise serve for a vessel's berth at such wharf. *Boston W. R. Corp. v. Old Colony R. Corp.*, 12 Cush. (Mass.) 605.—CRITICISED IN *Boston Gas Light Co. v. Old Colony & N. R. Co.*, 14 Allen (Mass.) 444. DISTINGUISHED IN *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504.

Bridges built under and pursuant to the terms of an act of congress are lawful structures. An act of congress authorizing a partial obstruction of navigation will not, however, protect an impediment not contemplated by the statute, and any excess in the exercise of the powers granted by which navigation is impaired becomes a nuisance *pro tanto*. *Silver v. Missouri Pac. R. Co.*, 44 Am. & Eng. R. Cas. 467, 101 Mo. 79, 13 S. W. Rep. 410.

Where an act of congress authorizes the construction of a bridge over a navigable river, if the bridge in any part be not constructed according to the terms of the act, it will be an unlawful structure to the extent of such departure, and will render the owners liable for injuries to vessels where they are navigated with ordinary skill and care. *Missouri River Packet Co. v. Hannibal & St. J. R. Co.*, 20 Am. & Eng. R. Cas. 275, 79 Mo. 478.—QUOTING *Missouri River Packet Co. v. Hannibal & St. J. R. Co.*, 2 Fed. Rep. 290.

The bridge over the Ohio river at Parkersburg being authorized by a law of congress, the obstruction of navigation at that point, so far as it was reasonable and necessary to the construction of the work, was justified; and in considering the rights of navigation, they must be viewed as limited by those rights which have been conferred upon the bridge company by the law authorizing the structure in question. *Baltimore & O. R. Co. v. Wheeling, P. & C. Transp. Co.*, 32 Ohio St. 116.

An act of congress declaring a bridge "a lawful structure" supersedes a decree of the U. S. Supreme Court ordering it abated as an obstruction. *Pennsylvania v. Wheeling & B. Bridge Co.*, 18 How. (U. S.) 421.—REVIEWED IN *Eaton v. New York & L. B. R. Co.*, 9 Phila. (Pa.) 475.

**83. While the bridge is being built.\***—The obstruction of navigation is lawful when caused by the construction of a bridge across a navigable stream by a railway company under authority of its charter, by the placing in the stream of such temporary structures as are absolutely essential, and without which the work could not be accomplished, the railway company taking care that such obstruction shall extend no further and be maintained no longer than is absolutely necessary for the erection and completion of the bridge by the exercise of due diligence and the employment of an adequate force of men and machinery. *Cantrell v. Knoxville, C. G. & L. R. Co.*, 90 Tenn. 638, 18 S. W. Rep. 271.

Such temporary and necessary obstruction of navigation is not within the prohibition of the statute which provides: "No mill-dam, fish-trap, bridge, or other improvement shall be allowed so as to interrupt or in any way injure or impair the navigation of any navigable watercourse of the state." *Cantrell v. Knoxville, C. G. & L. R. Co.*, 90 Tenn. 638, 18 S. W. Rep. 271.

Where by its charter a railroad company is authorized to build a bridge over a navigable stream, with the proviso that the navigation of said stream shall not be thereby obstructed, it is held that a temporary obstruction, such as the necessary framework and scaffolding used in the erection of said bridge, is an obstruction, within the meaning of the charter, for which the company would be liable to any person damaged thereby. *Memphis & O. R. Co. v. Hicks*, 5 Sneed (Tenn.) 427.

Where a railroad company commenced the erection of a bridge in the month of January, and was not authorized by a legislative act to build the bridge until the March following, such authority to build will not relieve the company from liability for damages occurring between the above dates. *Smith v. Louisville, N. O. & T. R. Co.*, 62 Miss. 510.

**84. While a bridge is being rebuilt.**—A railroad company which began to rebuild a bridge crossing navigable waters on January 7th, and finished the work on March 2d, is liable for damages for obstruct-

\* Obstruction of stream while building a bridge, how far allowable, see 52 AM. & ENG. R. CAS. 667, *abstr.*

Liability of railroad companies in constructing bridges over navigable rivers, see note, 20 AM. & ENG. R. CAS. 285.

ing navigation upon the last two days, by force of the provisions of the act respecting bridges. New Jersey Rev. p. 87, § 10. *Delaware, L. & W. R. Co. v. Mehrhof*, 53 N. J. L. 205, 23 Atl. Rep. 170.

**85. While a bridge is being repaired.**\*—A railroad company authorized to bridge a navigable river is not liable in damages to the owner of a vessel for a temporary obstruction of navigation while repairing the bridge. The inconvenience is *damnum absque injuria*. *Hamilton v. Vicksburg, S. & P. R. Co.*, 29 Am. & Eng. R. Cas. 490, 119 U. S. 280, 7 Sup. Ct. Rep. 206.—FOLLOWING *Escanaba Co. v. Chicago*, 107 U. S. 678; *Cardwell v. American River Bridge Co.*, 113 U. S. 205.—FOLLOWING IN *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 32 Fed. Rep. 566; *Rhea v. Newport News & M. V. R. Co.*, 52 Am. & Eng. R. Cas. 657, 50 Fed. Rep. 16.

A railroad company was authorized to bridge a certain navigable stream "so as not unreasonably to obstruct navigation." After the bridge was erected it became necessary to repair it, and in doing so it became necessary to obstruct temporarily the navigation of the river, but the company offered to transfer all river freights without extra charge to the shippers. The amount of shipping by railroad largely exceeded that by the river. *Held*, that this was not an unreasonable obstruction, and that a shipper who refused to send any freight by water could not recover from the company the extra cost of sending it over another line. *Rhea v. Newport News & M. V. R. Co.*, 52 Am. & Eng. R. Cas. 657, 50 Fed. Rep. 16.—DISTINGUISHING *Pennsylvania v. Wheeling & B. Bridge Co.*, 13 How. (U. S.) 518; *Grand Trunk R. Co. v. Backus*, 46 Fed. Rep. 216. FOLLOWING *Northern Transp. Co. v. Chicago*, 99 U. S. 635; *Hamilton v. Vicksburg, S. & P. R. Co.*, 119 U. S. 280, 7 Sup. Ct. Rep. 206; *Green & B. R. Nav. Co. v. Chesapeake, O. & S. W. R. Co.*, 88 Ky. 1, 10 S. W. Rep. 6. QUOTING *Cardwell v. American River Bridge Co.*, 113 U. S. 210, 5 Sup. Ct. Rep. 423.

In repairing a railroad bridge it was necessary to set piles in the river. The repairs were finished when the river was frozen over, and the piles were cut off even with the ice, and as the river fell they were cut

off again, so that after the ice had broken up they were left some 18 to 30 inches below the surface of the water. Plaintiff was engaged in floating rafted logs down the river and sued on account of an obstruction to the navigation. The master found that plaintiff continued to safely float his logs after the ice broke until the following summer, when the river was too low to be so used, if the stumps of the piles had been removed. *Held*, that this was equivalent to a finding that the piles had been properly removed, and that plaintiff was not entitled to damages. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 32 Fed. Rep. 566.—FOLLOWING *Hamilton v. Vicksburg, S. & P. R. Co.*, 119 U. S. 280, 7 Sup. Ct. Rep. 206.

The power to build a bridge across a navigable stream implies the power to make necessary repairs thereon; and where piling is necessary in making such repairs a party temporarily obstructed from navigating the river by reason of such piles cannot recover damages therefor, where the piles are driven and used in an ordinarily skilful manner. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 32 Fed. Rep. 566.

**86. Remedy for obstructing navigation.**—(1) *Generally.*—The obstruction of a navigable stream by a railroad bridge is a public nuisance to be abated by indictment, but a party who has been specially damaged thereby may maintain an action against the railroad. *South Carolina R. Co. v. Moore*, 28 Ga. 398.

A person interested in the navigation of a stream or an arm of the sea cannot recover damages caused by the navigation being obstructed by a bridge, where the plaintiff is only damaged in common with the whole public; and the fact that plaintiff is the only person maintaining a wharf above a bridge which cuts him off from reaching it by vessel, will not entitle him to damages where there is nothing to show that his injury is different from what may occur to other riparian proprietors above the bridge whenever they shall decide to use their lands for a similar purpose. *Blackwell v. Old Colony R. Co.*, 122 Mass. 1.

After notice was given to a railroad company to alter its bridge over a certain river so as not to obstruct navigation, as provided by an act of congress of August 11, 1888, but before lapse of the time therein provided for doing so, the property of the company passed into the hands of a receiver in a fore-

\* Obstruction of navigation beyond period allowed by statute while repairing a bridge; see 52 AM. & ENG. R. CA. 666, *abstr.*

closure proceeding, but no further notice was given to the receivers in their official capacity, though they did have knowledge prior to their appointment of the notice that had been given to the company. *Held*, that the receivers were not liable for the fine imposed by the statute for failing to obey the notice, neither was the company liable. *United States v. St. Louis, A. & T. R. Co.*, 43 *Fed. Rep.* 414.

(2) *Jurisdiction*.—The act of congress of July 26, 1866, authorizing the construction of certain bridges over the Missouri river at or near Kansas City, and providing further that "in case of any litigation arising from any obstruction or alleged obstruction to the free navigation of said river, the cause may be tried before the district court of the United States of any state in which any portion of said obstruction or bridge touches," does not confer exclusive jurisdiction upon the federal courts, but only concurrent jurisdiction with the state courts. *Missouri River Packet Co. v. Hannibal & St. J. R. Co.*, 20 *Am. & Eng. R. Cas.* 275, 79 *Mo.* 478.—FOLLOWED IN *Silver v. Missouri Pac. R. Co.*, 101 *Mo.* 79.

(3) *Pleading*.—A complaint alleging that the channel of the Wisconsin river was so obstructed by a bridge built by the defendant below the city of Portage, that no boats or rafts could pass in a city without guide-booms extending up the river from each end of the main span; that such guide-booms were not maintained; and that in consequence thereof the plaintiff suffered damage—is held to state a cause of action, although it does not allege that the channel span of such bridge has been designated by the engineer of the United States in accordance with § 1605, Rev. St. U. S., or that there has been any violation of § 1837, Rev. St. U. S. The obstruction to navigation being unnecessary and unlawful, the fact that the channel span had not been so established could not be a defense to an action for actual damages, although it would be a defense to an action for treble damages under § 1606, Rev. St. *Sweeney v. Chicago, M. & St. P. R. Co.*, 20 *Am. & Eng. R. Cas.* 268, 60 *Wis.* 60, 18 *N. W. Rep.* 756.

In an action by a steamboat company against a railroad company to recover damages for obstructing a navigable stream by the erection of a bridge, some particular injury must be averred in the declaration, but it is not indispensable to a recovery that the

injury shall be proved precisely as laid. Thus where the verdict, under the charge of the court, was based upon the expenses incurred by the boat in making the trip which was rendered fruitless by the obstruction, and the declaration based the damages upon the fact that the boat company were deprived of the profits which they would otherwise have made by the use of said boat in the carrying trade along said stream, it was held that such variance could not affect the verdict. *Memphis & O. R. Co. v. Hicks*, 5 *Sneed (Tenn.)* 427.

**87. Injunction to restrain the erection and operation of bridge.**—Where congress has not legislated concerning a certain river and as to how it may be bridged, a federal court will not enjoin the erection of a bridge over it which is authorized by state law, though the bridge will entirely prevent navigation except what may pass through draws. *Easton v. New York & L. B. R. Co.*, 9 *Phila. (Pa.)* 475.—QUOTING *Gilman v. Philadelphia*, 3 *Wall. (U. S.)* 713; *Wilson v. Blackbird Creek Marsh Co.*, 2 *Pet. (U. S.)* 250. REVIEWING *Pennsylvania v. Wheeling & B. Bridge Co.*, 18 *How. (U. S.)* 430.

The federal courts cannot be called on to prevent a wrong resulting from the exercise of the power of a state to erect bridges over its own navigable streams, until congress has taken the initiative by enacting a commercial regulation with which the exercise of such a power is inconsistent. *Easton v. New York & L. B. R. Co.*, 9 *Phila. (Pa.)* 475.

The jurisdiction of a United States circuit court to restrain the building of a bridge across a navigable river is not impaired by authority from the state in which the bridge is located, to erect it. *Baird v. Shore Line R. Co.*, 6 *Blatchf. (U. S.)* 276.

A suit to enjoin the erection of a bridge over a river is not a suit arising under the laws of the United States, where congress has passed no law prohibiting such bridge. *Willamette Bridge Co. v. Hatch*, 125 *U. S.* 1, 8 *Sup. Ct. Rep.* 811.—FOLLOWED IN *Rhea v. Newport News & M. V. R. Co.*, 52 *Am. & Eng. R. Cas.* 657, 50 *Fed. Rep.* 16.

The state of Pennsylvania having constructed lines of canal and railroad, and other means of travel and transportation, which would be injured in their revenues by the erection of a bridge over the Ohio river, has a sufficiently



direct interest to sustain an application to the United States supreme court, in the exercise of its original jurisdiction, for an injunction to remove the obstruction. The remedy at law is inadequate. *Pennsylvania v. Wheeling & B. Bridge Co.*, 13 How. (U. S.) 518.—DISTINGUISHED IN *Rhea v. Newport News & M. V. R. Co.*, 52 Am. & Eng. R. Cas. 657, 50 Fed. Rep. 16.

Where a person who has a right to the free navigation of a river files a bill representing that a contemplated bridge across the river will seriously interfere with navigation, and the defendants only deny that the bridge will not "substantially obstruct or impede" such navigation, and the court is in doubt as to whether the bridge will seriously or materially obstruct navigation, and also whether it is about to be constructed in the manner designated by the act authorizing it, a preliminary injunction will be granted to continue until a final hearing. *Silliman v. Hudson River Bridge Co.*, 4 Blatchf. (U. S.) 74.

On a motion for a provisional injunction to restrain the building of a bridge across a navigable river, both for railroad purposes and to accommodate ordinary travel, on the ground that it will obstruct the free navigation of the river, the court will grant such injunction until an opportunity is afforded for a more thorough examination, if there is reasonable ground for believing that the bridge will finally be held an obstruction and subject to abatement. *Silliman v. Hudson River Bridge Co.*, 4 Blatchf. (U. S.) 74.

**88. Abatement as a nuisance.\***—A part owner of vessels navigating a river may maintain a bill, without joining his partners, against a railroad to abate a bridge over the river as a nuisance, where he asks no damages. *Mississippi & M. R. Co. v. Ward*, 2 Black (U. S.) 485.

A suit was brought in Iowa against a railroad to abate as a nuisance a bridge over a river which was the boundary between that state and Illinois, the line being the middle of the river. Defendant corporation only owned the bridge on the Iowa side. Illinois corporations owned the Illinois side, and a resident of New York held a mortgage on the bridge. None of these latter parties were made defendants. *Held*, that there was no defect of parties. The nuisance complained of was in Iowa, and being local,

which required the suit to be brought there, the court had no power to bring in these parties. *Mississippi & M. R. Co. v. Ward*, 2 Black (U. S.) 485.—QUOTED IN *State v. Portland & K. R. Co.*, 57 Me. 402.

In such a case the lower court decreed an abatement of the bridge on the Iowa side to the middle of the river. Under the proofs it was extremely doubtful if that part constituted a nuisance, the main channel being on the Illinois side, where the damage complained of had occurred. *Held*, under the peculiar circumstances and facts of the case, that the bill should be dismissed. *Mississippi & M. R. Co. v. Ward*, 2 Black (U. S.) 485.—FOLLOWED IN *Rhea v. Newport News & M. V. R. Co.*, 52 Am. & Eng. R. Cas. 657, 50 Fed. Rep. 16.

Plaintiff was owner of a steam-vessel plying a lake and accustomed to run into a river where it leaves the lake, and to lie in a basin alongside a wharf. Defendants, in extending their line of railway, constructed a bridge across the river, which completely obstructed the entrance, and caused, it was alleged, special damage to plaintiff, who was obliged to moor his boat in a basin on the lake side of the bridge. While the bridge was in construction some correspondence took place by plaintiff personally and through his solicitor with defendants' general manager, in the nature of protests, but the bridge had been in use for several years without action on the part of plaintiff, when a bill was filed praying that it might be declared a nuisance and abated. *Held*, that by the delay in taking action, and otherwise, there had been unequivocal acquiescence in the action of defendants. *Sanson v. Northern R. Co.*, 29 Grant Ch. (Ont.) 459.

#### IV. TOLL-BRIDGES—BRIDGE COMPANIES.

##### 1. In General.

**89. What is deemed to be a toll-bridge.**—The Missouri Bridge Act authorized bridge companies to permit railroad companies to extend their tracks over bridges belonging to the former. The powers conferred upon a bridge company were conferred upon a railroad company, which was authorized, in connection with its railroad bridge, to erect a bridge for the passage of team, carriages, and foot-passengers. It was also provided that all railroads might run their cars over the bridge. A bridge was built which formed a necessary

\* See ante, 72.

part to the railroad company's track, although it was also used for carriages and foot-passengers. *Held*, that the bridge so built was not a toll-bridge, but was a railroad bridge, and assessable as an integral part of the railroad. *State ex rel. v. Hannibal & St. J. R. Co.*, 37 Am. & Eng. R. Cas. 406, 97 Mo. 348, 10 S. W. Rep. 436.—DISTINGUISHED IN *Glenn v. Mississippi River Bridge Co.*, 109 Mo. 253.

Although the Missouri State Board of Equalization is empowered to assess taxes on toll-bridges and to determine what bridges are toll-bridges, the question whether a bridge is in fact a toll-bridge or a railroad bridge is jurisdictional, and the conclusion of the state board in that respect is reviewable by the court. *State ex rel. v. Hannibal & St. J. R. Co.*, 37 Am. & Eng. R. Cas. 406, 97 Mo. 348, 10 S. W. Rep. 436.

**90. Extent and effect of the franchise.**—A franchise to erect a toll-bridge is not exclusive. A second and free bridge may be chartered over the same waters, so near as to destroy the value of the first franchise. *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420.—APPLIED IN *Aikin v. Western R. Co.*, 20 N. Y. 370. COMMENTED ON IN *Raritan & D. B. R. Co. v. Delaware & R. Canal Co.*, 18 N. J. Eq. 546. FOLLOWED IN *Thompson v. New York & H. R. Co.*, 3 Sandf. Ch. (N. Y.) 625; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Janesville Bridge Co. v. Stoughton*, 1 Pinn. (Wis.) 667. QUOTED IN *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140; *Commonwealth v. Chesapeake & O. R. Co.*, 27 Gratt. (Va.) 344.

The proprietors of the bridges over the rivers Passaic and Hackensack have, by contract with the state, the exclusive franchise of maintaining said bridges and taking toll thereon, and such contract is within the protection of the constitution, which declares that no law shall be passed impairing the obligation of contracts. But the construction of a viaduct over said river for a railway, to be used exclusively for the passage of locomotives, engines, and railroad cars, is not a bridge within the prohibition of said charter. *Prop'rs of Bridges v. Hoboken L. & I. Co.*, 13 N. J. Eq. 81; affirmed in 13 N. J. Eq. 503.—REVIEWING *Mohawk Bridge Co. v. Utica & S. R. Co.*, 6 Paige (N. Y.) 564; *McRee v. Wilmington & R. Co.*, 2 Jones (N. Car.) 186.

An act granting a company the right to  
1 D. R. D.—46.

construct a toll-bridge, but which does not claim to be an exclusive right, does not prevent the incorporation of another company and the erection of another bridge over the same waters, which does not obstruct the passage of the first bridge, but which will have the effect of diminishing its tolls and profits, and the proprietors of the first bridge cannot maintain a bill to restrain the erection and use of the second bridge. *Janesville Bridge Co. v. Stoughton*, 1 Pinn. (Wis.) 667.—FOLLOWING *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420.

**91. Violation of exclusive franchise, generally.**\*—The grant to a corporation of the right to erect a toll-bridge across a river without any restriction as to the right of the legislature to grant a similar privilege to others, does not deprive a future legislature of the power to authorize the erection of another toll-bridge across the same river so near to the first as to divert a part of the travel which would have crossed the river on the first bridge if the last had not been erected; and the building of a bridge across a river by a railroad company, and the transportation of passengers across the river on the bridge, in railroad cars, in the ordinary course of business, is not an infringement of the chartered rights of a toll-bridge which excludes others. *Mohawk Bridge Co. v. Utica & S. R. Co.*, 6 Paige (N. Y.) 554.—APPLIED IN *People v. Brooklyn, F. & C. I. R. Co.*, 9 Am. & Eng. R. Cas. 454, 89 N. Y. 75. APPROVED IN *Mayor, etc., of New York v. New England Transfer Co.*, 14 Blatchf. (U. S.) 159. FOLLOWED IN *Thompson v. New York & H. R. Co.*, 3 Sandf. Ch. (N. Y.) 625. QUOTED IN *McLeod v. Savannah, A. & G. R. Co.*, 25 Ga. 445; *Prop'rs of Bridges v. Hoboken L. & I. Co.*, 13 N. J. Eq. 503; affirming 13 N. J. Eq. 81. *Sheboygan v. Sheboygan & F. du L. R. Co.*, 21 Wis. 667. REFERRED TO IN *Hudson & D. Canal Co. v. New York & E. R. Co.*, 9 Paige (N. Y.) 323. REVIEWED IN *Prop'rs of Bridges v. Hoboken L. & I. Co.*, 13 N. J. Eq. 503; affirming 13 N. J. Eq. 81.

Where an act conferring a franchise to build a bridge and to take tolls provided that the owner of an unauthorized bridge or vessel used to transport passengers at the same point should pay treble tolls, to be recovered by the donee in an action of debt

\* See ante, 6.

before a justice; in a suit in equity by the owner of the bridge, against a corporation, for a violation of his franchise through a new bridge, alleged to be unauthorized—*held*: (1) that the remedy given by the act was cumulative, and did not preclude the donee from resorting to other actions; (2) if the act were otherwise, the necessity of the case would warrant another remedy, as the corporation could not be sued before the justice; (3) that chancery had jurisdiction to restrain, by injunction, the unlawful use of the new bridge, at the suit of the owner of the franchise; (4) that chancery would not maintain a suit in his behalf for an account of the tolls lost through the use of the new bridge, but that, if a case were made for its interposition by way of injunction, it would decree an account as an incident to such relief; (5) that this court would not enforce the penalty provided by the act. *Thompson v. New York & H. R. Co.*, 3 *Sandf. Ch. (N. Y.)* 625.

**92. Erection of railroad bridge not an infringement of a bridge franchise.**—The erection of a railroad bridge and the running of trains thereon is not an infringement of the exclusive right granted by the legislature in 1806 to a certain person to maintain a toll-bridge over the Ogeechee river at the same point, and collect tolls upon persons and the vehicles and conveyances then in use. *McLeod v. Savannah, A. & G. R. Co.*, 25 *Ga.* 445.

A subsequent grant of the right to erect a railroad bridge alongside a toll-bridge does not interfere with the franchise of the toll-bridge erected under a provision in its charter prohibiting any other bridge across the same water within one mile. *Lake v. Virginia & T. R. Co.*, 7 *Nev.* 294.—DISAPPROVING *Enfield Toll Bridge Co. v. Hartford & N. H. R. Co.*, 17 *Conn.* 40. QUOTING *Thompson v. New York & H. R. Co.*, 3 *Sandf. Ch. (N. Y.)* 625; *McRee v. Wilmington & R. R. Co.*, 2 *Jones (N. Car.)* 186; *Tucker v. Cheshire R. Co.*, 21 *N. H.* 29.

A franchise granted by the assembly, in 1766, to A., his heirs and assigns, to erect and keep a toll-bridge over a stream, and forbidding the erection of any other bridge or ferry within six miles, is not violated by a railroad company (incorporated by a modern act) which carried passengers over a railroad bridge, authorized by their charter as part of the road, though erected within the six miles. *McRee v. Wilmington & R.*

*Co.*, 2 *Jones (N. Car.)* 186.—APPLIED IN *Raleigh & G. R. Co. v. Reid*, 64 *N. Car.* 155. APPROVED IN *Mayor, etc., of New York v. New England Transfer Co.*, 14 *Blatchf. (U. S.)* 159. QUOTED IN *Lake v. Virginia & T. R. Co.*, 7 *Nev.* 294. REVIEWED IN *Prop'rs of Bridges v. Hoboken L. & I. Co.*, 13 *N. J. Eq.* 503; affirming 13 *N. J. Eq.* 81.

The legislature, in 1790, authorized M. to erect a toll-bridge across a navigable river or arm of the sea, where the tide flowed, and to maintain the same for sixty years; and the act provided that it should not be lawful for any person or persons to erect or maintain a bridge or ferry between the two places which were to be connected by M.'s bridge. The toll-bridge was built accordingly. In 1832 the legislature authorized the construction, between two distant places, of a railway which would necessarily cross the river at or near such bridge, and which was carried across the river by a bridge one-fourth of a mile distant from the former, and on its operation the railroad diminished by one-third the accustomed receipts of the toll-bridge. *Held*: (1) that the act conferring the franchise on M. was not a covenant or grant that no similar franchise should be conferred on others, and did not restrict the authority of a future legislature to establish a toll-bridge or ferry at the same place; (2) that the grant to the railroad company did not impair the obligation of any contract with M. within the meaning of the prohibition in the constitution of the United States; (3) that the franchise granted to the railroad company was not the same as that conferred on M., nor so similar as to be deemed an interference with the latter, in the sense in which a new bridge or ferry interferes with one previously established at the same point; (4) that if it were a direct interference, the railroad company were authorized to erect and maintain a bridge for the use of their railroad, adjacent to M.'s bridge, and the act granting them the power was valid. *Thompson v. New York & H. R. Co.*, 3 *Sandf. Ch. (N. Y.)* 625.—FOLLOWING *Oswego Falls Bridge Co. v. Fish*, 1 *Barb. (N. Y.) Ch.* 547; *Mohawk Bridge Co. v. Utica & S. R. Co.*, 6 *Paige (N. Y.)* 554; *Charles River Bridge v. Warren Bridge*, 11 *Pet. (U. S.)* 420; *Meads v. Wardell*, 4 *Barb. Notes Chancellor's Dec.* 14. APPLYING *Stourbridge Canal Co. v. Wheeley*, 2 *B. & Ad.* 792. DISTINGUISHING *Newburgh Turnpike Co. v. Miller*, 5 *Johns.*

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Where a state granted to a company in 1790 the right to erect a toll-bridge over a river, with a provision that no other bridges should be erected within a given distance of it—*held*, that a contract was thereby created within the meaning of the United States constitution which could not be impaired by the erection of any other bridge in use at that time; but that railroad bridges not then being known were not included, and the state might authorize the same within the prohibited distance. *Prop'rs of Bridges v. Hoboken L. & I. Co.*, 1 Wall. (U. S.) 116.

Where a person is empowered to build a bridge over a river and to take tolls, and the statute forbids other persons than he to convey persons across the river within certain limits, a railway company constructing a bridge over the same river within such limits as authorized by statute cannot be treated as a wrongdoer, and no action can be brought by the bridge-owner to obtain the demolition of its bridge; and even if the owner of the first bridge was entitled to compensation, the making of such compensation was not a condition precedent to the exercise of the powers granted by the statute of the company. *Jones v. Stanstead, S. & C. R. Co.*, 41 L. J. P. C. 19, 20 W. R. 417, 8 Moore P. C. C. N. S. 312, L. R. 4 P. C. 98, 26 L. T. 456.

**93. Forfeiture of franchise.**—A statute authorizing an individual to erect a bridge and to receive tolls for its use confers upon him a franchise, and a substantial compliance with the conditions imposed by the act will invest him with its rights and privileges. Where a franchise has become vested in the donee or grantee, it is no defense to a suit brought by him to assert or maintain the franchise, that he has forfeited it by any subsequent acts of commission or omission. There must be a judicial forfeiture of the franchise, at the suit of the state, before individuals can avail themselves of such acts. It cannot be impeached collaterally. *Thompson v. New York & H. R. Co.*, 3 Sandf. Ch. (N. Y.) 625.

#### 94. Regulation of tolls by statute.\*

—It seems that congress has the power, under its right to regulate commerce, to prescribe what compensation shall be paid for the use of a bridge constructed across waters which are the dividing line between the United States and Canada, under a joint charter from the latter government and one of the states of the Union. *Canada Southern R. Co. v. International Bridge Co.*, 8 Fed. Rep. 190.

The Georgia act of 1828, providing that wagons and carriages loaded with corn and cotton should pass the Ocmulgee bridge free of toll, is repealed *pro tanto* by the act of 1847, which vests in the corporate authorities of the city of Macon the right to regulate the tolls of said bridge, and repeals all laws or parts of laws which would militate against its provisions. *Mayor of Macon v. Macon & W. R. Co.*, 7 Ga. 221.

By incorporating into the charter of a bridge company a provision authorizing the president and directors to fix the rates of toll, and providing that they should, from time to time, reduce the rates so that the net profits of the bridge should not exceed 15 per cent per annum, the state does not surrender its power to regulate the bridge tolls so long as the company realized not exceeding 15 per cent profit. *Commonwealth v. Covington & C. Bridge Co.*, (Ky.) 54 Am. & Eng. R. Cas. 461, 21 S. W. Rep. 1042.

In determining whether an act regulating bridge tolls will reduce the receipts to less than the operating expenses, so as to constitute a taking of private property for public use without compensation, the receipts of the entire structure must be considered, including foot- and wagon-ways, where they are a part of the main bridge. *Commonwealth v. Covington & C. Bridge Co.*, (Ky.) 54 Am. & Eng. R. Cas. 461, 21 S. W. Rep. 1042.

**95. Condemning lands for bridge purposes.**—Under New York act of 1867, ch. 399, incorporating a company to construct a bridge between the cities of New York and Brooklyn, it is not necessary to give notice to the actual occupants of land over which the bridge would pass, or upon which it would rest, as required by section 22 of the general railroad act (Laws 1850, p. 211), and a failure to give such notice is not a jurisdictional defect. *In re New York Bridge Co.*, 67 Barb. (N. Y.) 295. Compare

\* See *post*, 98, 100, 104.

*Queen v. Great Western R. Co.*, 14 U. C. C. P. 462. *St. Andrew's Church v. Great Western R. Co.*, 13 U. C. C. P. 399.

**96. Stockholders of bridge company.**—A stockholder of a bridge company having an exclusive franchise to build bridges has a vested right in the value of his stock and interest in the franchise of exclusive tolls, and is not bound by the action of a majority of the stockholders authorizing a railroad company to bridge the same streams without compensating the stockholders for the injury that would result to their franchises. *Gifford v. New Jersey R. & T. Co.*, 10 N. J. Eq. 171.

**a. Rights, Duties, and Liabilities of Bridge Companies, or Persons who Maintain Bridges.**

**97. Right to make by-laws and rules.**—The Canadian act 20 Vic. c. 227, § 16, gave the International Bridge Company power to make by-laws and regulations for the use of its bridge; and there is nothing in § 2 of the amendment act (22 Vic. c. 124) which cuts down the power to make regulations for the use of the bridge by railway trains. *Canada Southern R. Co. v. International Bridge Co.*, L. R. 8 App. Cas. 723.

**98. Right to charge and collect tolls, generally.\***—The act of congress authorizing the construction of a railway bridge across the Arkansas river at Van Buren, Ark., provides that no higher charge shall be made for the transportation of passengers over it than is paid for similar transportation over the railroad leading to the bridge. Under the act of the general assembly of April 4, 1887, regulating the maximum charge for transportation of passengers by railroads, a charge of forty cents as a toll for crossing the bridge, in addition to the maximum charge for transportation, is illegal. *St. Louis & S. F. R. Co. v. Stevenson*, 54 Ark. 116, 15 S. W. Rep. 22.

A charter authorized the grantees to collect toll at the Augusta bridge across the Savannah river, from persons going from the South Carolina side; "but the collecting of said toll shall not subject the railroad company or the community to the payment of double toll." *Held*, not to authorize the grantees to collect tolls from persons going from the South Carolina side, as long

as such persons are required to pay again at a gate on the Georgia side, owned by the city council of Augusta. *South Carolina R. Co. v. Jones*, 4 Rich. Eq. (So. Car.) 459.

Where a bridge company is authorized by its charter to charge such toll as the judgment of its officers might warrant, which right is the essential value of its franchise, the power of the courts to interfere with this right can only be exercised where there is a clear and unambiguous declaration to that effect, and the right to so interfere will not be inferred if the language of the act is consistent with a less violent purpose. *Canada Southern R. Co. v. International Bridge Co.*, 8 Fed. Rep. 190.

**99. — tolls from railroad companies using bridge.**—It is incident to the corporate powers of a corporation of the character of the International Bridge Company, incorporated under 20 Vic. ch. 227, and 22 Vic. ch. 124, to demand payment of tolls from railway companies for the use of their bridge. *Held*, also, that the tolls payable for the passage of trains are not fixed by the said acts. *International Bridge Co. v. Canada Southern R. Co.*, 7 Ont. App. 226; affirming 28 Grant Ch. 114.

Where a company is chartered to construct a bridge "as well for the passage of persons on foot and in carriages, and otherwise, as for the passage of railway trains," and completes it for the passage of trains and leases it to a railway company, but makes no provision for other travel, a court of equity will not restrain the company from collecting tolls from the railway traffic; nor from allowing trains to pass until the bridge is completed for other travel. *Attorney-General v. International Bridge Co.*, 22 Grant Ch. (Ont.) 298.—FOLLOWING *Attorney-General v. Birmingham & O. J. R. Co.*, 4 DeG. & S. 490. **DISTINGUISHING** *Attorney-General v. Tewkesbury & M. R. Co.*, 4 Giff. 333, 1 De G. J. & S. 423; *Attorney-General v. Mid-Kent & S. E. R. Cos.*, L. R. 3 Ch. 100; *Raphael v. Thames Valley R. Co.*, L. R. 2 Ch. 147.

The attorney-general is the proper party to file a bill in such case. *Attorney-General v. International Bridge Co.*, 22 Grant Ch. (Ont.) 298.

**100. — toll from street-railway companies using bridge.**—A charge of two cents for every person transported over a bridge in the cars of a street-railway company is not unreasonable, although the

\* See *ante*, 94.



ordinary charge for a two-horse vehicle is fixed at twenty cents. *Covington & C. Bridge Co. v. South Covington & C. St. R. Co.*, (Ky.) 50 *Am. & Eng. R. Cas.* 395, 19 *S. W. Rep.* 403.

A bridge company is entitled to tolls from a street-car company that runs cars across its bridge, but not damages such as are provided for in ordinary eminent domain proceedings. *Monongahela Bridge Co. v. Pittsburgh & B. R. Co.*, 114 *Pa. St.* 478, 8 *Atl. Rep.* 233.

A law fixing the rate of tolls over a bridge "for every carriage, wagon, buggy, or other wheeled vehicles of whatever description" held not to include street-cars. *Monongahela Bridge Co. v. Pittsburgh & B. R. Co.*, 114 *Pa. St.* 478, 8 *Atl. Rep.* 233.

**101. Duty to permit street cars to cross bridge.**—Where a corporation owning a bridge connecting two cities has laid street-car tracks on such bridge and has constructed approaches for the use of street railways, so as to make it a street-railway bridge as well as a bridge for ordinary travel, and has induced street-car companies subsequently organized to expend large sums in building to the said bridge, and has allowed the use of the bridge by street cars for more than twenty-five years, it has assumed a public duty with reference to the street-car companies that requires it to permit cars to pass over the bridge at reasonable rates of toll, and cannot, at its pleasure, refuse to permit such cars to go upon the bridge. *Covington & C. Bridge Co. v. South Covington & C. St. R. Co.*, (Ky.) 50 *Am. & Eng. R. Cas.* 395, 19 *S. W. Rep.* 403.

A company was jointly chartered in the United States and Canada to build a bridge across the Niagara river, which forms the boundary line between the two countries. The relators, a railroad company of Canada, were authorized by statute to cross the bridge, which was refused. One railway company already had the privilege to cross, under a lease, and it appeared that by the United States charter that company had the right to exclude other roads. Held, that the exclusive lease to the railway company, under the Canadian charter, was void; but it appearing that the court had no power to grant the complaining company power to pass the centre of the bridge, and that it had not actually connected with the bridge, and probably could not do so without crossing the lands of the road already crossing the

bridge, a court of equity could grant no relief. *Attorney-General v. Niagara Falls I. Bridge Co.*, 20 *Grant Ch.* (Ont.) 490.

**102. Liability as distinguished from that of carrier.**—As the proprietors of a toll-bridge do not have the actual and exclusive possession of goods transported, as do common carriers, they are not liable to the same extent; that is, they are not insurers of the safety of the goods. *Frankfort Bridge Co. v. Williams*, 9 *Dana* (Ky.) 404.

**103. Bridge construction company not liable for death of brakeman.\***—An iron bridge company that erects a bridge over a railroad track so low that a brakeman cannot sit erect on top of freight cars and pass thereunder is not liable for the death of a brakeman who is killed by coming in contact with such bridge. *Stoneback v. Thomas Iron Co.*, (Pa.) 4 *Atl. Rep.* 721.

**104. Liability of lessee for not charging and collecting tolls.**—Where a railroad company leases the privilege of running cars across a toll bridge, and persists in allowing persons to pass without paying toll, it may be enjoined as for a continuing nuisance. *Niagara Falls I. Bridge Co. v. Great Western R. Co.*, 39 *Barb.* (N. Y.) 212.—FOLLOWING *Thompson v. New York & H. R. R. Co.*, 3 *Sandf. Ch.* 625.—DISTINGUISHED IN *Troy & B. R. Co. v. Boston, H. T. & W. R. Co.*, 7 *Am. & Eng. R. Cas.* 49, 86 *N. Y.* 107.

Where a railroad company leases the right to lay a track over a bridge and to run cars on the same, it will be liable to the proprietors of the bridge for allowing persons to pass over without the payment of tolls and for collecting tolls from others, and for failing to provide the directors of the bridge with passes over its road, according to agreement; and the amount of damages is the amount that such directors were compelled to pay out for fares, and the amount of tolls collected from such persons. *Niagara Falls I. Bridge Co. v. Great Western R. Co.*, 39 *Barb.* (N. Y.) 212.—DISTINGUISHED IN *Richmond v. Dubuque & S. C. R. Co.*, 33 *Iowa* 422.

#### BRIEFS.

On appeal, see *APPEAL*, etc., 137.

\* See *ante*, 25.



**BROKERS.**

Implied powers of agents to sell or purchase,  
see AGENCY, 15, 16.

Ticket brokers, see TICKETS AND FARES, IV.

**BUFFERS.**

Duty to employes as to safety of, see EMPLOYÉS, INJURIES TO, I, 6.

**BUILDINGS.**

Injuries to, by blasting, see BLASTING, 4.

Removal of, across railway track, power to authorize, see AGENCY, 65.

When deemed fixtures, see FIXTURES, 6.

**BURDEN OF PROOF.**

As respects contributory negligence, see CONTRIBUTORY NEGLIGENCE, VI.

As to contributory negligence of injured employé, see EMPLOYÉS, INJURIES TO, III, 8.

As to limitation of liability, see LIMITATION OF LIABILITY, IV.

As to negligence, in Illinois, see COMPARATIVE NEGLIGENCE, 5.

In actions for injuries to passengers, see CARRIAGE OF PASSENGERS, III, 1.

In actions for loss of baggage, see BAGGAGE, 117.

In actions for negligence, see NEGLIGENCE, III, 3.

In cases of derailment, see DERAILMENT, 3.

In cases of injuries to employes, see EMPLOYÉS, INJURIES TO, I, 9.

In collision cases, see COLLISIONS, 5.

In replevin, see REPLEVIN, 5.

In suits generally, see EVIDENCE, III, 2.

To show negligence in causing fires, see FIRES, II, 8.

To show negligence in stock-killing cases, see ANIMALS, INJURIES TO, 285, 286, 495-523.

**BURGLARY.**

Offense of, generally, see CRIMINAL LAW, III.

**BY-LAWS.**

Of cities, see MUNICIPAL CORPORATIONS, I; STREETS AND HIGHWAYS, V.

Of relief associations, see RELIEF ASSOCIATIONS, 7.

**1. Power to alter, amend, or modify.**—The by-laws, orders, and resolutions adopted by a railroad company or its stockholders are always under the control of the majority, unless expressly provided other-

wise by the charter; and they may be repealed, altered, or modified from time to time, as in the judgment of the majority may be deemed expedient. And it forms no legal ground of complaint that some regulation or resolution of the company which existed at the time a particular individual became a member, and upon the faith of the continuance of which alone he was induced to subscribe for stock, was afterwards abrogated or changed in a manner not inconsistent with the charter. *East Tenn. & V. R. Co. v. Gammon*, 5 *Sneed (Tenn.)* 567.

Though a by-law of a company authorizes the directors to alter or amend the by-laws, the directors have no authority under said by-law or otherwise to disregard or alter another by-law which was intended to impose a limitation on their powers. *Stevens v. Davison*, 18 *Gratt. (Va.)* 819.

**2. Validity.**—By-laws must be reasonable and for the common benefit, and must operate upon all equally. So a resolution of a corporation declaring the stock of one member forfeited for unpaid assessments, and directing a sale of the same, is not a by-law where there were other delinquent subscribers. *Budd v. Multnomah S. R. Co.*, 15 *Oreg.* 413, 15 *Pac. Rep.* 659.

A by-law imposing a fine upon a member of an association of common carriers, who might carry freight for less than a prescribed rate, is against public policy and will not be enforced. *Sayre v. Louisville U. B. Assoc.*, 1 *Duv. (Ky.)* 143.

The validity of a by-law of a corporation is a question of law, as is also the question whether a by-law is in conflict with law or with the company's charter; but a regulation of common carriers that affects the rights of passengers, such as requiring that they should exhibit tickets when requested, or not to smoke or indulge in other offensive practices, or that male passengers should not enter a place set apart exclusively for females, are not by-laws proper, and their validity depends upon whether they are reasonable, which is a question of fact for the jury. *State v. Overton*, 24 *N. J. L.* 435.

**3. Interpretation and effect.**—Third parties dealing with a corporation are not affected by a by-law providing how special meetings of the board of directors shall be called. *Samuel v. Holladay*, 1 *Woolw. (U. S.)* 450.

The by-laws of the defendants provided

that interest should be allowed on all instalments until the road was completed and in running order. *Held*, that the defendants could not recover of the plaintiffs, who had contracted to construct and complete the road by a specified time, the interest which accrued upon the instalments between that time and the time when the road was actually completed. *Barker v. Troy & R. R. Co.*, 27 *Vt.* 766.

A by-law of a railroad corporation provided that in case of a sale of shares for nonpayment of assessments the treasurer

should give notice to the delinquent owner, when his residence was known, of the time and place of sale, by letter seasonably put into the mail. *Held*, that this by-law was directory to the treasurer, and not a condition precedent; and that a written notice of the time and place of sale, signed by the treasurer, and delivered to the owner of the shares, or left at his dwelling house, and received by him as soon as he was entitled to receive it by mail, was sufficient. *Lexington & W. C. R. Co. v. Chandler*, 13 *Met. (Mass.)* 311.

## C

## CABLE RAILWAYS.

For decisions applicable to cable railways in common with other street railways, see STREET RAILWAYS.

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## I. RIGHT TO CONSTRUCT AND OPERATE.

1. In general.—Under general railway act.—A horse-car company can only claim an exclusive franchise as to such modes of transportation as are known at the time that it is chartered; and such charter will not exclude the use of competing cable cars that are unknown when the charter was issued. *Omaha Horse R. Co. v. Cable Tramway Co.*, 30 *Fed. Rep.* 324.—DISTINGUISHED IN *Detroit City R. Co. v. Mills*, 85 *Mich.* 634.

A company organized under the New York general railroad act of 1850 obtains no right to build a cable road on streets of a city, the only power gained thereby being the right to apply to the city authorities for permission to do so, which must be given before a road can be built. *Schaper v. Brooklyn & L. I. C. R. Co.*, 4 *N. Y. S. R.* 860, 42 *Hun* 657; affirmed in 124 *N. Y.* 630, mem., 3 *Silv. App.* 335, 26 *N. E. Rep.* 311, 35 *N. Y. S. R.* 112. *People ex rel. v. Newton*, 16 *N. Y. S. R.* 86, 1 *N. Y. Supp.* 197; reversing 14 *N. Y. S. R.* 906.

2. Under municipal franchises.—A municipality may grant a franchise to operate cable cars on the streets, but it cannot grant the right to operate the power-house with its engines, so as to relieve it of liability for damages to adjoining proprietors who may be injured by the manner in which the power-house is run. *Tuebner v. California St. R. Co.*, 19 *Am. & Eng. R. Cas.* 147, 66 *Cal.* 171, 4 *Pac. Rep.* 1162.

Where a company holds a franchise to operate a cable railway upon certain streets through compliance with the absolute conditions contained in the grant, but operates a horse railway instead of a cable railway upon one of the streets, the proper course for the city is not to abate such horse railway as a nuisance, but to take such legal proceedings as will compel the operation of the road by cable instead of by horses. *Spokane St. R. Co. v. Spokane Falls*, 6 *Wash.* 521, 33 *Pac. Rep.* 1072.

3. Right to open streets and lay cables.—A corporation organized under the New York general railroad act (Laws 1850, c. 140) was authorized by a city "to lay a double track for a railroad" in certain streets, upon condition that it should keep in good repair the space between the tracks and a space on each side of the same, and that the tracks should be laid upon a good foundation, with a rail even with the surface of the streets. Pursuant to this authority, a horse railway was constructed and operated for many years. *Held*, that the authority conferred upon the company by the city did not authorize it to open up the

streets for the purpose of constructing a cable railroad in place of the horse railway. *People v. Newton*, 38 Am. & Eng. R. Cas. 391, 112 N. Y. 396, 19 N. E. Rep. 831, 21 N. Y. S. R. 8; *affirming* 48 Hun 477, 1 N. Y. Supp. 197, 16 N. Y. S. R. 86.—FOLLOWING *People ex rel. v. Thompson*, 98 N. Y. 6.—DISTINGUISHED IN *Re Washington St. A. & P. R. Co.*, 115 N. Y. 442, 22 N. E. Rep. 356, 26 N. Y. S. R. 504; *Hudson River Tel. Co. v. Watervliet T. & R. Co.*, 135 N. Y. 393; *Hudson Riv. Tel. Co. v. Watervliet T. & R. Co.*, 48 N. Y. S. R. 417; *reversing* 39 N. Y. S. R. 952.

**4. Rights of abutting owners—Consent.**—A cable railroad company which derives from the city its right to alter the grade of a street for the purpose of constructing its road is liable for the damages to the abutting property-owners caused by the alteration of the street. *Sheehy v. Kansas City Cable R. Co.*, 32 Am. & Eng. R. Cas. 233, 94 Mo. 574, 13 West Rep. 653, 7 S. W. Rep. 579.

An abutting property-owner has such an easement in the street as will support an action for the damages peculiar to him by reason of such change in the street. *Sheehy v. Kansas City Cable R. Co.*, 32 Am. & Eng. R. Cas. 233, 94 Mo. 574, 13 West Rep. 653, 7 S. W. Rep. 579.

Under the Missouri constitution (Const. 1875, art. 2, § 21), the owner of property abutting on a street may maintain an action against a cable street-railroad company, authorized by the city to change the established grade of the street, for injury resulting to his property by such change. And the measure of damages is the difference in the market value of the property before and after the grade of the street is altered. *Sheehy v. Kansas City Cable R. Co.*, 32 Am. & Eng. R. Cas. 233, 94 Mo. 574, 13 West Rep. 653, 7 S. W. Rep. 579.

Where the petition claimed damages for permanent injury to plaintiff's land by reason of the reduction of a graded street for a cable railroad, making the property inaccessible except at great expense, an instruction authorizing a recovery of damages for the injury to the market value of such property caused by such excavation and use of the street is proper. *Brady v. Kansas City Cable R. Co.*, 111 Mo. 329, 19 S. W. Rep. 953.

The fact that the abutting property was ten feet above the grade of the street does

not preclude the owner from recovering damages where the grade is lowered another ten feet. *Brady v. Kansas City Cable R. Co.*, 111 Mo. 329, 19 S. W. Rep. 953.

Where a street is raised for the purpose of a cable railway, it is proper to admit evidence, in an action by an abutting lot-owner to recover damages, of the probable cost of a retaining-wall, and of the cost of raising his property to the new grade line of the street. *Taylor v. Kansas City Cable R. Co.*, 38 Mo. App. 668.

An affidavit filed by a cable railroad company contained a list of the abutting property-owners who had refused their consent to the construction of the road. It also gave a list of the streets in which the persons so applied to resided, and the valuation in each street of the property owned by the person so refusing. The petition showed the total valuation of the property on the streets along which the company proposed to construct its road, and it appeared therefrom that the refusals to consent represented more than one-half of the total valuation. *Held*, that the refusal of more than one-half of the property-owners to consent to the construction sufficiently appeared. *In re People's R. Co.*, 38 Am. & Eng. R. Cas. 404, 112 N. Y. 578, 20 N. E. Rep. 367, 21 N. Y. S. R. 496; *affirming* 48 Hun 617, *mem.*—RECONCILING *In re Broadway Underground R. Co.*, 23 Hun 693; *In re Broadway Surface R. Co.*, 36 Hun 644; *In re New York Cable R. Co.*, 36 Hun 355.

**5. Location of power-house.**—A company in the city of Brooklyn was authorized by its charter to construct and operate a cable road from a designated street "through Montague street to Wall street ferry," and to erect necessary power-houses "in streets adjacent to Montague street west of the hill." There were no streets touching Montague street west of the hill, and it appeared from the topography of the country that the charter would be worthless unless the power-house was erected on some street in the vicinity of Montague street. *Held*, that the words "adjacent to Montague street" must be construed to mean the neighboring or parallel streets. *Brooklyn Heights R. Co. v. Brooklyn*, 46 N. Y. S. R. 299, 18 N. Y. Supp. 876.

**6. Regulation by city ordinance.**—Municipal ordinances regulating the running of street-railway cars are applicable to all cable and other railways employed in the

transportation of passengers through the streets of a city, without distinction as to the character of the motive power. *Lamb v. St. Louis C. & W. R. Co.*, 33 Mo. App. 489.

An ordinance of the city of St. Louis, which was in force for more than thirty years, provided in regard to street railways that "the conductor and driver of each car shall keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or moving towards it, and, on the first appearance of danger to such persons or vehicles, the car shall be stopped in the shortest time and space possible."

*Held*, that this ordinance is not applicable to street railways propelled by cable, but only to street railroads propelled by horse-power, *Glenville v. St. Louis R. Co.*, 51 Mo. App. 629.

**7. Rights of horse railway crossed or paralleled.**—Where a line of horse cars is afterward paralleled and crossed by a cable-car line, the former may recover from the latter damages for inconvenience of access to its cars where the cable cars run between the horse-car track and the sidewalk; but it is not entitled to recover damages resulting from a mere matter of competition, or from the fact that the better facilities offered by the cable road attracted passengers, nor for its track being crossed by the cable line. *Omaha Horse R. Co. v. Cable Tramway Co.*, 32 Fed. Rep. 727.

## II. LIABILITY FOR INJURIES CAUSED BY NEGLIGENCE.

### 1. To Passengers.

**8. In general.—Presumption of negligence.**—A passenger injured while occupying a seat upon the dummy-car of a cable railway is not guilty of contributory negligence, as such seats are provided for passengers, and any one sitting there has the same right to be protected against the negligence of the company's servants as passengers in the trail-car. *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, 28 Pac. Rep. 1021.

Where a cable car is stopped so suddenly as to throw a passenger from her seat and to break the glass in the car-windows, a presumption of negligence arises on the part of the company. *Clow v. Pittsburgh Traction Co.*, 158 Pa. St. 410.

Proof of an accident and resulting injury to a passenger is not always sufficient to raise a presumption of negligence on the

part of the carrier, or to make out a *prima facie* case in favor of the passenger. So where a passenger on a cable car was injured by coming in collision with a horse and buggy on the street, while the curtains were drawn to protect him from the rain, obstructing the view on that side of the car of both him and the manager of the car—*held*, that the burden of proof was on him to show negligence. *Potts v. Chicago City R. Co.*, 33 Fed. Rep. 610.

**9. Defective appliances.**—An instruction to the jury that a street-railway company propelling cable cars, as respects precautions for the safety of passengers, is bound to exercise the greatest care and foresight in the construction and operation of its cars, correctly states the law. *Watson v. St. Paul City R. Co.*, 41 Am. & Eng. R. Cas. 114, 42 Minn. 46, 43 N. W. Rep. 904.

Railroad companies are only required, in providing for the safety of passengers, to use the best appliances known to and obtainable by them, after inquiry and investigation, and after subjecting such appliances to a reasonable test as to strength and fitness. A cable-car company, after selecting its appliances as above, and after having properly tested them, is not liable for an accident resulting from the breaking of the shank of a grip through some hidden defect which could not be discovered by proper examination. *Carter v. Kansas City Cable R. Co.*, 42 Fed. Rep. 37.

In an action for personal injuries alleged to have been caused by insufficient and defective grip-irons and brakes on a cable-railway car, plaintiff cannot complain that he was compelled to carry the burden of proof at the trial, where the court instructed at his request that "the burden of proof is upon the defendant to establish to the reasonable satisfaction of the jury that it could not discover any insufficiency of the grip-shanks or rail-brakes, if any there was, by the exercise of the utmost practicable skill and human foresight." *Sharp v. Kansas City Cable R. Co.*, 52 Am. & Eng. R. Cas. 561, 114 Mo. 94, 20 S. W. Rep. 93.

In such action an instruction asked by plaintiff, basing his right to recover upon the defective construction of the grip-irons and brakes, should have been given, and the error in refusing it was not cured by an instruction given by the court of its own motion, which placed his right to recover upon want of repair. *Sharp v. Kansas City*

*Cable R. Co.*, 52 Am. & Eng. R. Cas. 561, 114 Mo. 94, 20 S. W. Rep. 93.

An instruction which excuses the defendant, if the liability of the break-shank to brake, or the insufficiency of the brake, was either not known to the defendant or was such as could not have been known by the utmost practicable care, is erroneous in the use of *or for and*, as the mere want of knowledge of the insufficiency of the grip or brake would not relieve the defendant. *Sharp v. Kansas City Cable R. Co.*, 52 Am. & Eng. R. Cas. 561, 114 Mo. 94, 20 S. W. Rep. 93.

In such case, proof that the brakes were insufficient to hold the car makes a *prima facie* case for the plaintiff. *Sharp v. Kansas City Cable R. Co.*, 52 Am. & Eng. R. Cas. 561, 114 Mo. 94, 20 S. W. Rep. 93.

A cable railway company in supplying grips and brakes for its cars and in keeping them in repair is bound to anticipate and take into consideration all such weather and conditions of the track as may be reasonably expected in the climate where operated. *Sharp v. Kansas City Cable R. Co.*, 52 Am. & Eng. R. Cas. 561, 114 Mo. 94, 20 S. W. Rep. 93.

**10. Excessive speed.**—Where a passenger alights from a cable car while it is running at a rate of speed prohibited by ordinance and is injured by a similar car moving in the opposite direction, it cannot be said that the speed of the train had no direct agency in causing the injury. *Weber v. Kansas City Cable R. Co.*, 41 Am. & Eng. R. Cas. 117, 100 Mo. 194, 12 S. W. Rep. 804, 13 S. W. Rep. 587, 7 L. R. A. 819.

Evidence held to justify a finding of negligence in respect to the condition or operation of a train of cable cars which, while carrying passengers, ran down a steep declivity composing a part of the line at very great and dangerous speed, and apparently beyond the control of those operating the train. *Bishop v. St. Paul City R. Co.*, 48 Minn. 26, 50 N. W. Rep. 927.

**11. Injury to passenger boarding car.**—Two parallel street-car tracks were so near together that cars going in opposite directions would pass within two feet of each other. The cars were operated by cable. Held, negligence for a person, after dark, to deliberately stand between the tracks, wait for and attempt to take passage on cars coming on one track, at the same time paying no attention to see whether cars

were approaching within dangerous proximity on the other track. *Miller v. St. Paul City R. Co.*, 42 Minn. 454, 44 N. W. Rep. 533.

**12. — riding on platform.**—It is not negligence *per se* for a passenger to stand upon the front platform of the trailer of a cable train in the absence of any rule of the company forbidding it, and where it is customary for passengers to occupy that position. *Muldoon v. Seattle City R. Co.*, (Wash.) 58 Am. & Eng. R. Cas. 546.

Where a train of cable cars on which the plaintiff was a passenger, standing on the platform of the rear car, came to a stop when about half-way through the tunnel, and remained standing several minutes, when another train descending through the tunnel collided with the rear car of the standing train and thereby inflicted a personal injury—held, that the mere fact of the injury raised a presumption of negligence which was sufficient to sustain a general charge of negligence in the running and operating of the defendant's road and the cars propelled thereon. *North Chicago St. R. Co. v. Cotton*, 52 Am. & Eng. R. Cas. 238, 140 Ill. 486, 29 N. E. Rep. 899; affirming 41 Ill. App. 311.

**13. — alighting from car.**—The facts that the door of a cable car was open on the side next to the parallel track, and that no guard was there to prevent persons from getting off through it, cannot be construed as an invitation to a passenger to alight while the train was at full speed. The fact that the train did not stop or check up was a warning to the passengers not to get off. *Weber v. Kansas City Cable R. Co.*, 41 Am. & Eng. R. Cas. 117, 100 Mo. 194, 12 S. W. Rep. 804, 13 S. W. Rep. 587, 7 L. R. A. 819.

One in the possession of his faculties, who was accustomed to cable cars and must have known that they passed each other every few minutes, who left his seat without signifying to the brakeman near him any desire to get off, and who, without any reason to believe the cars would stop, went to the door of the car and jumped off while it was in full speed, and was injured by an approaching train, without looking for it, when he might have seen it had he looked, is guilty of contributory negligence. *Weber v. Kansas City Cable R. Co.*, 41 Am. & Eng. R. Cas. 117, 100 Mo. 194, 12 S. W. Rep. 804, 13 S. W. Rep. 587, 7 L. R. A. 819.—REVIEWING

Chicago City R. Co. v. Robinson, 36 Am. & Eng. R. Cas. 66, 127 Ill. 9.

Plaintiff was a passenger upon a cable car and got out of it on the north side in a place of entire safety. Except in so far as the car from which he alighted obstructed his view, he could see the south track for a square or more. Without looking or waiting, he turned sharply around the rear of the car and started to cross the street. The space between the two tracks was four and a half feet, and while crossing it he might have seen the approaching car. Instead of looking, he stepped right into the car, which was upon him at the instant he set foot upon the south track. *Held*, that the plaintiff was guilty of contributory negligence and that a nonsuit was properly ordered. *Buzby v. Philadelphia Traction Co.*, 42 Am. & Eng. R. Cas. 144, 126 Pa. St. 559, 17 Atl. Rep. 895.

## 2. To Persons in the Street.

**14. In general—Care required of gripman.**—A cable-railway company operating dangerous machinery at a rapid speed on and along the public streets of a city must know, and in law is bound to know, that men, women, and children have an equal right to the use of the highway, and will be upon it. *Winters v. Kansas City Cable R. Co.*, 40 Am. & Eng. R. Cas. 261, 99 Mo. 509, 12 S. W. Rep. 652, 6 L. R. A. 536.—QUOTED IN *Cambeis v. Third Ave. R. Co.*, 48 N. Y. S. R. 709.

It is the duty of the company's servants to be on the lookout and to take all reasonable measures to avoid injuries to persons on the streets. *Winters v. Kansas City Cable R. Co.*, 40 Am. & Eng. R. Cas. 261, 99 Mo. 509, 12 S. W. Rep. 652, 6 L. R. A. 536.

It is not, as a matter of law, sufficient care on the part of the gripman, when approaching a curve in the street, to ring the bell, and, having seen that the way was clear in front, to go ahead without thereafter looking to the right or left. *Winters v. Kansas City Cable R. Co.*, 40 Am. & Eng. R. Cas. 261, 99 Mo. 509, 12 S. W. Rep. 652, 6 L. R. A. 536.

The gripman of a cable car should always be on the alert to avoid danger, and his attention should never be diverted from his duties. He should keep his eye constantly on the track before him and under no circumstances should any one be allowed to ride with him in the cab. *Schnur v. Citizens'*

*Traction Co.*, 153 Pa. St. 29, 25 Atl. Rep. 650.

Plaintiff's intestate was killed in the street, opposite a new building that was being erected, and where building material obstructed the street nearly to the car-line. The court instructed that "if the jury found that the car was driven at a rate of speed that was dangerous, owing to the obstructions in the street, and that the defendant failed to give any warning of the approach of the car, \* \* \* and that by reason thereof the accident happened, and would not otherwise have occurred, then the defendant is liable." *Held*, that the instruction was too narrow; it should have submitted whether, under all the circumstances of the case, the car was managed with reasonable care. *Wright v. Third Ave. R. Co.*, 23 N. Y. S. R. 483, 5 N. Y. Supp. 707.—REVIEWING *McGrath v. New York C. & H. R. R. Co.*, 63 N. Y. 522.

In such case it was error to instruct that it was the duty of the gripman to keep a strict lookout forward for obstructions or objects which might come upon the track, as it was for the jury to determine whether the car was properly managed, in the absence of such strict lookout. *Wright v. Third Avenue R. Co.*, 23 N. Y. S. R. 483, 5 N. Y. Supp. 707.

**15. Collisions.**—The cable-car gripman is required to exercise ordinary care to prevent injuries to persons on the street, which would include the duty to stop the car so as to prevent a collision, if it could be done with safety to the car and its passengers. *Pope v. Kansas City Cable R. Co.*, 43 Am. & Eng. R. Cas. 290, 99 Mo. 400, 12 S. W. Rep. 891.—DISTINGUISHING *Bell v. Hannibal & St. J. R. Co.*, 72 Mo. 50.

In an action for a personal injury resulting from the collision of a cable car and plaintiff's wagon, an instruction which told the jury that "if the gripman *intentionally* and *carelessly* ran the defendant's car against the plaintiff's wagon, that this was negligence," is condemned, as "intentionally" and "carelessly" express different and inconsistent views of the same manner. *Bindbeutel v. Street R. Co.*, 43 Mo. App. 463.—DISTINGUISHED IN *Holmes v. Atchison, T. & S. F. R. Co.*, 48 Mo. App. 79.

The error contained in said instruction was prejudicial, and the more so when taken in connection with another instruction, which told the jury that if they found that



the injuries sustained were wilfully and intentionally inflicted, they should allow plaintiff punitive damages; as also, when taken in connection with a further instruction to the effect that if the injury was "intentional," then the defense of contributory negligence could not avail defendant. *Bindental v. Street R. Co.*, 43 Mo. App. 463.

In an action for damages for injuries resulting to plaintiff from the collision of a cable car with her wagon, which she was unable to get off the track because of the refusal of her horses to move, an instruction asked by defendant that "if it appears from the evidence that the plaintiff was guilty of any negligence whatever which contributed to cause the injury complained of in this action, or concurred with the negligence of the defendant, if any, in producing it, then your verdict must be for defendant," was properly refused, on the ground that it imposes a greater degree of care upon the party injured than upon the one committing the injury. *Spurrier v. Front St. Cable R. Co.*, 3 Wash. 659, 29 Pac. Rep. 346.

Plaintiff, who had hitched his horse to an awning-post, untied the hitching-strap while standing on the pavement, with some boxes between the horse and himself. Just then a cable car came along and the ringing of the bell alarmed the horse. It pulled the strap from plaintiff's hand, ran upon the track, and was struck by the cable car. Plaintiff testified that when the horse reached the track the cable car was about eighteen to twenty feet distant. He also testified that the gripman could have stopped the car and have seen the horse, but there was no evidence to corroborate his testimony in that respect. *Held*, that there was not sufficient evidence to submit to the jury the question whether the gripman was negligent in not stopping the car in time to prevent a collision, the plaintiff not being qualified to express an opinion upon that point; that the ringing of the bell was not negligence; and that plaintiff could not recover. *Philadelphia Traction Co. v. Bernheimer*, 38 Am. & Eng. R. Cas. 487, 125 Pa. St. 615, 17 Atl. Rep. 477. — FOLLOWED IN *Steiner v. Philadelphia Traction Co.*, 41 Am. & Eng. R. Cas. 535, 134 Pa. St. 199.

**10. Failure to ring bell at crossing.**—Where an ordinance requires a bell to be rung on cable cars in passing street crossings, a failure to do so is not excused by showing that the car-conductor was tempo-

rarily absent, and that the gripman was otherwise engaged. *Driscoll v. Market St. Cable R. Co.*, 97 Cal. 553, 32 Pac. Rep. 591.

A person walking on the street was killed by a cable car at a street crossing. A city ordinance required that a bell should be rung continuously from a point 25 feet from the crossing until after it should be passed. *Held*, that the failure to do so was negligence, both as a violation of a reasonable ordinance and because the circumstances showed in this case that it was carelessness not to do so. *Driscoll v. Market St. Cable R. Co.*, 97 Cal. 553, 32 Pac. Rep. 591.

**17. Frightening horses.**—Where damages are claimed for injuries sustained through the plaintiff's horses taking fright at a traction car, evidence that the gripman rang the bell of the car at or near a street crossing, where it was his duty to ring, does not establish negligence on the part of the gripman so as to render the company liable. *Steiner v. Philadelphia Traction Co.*, 41 Am. & Eng. R. Cas. 535, 134 Pa. St. 199, 17 Atl. Rep. 491. — FOLLOWING *Philadelphia Traction Co. v. Bernheimer*, 125 Pa. St. 615. QUOTING *Philadelphia, W. & B. R. Co. v. Stinger*, 78 Pa. St. 219.

**18. Excessive width of grip-slot.**—A cable-car company was sued for injuries caused to a person driving on the street by the wheels of his carriage on one side dropping through the slot. *Held*, that the company was liable if the widening of the slot occurred by reason of defects in the original construction or design of the road, and that it was equally liable if the widening resulted from frost and thawing, as it was the company's duty to properly inspect the track, to provide against such accidents. *Griveaud v. St. Louis C. & W. R. Co.*, 33 Mo. App. 458. — QUOTING *Keitel v. St. Louis C. & W. R. Co.*, 28 Mo. App. 665.

An instruction to the effect that the defendant would not be liable for the plaintiff's injuries resulting from the opening of the slot in a cable railway if the said opening was caused by heavy teams passing over the same, and if defendant did not know that such opening existed and could not have known thereof from the most careful inspection in time to have remedied the defect before the occurring of the accident, was properly refused, because it omitted one possible element of the defendant's liability, namely, that the roadbed may have been deficient in original construction and design.

*Griveaud v. St. Louis C & W. R. Co.*, 33 Mo. App. 458.

A cable-car company was sued for injuries to a horse by catching the calk of his shoe in the slot. The liability of the company depended upon whether the slot was more than three-fourths of an inch wide, and if so, whether the excess of width was the cause of the injury, upon which there was a conflict of evidence. *Held*, that it was proper to submit these questions to the jury, and that their verdict should not be disturbed. *Humbert v. Brooklyn Cable Co.*, 12 N. Y. S. R. 172.

In an action against a street-cable railway company for damages occasioned by the excessive and improper width of the grip-slot at a particular point, it is not necessary for the plaintiff to plead the defendant's notice or knowledge of such defective condition of its roadway. *Keitel v. St. Louis C. & W. R. Co.*, 28 Mo. App. 657.

**10. Contributory negligence.**—An attempt to pass with a wagon in front of a cable car forty feet away and approaching at a speed of ten miles an hour is negligence as matter of law. *Hamilton v. Third Ave. R. Co.*, 6 Misc. (N. Y.) 382, 26 N. Y. Supp. 754, 56 N. Y. S. R. 397.

Where a cable-railway company is sued for negligently killing a person on the street, and there is evidence tending to show contributory negligence, it is error to ignore such contributory negligence and simply charge that "if the jury believed that the gripman was looking back, and the accident would not have occurred had he been looking forward, \* \* \* and that this inattention was the proximate cause of the accident, then the defendant is liable." *Wright v. Third Ave. R. Co.*, 27 N. Y. S. R. 523, 5 N. Y. Supp. 707.—REVIEWING *McGrath v. New York C. & H. R. R. Co.*, 63 N. Y. 522.

An aged woman of good eyesight, but slightly deaf, sued to recover for injuries for being struck by a car. At the trial she testified that it was always her habit before crossing the track to look both ways for cars but that she could not recollect having done so at the time of the accident, and that she could have seen the car half a block away, but did not either see or hear it. Another witness testified that plaintiff did look both ways. *Held*, sufficient evidence to support a finding that plaintiff used reasonable care. *Cowan v. Third Ave. R. Co.*, 9 N. Y. Supp. 610.

## CALIFORNIA.

Animals running at large in, see ANIMALS, INJURIES TO, 244.

State aid to railroads in, see STATE AID, II.

Statutes of, relative to killing stock, see ANIMALS, INJURIES TO, 10.

## CALLS.

For directors' meetings, see DIRECTORS, 18.  
Upon shares, see SUBSCRIPTIONS TO STOCK, II.

## CANADA.

Examination of persons before trial in, see DISCOVERY, 10.

Government railroads in, see GOVERNMENT RAILROADS, II.

Incorporation under statutes of, see INCORPORATION, 5.

Land grants in, see LAND GRANTS, VI.

Protection of private ways by statute in, see PRIVATE WAYS, 10.

Rule as to animals running at large in, see ANIMALS, INJURIES TO, 158.

Statutes of, concerning fires caused by locomotives, see FIRES, 1, 2.

Taxation of railroads in, see TAXATION, XII.

## CANALS.

Property of, when subject to execution, see EXECUTION, 4.

### 1. Private canals, generally. —

Where a canal is constructed and maintained at private expense, it is like a private road built and maintained in the same way, over which the public is permitted to travel but in which it obtains no vested rights. *Potter v. Indiana & L. M. R. Co.*, 95 Mich. 389, 54 N. W. Rep. 956.

**2. Contracts for the passage of boats.**—The right to make contracts or agreements for the passage of boats, etc., through the Louisville and Portland Canal is a necessary incident to the powers specifically granted to the corporation to which the canal belongs; and for any failure to perform a contract or undertaking of that sort, the corporation is liable, in the same manner and to the same extent that a natural person would be. *Muir v. Louisville & P. Canal Co.*, 8 Dana (Ky.) 161.

When a boat is induced by a company to enter its canal in the expectation that, for a fair compensation, it shall have a passage through, the law implies an agreement on the part of the corporation that the boat shall get through in a reasonable time.

*Muir v. Louisville & P. Canal Co.*, 8 Dana (Ky.) 161.

**3. Breaking away of embankments.**—A canal company is bound to use all ordinary and reasonable means and appliances to guard against the breaking away of the embankment of its canal; and failing to do so, if a break occurs resulting in injury to the person or property of others, it is liable. *McArthur v. Green Bay & M. Canal Co.*, 34 Wis. 139.

**4. Sunday navigation.**—A canal is a public highway which all persons complying with all lawful requirements may navigate and use at their pleasure on all days except Sunday, and on Sunday in cases of necessity. *McArthur v. Green Bay & M. Canal Co.*, 34 Wis. 139.

A regulation of a canal company that "no boat will be allowed to pass the lock on Sunday without a written permit from the superintendent or his assistant, and this permit will not be granted unless in case of actual necessity," is unreasonable, and neither the superintendent nor the board of directors of the company has power to establish and enforce it. *McArthur v. Green Bay & M. Canal Co.*, 34 Wis. 139.

**5. State canals—Rights of purchasers from state.**—The state of Indiana held the fee to the title in the real estate over which the Wabash & Erie Canal was constructed, which passed to its purchasers, and upon abandonment of the canal for navigation and converting it to the purposes of a railroad, the property did not revert to the original proprietors. *Mason v. Lake Erie, E. & S. W. R. Co.*, 9 Biss. (U.S.) 239, 1 Fed. Rep. 712.

Under a lease by the state of the use of so much of the surplus water, not required for navigation, of the Wabash & Erie Canal, owned by the state, as would be sufficient to propel machinery for the lessee's mill, the implied covenant for quiet enjoyment was such that so long as the canal was used for purposes of navigation, and while there was, during that period, a surplus of water, the state agreed to do no acts which would deprive the lessee of its enjoyment. *Hoagland v. New York, C. & St. L. R. Co.*, 30 Am. & Eng. R. Cas. 186, 111 Ind. 443, 12 N. E. Rep. 83, 9 West. Rep. 252.

But the contract in such case did not impose upon the state, or upon a railroad company that subsequently became its grantee, any obligation to keep the canal in repair,

or to maintain it in such a condition that surplus water would be available, or to supply any water whatever; but the lessee took the lease subject to the right of the state or its grantees to abandon the canal for the purpose of navigation, and to appropriate it to other uses, including the right to construct a railroad thereon. *Hoagland v. New York, C. & St. L. R. Co.*, 30 Am. & Eng. R. Cas. 186, 111 Ind. 443, 9 West. Rep. 252, 12 N. E. Rep. 83.

The state of Pennsylvania acquired the absolute title to lands used and occupied for such improvements as canals, and could convey that title, but not so of lands needed for temporary purposes only. *Pennsylvania & N. Y. C. & R. Co. v. Billings*, 10 Am. & Eng. R. Cas. 72, 94 Pa. St. 40.

The Pa. act of April 21, 1858, authorizing the sale of the state canals, is constitutional; and the judiciary have no power to declare the sale void for inadequacy of price, or for any undue favor to local interests supposed to have influenced it. *Sunbury & E. R. Co. v. Cooper*, 33 Pa. St. 278.

The purchasers of the state canals under the Pa. act of April 21, 1858, took the same subject to all provisions of the resolution of April 14, 1843, respecting the payment of the tolls collected at Williamsport to the Williamsport & Elmira Railroad Company. *Williamsport & E. R. Co. v. Commonwealth*, 33 Pa. St. 288.

The title of a railroad company which has succeeded to the property and rights of the former Pennsylvania canals cannot be attacked by one who holds no title except by possession, on the ground that the land was not necessary for canal purposes. The action of the canal commissioners in buying and selling the land is conclusive. *Harris v. Pennsylvania & N. Y. C. & R. Co.*, (Pa.) 9 Atl. Rep. 174.

**6. Tolls generally.**—The term "canal revenues," as used in N. Y. Const. of 1846, art. 7, did not include tolls or taxes upon merchandise carried by railroads, as imposed by the laws in force at the time of the adoption of the constitution; therefore the act of 1851, ch. 497, repealing the laws imposing such tolls and taxes is constitutional. *People v. New York C. R. Co.*, 24 N. Y. 485; affirming 34 Barb. 123.

**7. — under English statutes.**—The word "toll" in the 11th section of the Regulation of Railways Act 1873 includes the tolls which are levied for the use of a

canal. *Proprietors of Warwick & B. C. N. Co. v. Proprietors of Birmingham C. N. Co., 3 Ry. & C. T. Cas.* 113.

A company may be a forwarding company within the meaning of the above section without acting as the carriers of the traffic they forward. *Proprietors of Warwick & B. C. N. Co. v. Proprietors of Birmingham C. N. Co., 3 Ry. & C. T. Cas.* 113.

In a statute granting a gross toll to the Birmingham Canal Company, it was recited that it would be of public advantage for the canal from Warwick to Birmingham to be opened into the Digbeth branch; and that, in order to induce the Birmingham Company to agree to such junction taking place, it had been proposed and agreed that the Birmingham Company should have the rates or dues thereafter mentioned. Both these statutes were repealed by others substituting fresh tolls. *Held*, that the particular circumstances which led to the original establishment of the tolls did not prevent them coming under the jurisdiction of the commissioners in fixing through tolls under the Regulation of Railways Act 1873, § 11. *Proprietors of Warwick & B. C. N. Co. v. Proprietors of Birmingham C. N. Co., 3 Ry. & C. T. Cas.* 113.

A canal company had a dividend guaranteed to them by a railway company under a statute, which provided that they should not reduce or vary their tolls without the consent of the railway company. *Held*, that the consent of the railway company to the granting of a through toll affecting the tolls of the canal company was not required. *Proprietors of Warwick & B. C. N. Co. v. Proprietors of Birmingham C. N. Co., 3 Ry. & C. T. Cas.* 113. See also *Id.* 324.

Upon a reference to the railway commissioners by the board of trade, under 37 & 38 Vic. c. 40, § 6, they reduced the tolls charged by the Great Western Railway Company upon the Kennet & Avon Canal, upon the complaint of traders using the canal under the provisions of the Great Western Act 1852. *Wilts. S. & B. C. T. Assoc. v. Great Western R. Co., 3 Ry. & C. T. Cas.* 20.

A railway company managed a canal, collected the tolls, repaired the weirs and lock-gates, and paid the rents due by the proprietors of the navigation. *Held*, that they were a railway company "having the management of" a canal, within the meaning of the Regulation of Railways Act 1873, § 17; but that, having discontinued the manage-

ment and collection of tolls before the date of an application seeking to enforce the provisions of that section against them, they had relieved themselves from liability to maintain the canal thereunder. As the company had given no public notice of the relinquishment of their management, they were ordered to pay half the cost of the applicants. *Foster v. Great Western R. Co., 3 Ry. & C. T. Cas.* 14.

### CANCELLATION.

Jurisdiction to order, generally, see EQUITY, 11-15.

Of corporate bonds, see BONDS, 62.

— deeds, see DEEDS, VI.

— of unpaid subscriptions, see REORGANIZATION, 6.

### CAPITAL STOCK.

See STOCK; SUBSCRIPTIONS TO STOCK.

### CAPTION.

Of statute, effect of recitals in, see ANIMALS, INJURIES TO, 3.

### CAR-TRUST ASSOCIATIONS.

Rights of, as respects mortgaged cars, see MORTGAGES, II, 4.

1. *Validity of their contracts, generally.*\*—As to the power of a receiver to contract with a car-trust association, see *Taylor v. Philadelphia & R. R. Co., 3 Am. & Eng. R. Cas.* 177, 9 *Fed. Rep.* 1.

2. *Leases of cars.*—Where a car-trust association is represented by trustees, and they enter into an agreement with a company that has already leased cars, by which the terms of the lease are modified, but which only purports to bind such stockholders of the trust association as authorize it by an indorsement on their certificates representing stock, and not a minority who fail to assent, the trustees still represent the minority, and may sue on the original lease to recover for them according to its terms. *Humphreys v. New York, L. E. & W. R. Co., 43 Am. & Eng. R. Cas.* 700, 121 *N. Y.* 435, 24 *N. E. Rep.* 695, 31 *N. Y. S. R.* 299.

The trustees of a car-trust association leased to defendant company certain cars and locomotives, by which the latter was to

\* Car trusts and car-trust certificates, see note, 57 *Am. & Eng. R. Cas.* 243.

pay, as rental, 6 per cent on certificates representing the capital stock of the trust company, and a further fixed sum, to be applied in purchasing the certificates. This lease was afterward modified "on behalf of such of the holders of said certificates as have already authorized or shall hereafter authorize the same," and the rental was reduced to 5 percent and other changes were made. Some of the certificate holders never authorized the same or assented thereto. *Held*, that the modified lease was only binding upon such certificate holders as authorized it; that the trustees could maintain an action to recover for the non-consenting certificate holders according to the terms of the original lease; and that the mere form of the lease was not binding on all, as it was evident from the whole lease that the trustees only intended to bind those who assented to the modification. *Humphreys v. New York, L. E. & W. R. Co.*, 43 *Am. & Eng. R. Cas.* 700, 121 *N. Y.* 435, 24 *N. E. Rep.* 695, 31 *N. Y. S. R.* 299.

**3. Taxation of.**—An association known as a car trust is a "person," within the meaning of *Mass. Pub. St. ch. 11, § 20*, providing that personal property held in trust, the income of which is payable to another person, shall be assessed to the trustee in the place where such other person resides, if within the commonwealth. *Ricker v. American L. & T. Co.*, 140 *Mass.* 346.

For the purpose of taxation under a statute providing that "property held in trust, the income of which is payable to another person, should be taxed where such other person resides," when such other person, or the *cestui que trust*, is a partnership, the place where the partnership resides is the place where its business is carried on; and where its business is carried on by a trustee, the latter's place of business fixes the residence of the partnership. *Ricker v. American L. & T. Co.*, 140 *Mass.* 346.

There is no intermediate form of organization between a corporation and a partnership known to the laws of Massachusetts, and therefore, where a car-trust association is not a corporation it must be deemed a partnership and not simply an association of co-owners. *Ricker v. American L. & T. Co.*, 140 *Mass.* 346.

Under *Mass. Pub. St. ch. 11, § 24*, providing that "partners, whether residing in the same or different places, may be jointly taxed under their partnership name in the place where their business is carried on,

for all the personal property employed in such business," and under § 20 of the same chapter, providing that "personal property held in trust, the income of which is payable to another person, shall be assessed to the trustee in the place where such other person resides if within the commonwealth," the personal property of a car-trust association which was so organized as to constitute a partnership, whose property was held and business conducted by a trustee in Boston, and where the members of the association had no other place of meeting or business, is properly taxable to the trustee in Boston. *Ricker v. American L. & T. Co.*, 140 *Mass.* 346.

### CARRIAGE OF LIVE STOCK.

Authority to allow persons to ride on cattle-car, see **CONDUCTOR, 2**.

By ferry, see **FERRIES, 10**.

Duty to deliver under contract, see **STOCK-YARDS, 3**.

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## I. OBLIGATION TO RECEIVE AND CARRY.

### 1. In General.

**1. Not carriers of live stock at common law.\***—Railroad companies are not by the common law carriers of live stock, and can only make themselves carriers of that species of property by assuming to convey it as carriers. *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329.—FOLLOWING Michigan, S. & N. I. R. Co. v. McDonough, 21 Mich. 165.

Unless required to do so by charter or by a statute a railroad company is not bound to receive and carry live stock as common carriers. *Michigan, S. & N. I. R. Co. v. McDonough*, 1 Mich. (N. P.) [Supp.] lxxxvi.

A railroad charter only binds the company as a common carrier to transport such property as was usually transported by railroad companies at the time the charter was granted; and where cattle were not transported by rail at the time a charter was granted, the company is not bound to transport them as a common carrier, unless it holds itself out to the public as transporting them, or enters into a special contract to do so. *Michigan, S. & N. I. R. Co. v. McDonough*, 21 Mich. 165.

Evidence that a company had carried, and still offers to carry, live stock for hire for all who desired on terms, as to duties, liabilities, and relations, not recognized by the law of carriers, but in some respects variant, and in others repugnant thereto, does not tend to prove that such company is a carrier of live stock. *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329, 5 Am. Ry. Rep. 249.

### 2. Refusal to receive, when proper.

—A railway company is not liable for damages sustained by reason of its refusal to receive cattle for carriage into a county, the local authorities of which require that before "any movement into the county district" a license shall be procured, the owners of such cattle having produced no license. *Williams v. Great Western R. Co.*, 52 L. T. 250, 49 J. P. 439.

**3. Cattle-pens.†**—Texas Rev. St. art. 4236, providing that railway companies "shall erect stations, suitable buildings, or inclosures to protect produce, wares, and merchandise and freight of every description," includes necessary stock-pens for

cattle tendered for shipment, and they must be made sufficiently safe. *Gulf, C. & S. F. R. Co. v. Trawick*, 80 Tex. 270, 15 S. W. Rep. 568, 18 S. W. Rep. 948.

The carrier of live stock cannot exonerate itself from damages resulting from a breach of its duty to furnish suitable stock-pens, on the ground that the owner of the stock saw the condition of the pens. *Mason v. Missouri Pac. R. Co.*, 25 Mo. App. 473.—REVIEWING *Potts v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 394.

Where stock tendered for shipment are placed in pens provided by the company it cannot relieve itself from liability for injuries occurring through defects in the pens, by showing that the owner had knowledge of such defects. *Gulf, C. & S. F. R. Co. v. Trawick*, 80 Tex. 270, 15 S. W. Rep. 568, 18 S. W. Rep. 948.—REVIEWED IN *Galveston, H. & S. A. R. Co. v. Wesch*, 85 Tex. 593.

Where a railway company to which are delivered pigs for carriage places them in a pen where they are injured by coming in contact with a covering of lime, it is no defense in an action for such injury for the company to allege that the lime was placed in the pen by order of the lord lieutenant in council, under the provisions of the Contagious Diseases Act 1878. *Shaw v. Great S. & W. R. Co.*, L. R. 8 Ir. 10.

### 2. Duty to Furnish Cars.

**4. Company must furnish safe and secure cars.\***—Carriers are bound to furnish safe and properly constructed cars in which to transport live stock, and suitable with reference to the kind and value of the stock. *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. Rep. 870. *Potts v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 394.—DISTINGUISHING *Miltimore v. Chicago & N. W. R. Co.*, 37 Wis. 190. REVIEWING *Illinois C. R. Co. v. Hall*, 58 Ill. 410; *Betts v. Farmers' L. & T. Co.*, 21 Wis. 87; *Hawkins v. Great Western R. Co.*, 17 Mich. 63, 18 Mich. 433.—REVIEWED IN *Mason v. Missouri Pac. R. Co.*, 25 Mo. App. 473.

A carrier of live stock is under the same obligation to provide cars of sufficient strength as are carriers of merchandise. *St. Louis & S. E. R. Co. v. Dorman*, 72 Ill. 504.

A carrier of live stock is only bound to provide suitable, safe, and sufficient cars

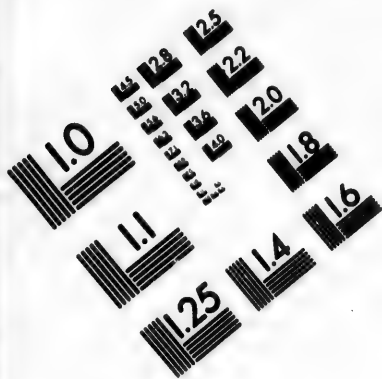
\* See also *post*, 22.

† See also *post*, 16, 53.

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\* Duty of company to furnish suitable cars for transportation of live stock, see notes, 9 L. R. A. 449, 30 AM. & ENG. R. CAS. 48.





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with proper motive power, and is not bound to provide "the safest and best approved motive power with the best appliances in use." *Illinois C. R. Co. v. Haynes*, 63 Miss. 485.

Where a common carrier of live stock provides suitable cars, and exercises due care in other respects, it is not liable for injuries to the animals resulting from their own viciousness, or their struggles in efforts to escape; but it is bound to provide cars strong enough to prevent them escaping, even though they are unruly or vicious. *Smith v. New Haven & N. R. Co.*, 12 Allen (Mass.) 531.—QUOTED IN *Bowie v. Baltimore & O. R. Co.*, 1 M. Arth. (D. C.) 94; *Mynard v. Syracuse & N. Y. R. Co.*, 71 N. Y. 180.

The shipment of horses under a contract providing that the owner assumed the risk of loss or injury in "loading, unloading, conveyance, and otherwise, whether arising from negligence, default, or misconduct, gross or culpable or otherwise, on the part of the railway company's servants, agents, or officers," does not relieve the company from the duty of furnishing suitable cars. *Hawkins v. Great Western R. Co.*, 17 Mich. 57.—REVIEWED IN *Potts v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 394.

Mo. Rev. St. 1889, §§ 2598-2600, which require railroad companies to furnish double-decked cars for carrying sheep when requested, and impose a penalty for refusal to do so, are constitutional, being a reasonable regulation of common carriers. *Emerson v. St. Louis & H. R. Co.*, 111 Mo. 161, 19 S. W. Rep. 1113.

The defendant undertook to transport for the plaintiff a car-load of live stock. Held, that it was bound to furnish a suitable and safe car, and was responsible for any loss arising from neglect of duty in this particular; and that the mere presence of the owner did not lessen this responsibility, if he had no power over the train nor right to make any change in the disposition of the cars, which were necessarily under the control of the agents of the company. *Peters v. New Orleans, J. & G. N. R. Co.*, 16 La. Ann. 222.

##### 5. Liability for failure to furnish cars.\*—A common carrier of live stock is

\* Liability of company for failure to furnish cars so that stock could reach destination in time to be exposed for sale on Sunday, see 55 AM. & ENG. R. CAS. 344, *abstr.*

bound to furnish suitable cars upon reasonable notice whenever it can do so with reasonable diligence, without jeopardizing its other business; and when it is sued for failing to do so, the burden of showing that it could not is upon the company, even where the plaintiff has expressly pleaded the contrary. *Ayres v. Chicago & N. W. R. Co.*, 35 Am. & Eng. R. Cas. 679, 71 Wis. 372, 5 Am. St. Rep. 226, 37 N. W. Rep. 432.—FOLLOWED IN *Pittsburgh, C., C. & St. L. R. Co. v. Racer*, 5 Ind. App. 209.

There is nothing to prohibit a railroad company from entering into a contract to furnish cars at a particular place and time for the shipment of stock, if they can be had; and where it appears that the cars were on hand, but were used in shipping other stock, the company is liable under its contract, though in the absence of such contract it would have been relieved under the circumstances from liability. *Cross v. McFaden*, 1 Tex. Civ. App. 461, 20 S. W. Rep. 846.

In the absence of a special contract, a common carrier of live stock is not liable for a failure to have cars in readiness on the day that the shipper has given notice that he would have the stock ready, where there is nothing to show that the notice given was a reasonable one, within the meaning of Wis. Rev. St. § 1798, providing that every railroad company shall, upon reasonable notice, when within its power to do so, furnish cars to any person applying therefor for the transportation of freight. *Richardson v. Chicago & N. W. R. Co.*, 18 Am. & Eng. R. Cas. 530, 61 Wis. 596, 21 N. W. Rep. 49.

If a shipper's order to a common carrier of live stock for a designated number of cars, to be furnished at a station indicated, on a day mentioned in the future for the transportation is accepted by the carrier, such an agreement would constitute a contract binding on the company to furnish the cars, and upon the shipper to furnish the stock to load them. The validity of the contract is not affected by the fact that the shipper did not own or have the stock when the contract was made. *Pittsburgh, C., C. & St. L. R. Co. v. Racer*, 5 Ind. App. 209, 31 N. E. Rep. 853.

A parol contract by which a railroad company agrees to receive cattle on its cars for transportation on a day certain, and which is violated by not having the cars as agreed

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on, may be made the basis of recovery against the company for all damages caused thereby. It cannot claim that its liability did not attach until the signing of a bill of lading for the cattle, which were delivered at a subsequent day, and after the contract had been violated. The liability of the company for damages was for a breach of contract, which made delivery of the cattle at the time specified impossible; and arts. 281, 282, and 283 of the Rev. St. refer only to the liability of a common carrier after delivery of the thing to be transported and after signing a bill of lading therefor. *Texas Pac. R. Co. v. Nicholson*, 21 Am. & Eng. R. Cas. 133, 61 Tex. 491. *Texas & P. R. Co. v. Hamm*, 2 Tex. App. (Civ. Cas.) 436.—FOLLOWING *Texas Pac. R. Co. v. Nicholson*, 61 Tex. 491.

Where a railroad company which is a common carrier of live stock is requested, a reasonable time beforehand, to furnish cars suitable for the transportation of live stock at a specified time and shipping point, it is its duty to inform the applicant within a reasonable time whether it can furnish such cars at the time required; and where it fails to give such notice, and the shipper, relying upon its performance of duty as a common carrier, prepares and has his stock ready for shipment at the time and place named, the company is liable for the damages suffered by him by reason of its failure to so furnish the cars. *Ayres v. Chicago & N. W. R. Co.*, 35 Am. & Eng. R. Cas. 679, 71 Wis. 372, 5 Am. St. Rep. 226, 37 N. W. Rep. 432. *Pittsburgh, C., C. & St. L. R. Co. v. Racer*, 5 Ind. App. 209, 31 N. E. Rep. 853.—FOLLOWING *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 31 Fed. Rep. 864; *Ayres v. Chicago & N. W. R. Co.*, 71 Wis. 372, 5 Am. St. Rep. 226.

Where a war has been in progress for more than two years, a railway company is supposed to be acquainted with the prior claims of the government to the use of its freight cars, but it is its duty, as a common carrier, to provide for the accommodation of private citizens as well as the government; and if it fails to do so, it cannot excuse a delay in shipping live stock belonging to a private citizen, on the ground that its cars were in use by the government. *Pruitt v. Hannibal & St. J. R. Co.*, 62 Mo. 527.—FOLLOWING *in Quinn v. Wabash, St. L. & P. R. Co.*, 20 Mo. App. 453.

A shipper of live stock sued the carrier, declaring: (1) for a violation of a parol con-

tract to furnish cars, and (2) for delay and injury to the stock while being carried. The company set up as a defense a provision in the written contract of shipment, limiting the right to sue for injuries to 40 days. *Held*, that this provision could not affect plaintiff's right to sue and recover for a breach of the parol contract to furnish cars. *McCarthy v. Gulf, C. & S. F. R. Co.*, 79 Tex. 33, 15 S. W. Rep. 164.

**6. Liability for loss or damage caused by defects in cars.**—Where a company undertakes to transport live stock it is its duty to furnish good and sufficient cars in which to carry the same, and, if it does not, and animals escape, from defects in its cars, beyond the terminus of its road, it will be liable for the loss, even though there be a special contract limiting its liability to the end of the road. *Indianapolis, B. & W. R. Co. v. Strain*, 81 Ill. 504.—FOLLOWED IN *Potts v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 394.

If the carrier furnishes an unsafe and unsuitable car for the transportation of live stock this is negligence, and a recital in the bill of lading that the shipper examined the car and found it safe and suitable does not operate as an estoppel, but only imposes on him the burden of proving that it was unsafe or unsuitable. *Western R. Co. v. Harwell*, 45 Am. & Eng. R. Cas. 358, 91 Ala. 340, 8 So. Rep. 649.

Where a person hires cars and packs his animals therein as he sees fit, yet if the death of some animals is caused by failure of the railroad to perform its contract to put slatted doors on the cars it will be liable. *East Tenn. & G. R. Co. v. Whittle*, 27 Ga. 535.

Where live stock were shipped under a contract that they were to be accompanied and cared for by the owner, but were placed in a defective car, which broke down while en route, necessitating changing the cattle to another car, where it was impossible for the owner to get proper bedding, he can recover for damages resulting from a want of proper bedding. *McDaniel v. Chicago & N. W. R. Co.*, 24 Iowa 412.

Where horses are received for shipment under a contract relieving the company from liability for loss or injury resulting from the negligence of the company's agents or officers, but silent as to the duty of the company to furnish cars, the company is required to furnish suitable cars and is liable for injuries resulting from a failure to do so, unless

the shipper, after full opportunities of observation, assented to the cars on which the horses were shipped. *Great Western R. Co. v. Hawkins*, 18 Mich. 427.—QUOTED IN *Kansas Pac. R. Co. v. Nichols*, 9 Kan. 235 RECONCILED IN *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329.

**7. Liability for defects in car received from another company.**—

When a second carrier of live stock receives a car from the first carrier it adopts it as part of its own train and becomes liable for stock injured by means of defects therein to the same extent as if it was its own car. *Wallingford v. Columbia & G. R. Co.*, 30 Am. & Eng. R. Cas. 40, 26 So. Car. 258, 2 S. E. Rep. 19.—DISTINGUISHING *Felder v. Columbia & G. R. Co.*, 21 So. Car. 35.

A railway company is bound to provide a car reasonably fit for the conveyance of horses, and if it accepts a defective car from a connecting line in which the horses were originally loaded and sends it on to the destination on its own line it is liable for an accident caused by defects in such car. *Combe v. London & S. W. R. Co.*, 31 L. T. 613.

**8. Liability for furnishing infected car.**—Where a railroad company furnishes the car and fixes the joint rate of compensation for the transportation of cattle over a connecting line as well as its own, it cannot escape liability for negligence in furnishing an infected car on the ground that the bill of lading was not signed by its agent, but was signed by the initial connecting carrier. *St. Louis, I. M. & S. R. Co. v. Henderson*, 57 Ark. 402.

**9. Waiver of defects in car—Assumption of risk by shipper.**\*—Where the owner of live stock to be transported makes his own selection of cars, with full knowledge of their defects and capabilities, the carrier is not liable for injuries which may be exclusively the result of defects therein, but by the selection of cars himself the owner does not assume loss which results from a detention of the cars while in transit. *Harris v. Northern Ind. R. Co.*, 20 N. Y. 232.

Where the owner of live stock loads them

himself without objecting to the character of the cars furnished he cannot afterward, in an action to recover for injuries to the stock, testify that there were other cars better adapted to the purpose of carrying stock than the ones furnished. *Chicago & N. W. R. Co. v. Van Dresar*, 22 Wis. 511.

Where the owner of cattle contracts to load them into cars for shipment, and accepts a car not provided with bedding, he cannot claim damages for injuries resulting from a lack of bedding. *East Tenn., V. & G. R. Co. v. Johnston*, 22 Am. & Eng. R. Cas. 437, 75 Ala. 596, 51 Am. Rep. 489.

The carrier, however, is bound to see that the freighter has knowledge of a defect in a car. He is not bound to enter the vehicles to examine them. To exonerate the carrier he must show that defects not palpable and visible were pointed out, or prove such circumstances as will justly charge the freighter with knowledge of their existence. *Harris v. Northern Ind. R. Co.*, 20 N. Y. 232.

The acceptance (or assent to the use) of a defective box-car, by the shipper, does not relieve a railroad company from liability for damages caused by such car. *Wallingford v. Columbia & G. R. Co.*, 30 Am. & Eng. R. Cas. 40, 26 So. Car. 258, 2 S. E. Rep. 19. *Ogdensburg & L. C. R. Co. v. Pratt*, 49 How. Pr. (N. Y.) 84.

A railroad company placed a mare and a colt in an ordinary box freight-car, the roof of which was so low that the mare on lifting her head struck it, and it was without partitions, so that she was thrown down by the motion of the cars and her leg was broken. But the plaintiff's agent, who had charge of the animals, was told of the defects of the car, and was offered a more suitable one if he would pay a higher but reasonable freight, but he decided to have this one used, and padded the rafters and placed a stuffed hood on the mare's head. Held, that the jury should have been charged that it was competent for them to find from these facts alone that the plaintiff assumed the risks incident to the unsuitableness of the car. *Coupland v. Housatonic R. Co.*, 55 Am. & Eng. R. Cas. 380, 61 Conn. 531, 23 Atl. Rep. 870.

In an action to recover for the loss of hogs which escaped from the cars while in the course of transportation, the bill of lading provided that the hogs should be taken care of by the owner, and that the company

\* Liability of carrier where consignor selects car, see note, 30 AM. & ENG. R. CAS. 49.

How far acceptance of cars by a shipper of live stock is assumption of risks, see 45 AM. & ENG. R. CAS. 356, *abstr.*; see also note, 55 AM. & ENG. R. CAS. 395.

should not be liable for loss of hogs by jumping from cars, except by reason of a collision or when cars were thrown from the track. The hogs were shipped in cars belonging to another company and selected by plaintiff, he refusing to use the cars of defendant. *Held*, that, if the hogs escaped from the cars by reason of any defect in them or of the door-fastenings, defendant would not be responsible if it did not know the fact when plaintiff selected them. *Illinois C. R. Co. v. Hall*, 58 Ill. 409, 11 Am. Ry. Rep. 95.—REVIEWED IN *Potts v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 394.

**10. Contract by shipper to furnish cars.**—A shipper is not in fault for failure to furnish cars under a contract of shipment providing that he shall furnish the cars and load them at a certain station, where he notifies the railroad company that cars to be used in the business are at certain other stations, that he desires the company to take them from another company in whose possession they are and which had been directed to turn them over, and the railroad company does not decline to get the cars, or claim that the shipper is bound to make any other delivery of them, or that there is any difficulty in getting them, but merely fails to accept them and commence the shipment within the time specified in the contract. *Lawrence v. Milwaukee, L. S. & W. R. Co.*, 84 Wis. 427, 54 N. W. Rep. 797.

### 3. Duty to Ship Promptly.

**11. In general.**—It is the duty of a carrier to forward cattle by the next train after they are loaded and the agent has knowledge of the fact, and if it fails to do so it is liable for any damages resulting from the delay. *Illinois C. R. Co. v. Waters*, 41 Ill. 73.

Where cattle were delivered to the carrier for shipment two days before duplicate written bills of lading were executed, the liability of the company to ship promptly under an oral contract is not merged in the writing, so as to exclude proof of a delay in failing to ship promptly before the execution of the written agreement. *Cleveland & T. K. Co. v. Perkins*, 17 Mich. 296.—DISTINGUISHING *Michigan S. & N. I. R. Co. v. Shurtz*, 7 Mich. 515.

Carriers are responsible for the natural or ordinary and proximate consequences of

their acts, but not for such as are remote and extraordinary. So where a common carrier of live stock is sued for a failure to receive it in its proper order for shipment, the necessary expenses of feeding and taking care of the stock are the natural and immediate consequences of the act; but not the death or shrinkage in weight of the stock, unless it appears to be caused directly by the act of the carrier. *Ballentine v. North Mo. R. Co.*, 40 Mo. 491.

Where hogs are delivered to a railroad company for shipment, and are left for 25 days in the month of December, in the latitude of Missouri, in uncovered pens, it is a question for the jury whether loss from exposure and smothering might reasonably have been expected. *Pruitt v. Hannibal & St. J. R. Co.*, 62 Mo. 527.

A carrier is not bound to receive live stock for shipment on Sunday, but if it does so it is bound by its obligation to ship promptly, and liable for a delay. In such case the gist of the action is the negligent delay in shipping and not in receiving. *Guinn v. Wabash, St. L. & P. R. Co.*, 20 Mo. App. 453.

A railroad company is not liable for failure to promptly carry cattle unless the jury believe that the cattle were delayed beyond the usual and ordinary time of shipment, or that they were injured through the negligence of the company while in its care. *Missouri Pac. R. Co. v. Nicholson*, 2 Tex. App. (Civ. Cas.) 147.

Where the stock to be shipped by plaintiff were not loaded upon the arrival of the defendant's train, and were not even in the yards of the company, but in a private yard, and had not been given into the possession of any authorized agent of defendant—*held*, that defendant was not liable for refusing to delay the train until the stock could be loaded, notwithstanding the same train took cars of stock at other stations later, although in these instances the locomotive was required to assist in loading the cars, while in plaintiff's case it was not. *Frazier v. Keokuk, C., St. J. & C. B. R. Co.*, 48 Iowa 571.

**12. What is a reasonable time within which to make shipment.**—Where a contract with a carrier for the transportation of live stock fixes no time for shipment, they must be shipped within a reasonable time, which must depend upon the circumstances of the particular case.



*Cincinnati, I., St. L. & C. R. Co. v. Case*, 42 *Am. & Eng. R. Cas.* 537, 122 *Ind.* 310, 23 *N. E. Rep.* 797.—DISTINGUISHED IN *Pennsylvania R. Co. v. Clark*, 2 *Ind. App.* 146.

Where there is a delay in shipment from Friday, 6 P.M., till Saturday, 4 A.M., the carrier having means of shipment at hand when the stock were delivered, and in consequence they arrive at their destination too late for the Saturday market, and have to be cared for till Monday, the shipment will not be deemed to have been made within a reasonable time. *Cincinnati, I., St. L. & C. R. Co. v. Case*, 42 *Am. & Eng. R. Cas.* 537, 122 *Ind.* 310, 23 *N. E. Rep.* 797.

A railroad company is bound to transport live stock within a reasonable time after receiving it, but it cannot be said as a matter of law that this means that the shipment must be made on the first train leaving after the property has been delivered for transportation. *Pennsylvania R. Co. v. Clark*, 2 *Ind. App.* 146, 27 *N. E. Rep.* 586.

**13. What will excuse delay in shipment.**—A snowstorm so severe as to hinder and delay a railroad company in the performance of its duties is such an act of God as to relieve the company from liability for loss or injury resulting from a delay in shipping live stock within a reasonable time. *Ballentine v. North Mo. R. Co.*, 40 *Mo.* 491. *Black v. Chicago, B. & Q. R. Co.*, 30 *Neb.* 197, 46 *N. W. Rep.* 428.

A carrier of live stock is not liable for injuries thereto caused by a delay, where the delay is caused by atmospheric conditions beyond the carrier's control, making it impossible to get telegraphic shipping orders; but to excuse such delay the carrier must have exercised due care to protect the property from injury during the delay. *International & G. N. R. Co. v. Hynes*, 3 *Tex. Civ. App.* 20, 21 *S. W. Rep.* 622.—APPLYING *Gulf, C. & S. F. R. Co. v. Levi*, 76 *Tex.* 337.

A provision in the charter of a railroad company requiring it to ship property in the order it is received at the depots, way-stations, and places desired by the owners thereof, is not violated by failing to carry live stock loaded at a way-station, but which, owing to the amount of business, could not have been carried on the first train passing without an extra engine, which must have been sent out from a distance and at night. *Michigan S. & N. I. R. Co.*

*v. McDonough*, 21 *Mich.* 165.—APPROVED IN *Central R. & B. Co. v. Smitha*, 85 *Ala.* 47, 4 *So. Rep.* 708. DISAPPROVED IN *Bamberg v. South Carolina R. Co.*, 9 *So. Car.* 61.

**14. What excuses will not avail the carrier.**—A railroad company cannot excuse the breach of a contract to receive and transport cattle upon a certain day by the fact that it was so crowded with business upon that day and during the time of the subsequent delay that it had no empty cars in which to receive the cattle. *Gulf, C. & S. F. R. Co. v. McCorkquodale*, 35 *Am. & Eng. R. Cas.* 653, 71 *Tex.* 41, 9 *S. W. Rep.* 80.

Railroad agents are placed at stations for the express purpose of receiving and forwarding freights and making contracts with reference thereto; and where an agent has agreed to receive and ship stock at a particular time the company is bound thereby, unless a delay in shipping was due to some unforeseen event, such as the law recognizes as sufficient. So held, where a railroad company insisted that its agent was not authorized to contract for the shipment of live stock during very cold weather. *Pruitt v. Hannibal & St. J. R. Co.*, 62 *Mo.* 527.

It is the duty of the carrier when applied to for cars to advise the shipper of the situation and circumstances which would likely occasion any unreasonable delay; and if he does not so advise and obtain consent either express or implied, to the delay, he becomes bound to carry the goods within a reasonable time; and he will not be heard to say that his delay was caused by some contingency. And such unavoidable difficulty, though wholly unknown and unanticipated at the time of acceptance, will not excuse him. *Guinn v. Wabash, St. L. & P. R. Co.*, 20 *Mo. App.* 453.—FOLLOWING *Pruitt v. Hannibal & St. J. R. Co.*, 62 *Mo.* 539.

Common carriers of live stock cannot excuse a delay in shipping cattle by reason of a washout on its road, where it appears that the stock would have passed the place of the washout before it occurred if they had been shipped promptly. *Gulf, C. & S. F. R. Co. v. McCorkquodale*, 35 *Am. & Eng. R. Cas.* 653, 71 *Tex.* 41, 9 *S. W. Rep.* 80.

It is the duty of common carriers to provide themselves with all reasonable facilities and appliances for the transportation of goods and live stock; and a company cannot excuse itself for delay in forwarding live stock by showing that a bridge was

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A delay of twenty-five days in shipping one drove of hogs and one of forty-one days in shipping another, which were claimed by the company to be due to heavy snows, but where trains were operated to some extent, are *prima-facie* evidence of negligence inexcusable, unless by the total cessation of all business by the company for the public. *Pruitt v. Hannibal & St. J. R. Co.*, 62 Mo. 527.—REVIEWED IN *Davis v. Wabash, St. L. & P. R. Co.*, 26 Am. & Eng. R. Cas. 315, 89 Mo. 340.

Where the negligence of a carrier of live stock concurs in and contributes to the injury, he is not exempt from liability on the ground that the immediate damage was occasioned by the act of God or inevitable accident. *Pruitt v. Hannibal & St. J. R. Co.*, 62 Mo. 527.—APPROVING *Michaels v. New York C. R. Co.*, 30 N. Y. 564; *Read v. Spaulding*, 30 N. Y. 630. *Bostwick v. Baltimore & O. R. Co.*, 45 N. Y. 712. FOLLOWING *Wolf v. American Exp. Co.*, 43 Mo. 421; *Reed v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 199. RECONCILING *Clark v. Pacific R. Co.*, 39 Mo. 184.

Snowstorms of sufficient violence or duration to obstruct the passage of trains are a sufficient excuse, during their continuance, for a delay by a carrier in shipping live stock; but such violent storms or excessive cold weather should hardly be regarded as an extraordinary event in the latitude of northern Missouri during the months of December and January. *Pruitt v. Hannibal & St. J. R. Co.*, 62 Mo. 527.

A carrier cannot be permitted negligently to delay a shipment of cattle beyond the time it could well make and does customarily make shipments, and then excuse itself by showing that it still made the trip within the period stipulated as a reasonable time, as such interpretation would make the stipulation against public policy, which does not permit a carrier to be negligent with impunity. Such stipulation means that the cattle were to be taken with all reasonable dispatch, and was a protection against a failure so to dispatch them. *Leonard v. Chicago & A. R. Co.*, 54 Mo. App. 293.

## II. DELIVERY TO THE CARRIER.

**15. Sufficiency, generally.**—Where plaintiff has contracted to ship a horse, and

has brought him to the place designated by the company's agent for loading, and the horse is injured while being loaded by reason of a rotten gangway breaking down, there is such a delivery as to render the company liable for a failure to provide safe means of loading. *McCullough v. Wabash W. R. Co.*, 34 Mo. App. 23.—QUOTING *Mason v. Missouri Pac. R. Co.*, 25 Mo. App. 473.

Where the owner of cattle, in consideration of a reduced rate, contracts with the carrier to take personal charge of them while being carried, and to assume the risk of transportation, there is no complete delivery to the company, and it will only be liable for injury or loss resulting from its gross negligence or willful misfeasance. *Illinois C. R. Co. v. Morrison*, 19 Ill. 136.—FOLLOWED IN *Illinois C. R. Co. v. Adams*, 42 Ill. 474. QUOTED IN *Annas v. Milwaukee & N. R. Co.*, 27 Am. & Eng. R. Cas. 102, 67 Wis. 46, 57 Am. Rep. 388, note.

Where there is no evidence to show that a railway company's porter was given authority, or held himself out as having authority, to receive or contract for the carriage of animals in any other than the usual way, viz., by the porter and the shipper both signing a consignment note, a railway company is not liable for the non-delivery of animals received by a porter without conforming to such practice. *Slim v. Great Northern R. Co.*, 14 C. B. 647, 2 C. L. R. 864, 8 Jur. 1119, 23 L. J. C. P. 166.

Where a contract was entered into by which four horses were to be transported from Washington to Baltimore on the railroad of defendant, and the horses were to be accompanied by their grooms, if the horses, in accordance with the agreement, were admitted to the inclosure where the defendant usually received such freight, and the defendant notified that they were there; and if the process of loading them had been partially completed by the shipment of three of the horses with their grooms—held, that although the agents of both parties were engaged in such loading when the injury occurred, these facts would constitute a delivery of the animals. *Bowie v. Baltimore & O. R. Co.*, 1 MacArth. (D. C.) 609.

Such an agreement is no waiver of the strict responsibility of the defendant as a common carrier, any further than it might be modified by the fact that persons were to be sent by the owner along with the prop-

erty; and if the property is injured through the negligence of the agents of the defendant, it is liable for the damage; and if the injury is caused by the act or conduct of the owner's servants, the defendant will not be responsible. *Bowie v. Baltimore & O. R. Co.*, 1 *MacArth.* (D. C.) 609.

#### 16. Receiving cattle in stock-pens.\*

—The liability of a railroad company, as a common carrier of live stock, attaches when the stock are received in its pens for transportation. *Gulf, C. & S. F. R. Co. v. Tra-  
wick*, 80 *Tex.* 270, 15 *S. W. Rep.* 568, 18 *S. W. Rep.* 948.—REVIEWING *East Line & R. R. Co. v. Hall*, 64 *Tex.* 620.

Such liability attaches from the moment of such delivery, and not from the time the car in which they are loaded is put in motion. *Mason v. Missouri Pac. R. Co.*, 25 *Mo. App.* 473.—REVIEWING *Pruitt v. Hannibal & St. J. R. Co.*, 62 *Mo.* 527.

The reception of hogs in the pens of a common carrier for transportation is equivalent to an obligation to forward them without unnecessary delay. *Pruitt v. Hannibal & St. J. R. Co.*, 62 *Mo.* 527.—APPROVING *Deming v. Grand Trunk R. Co.*, 48 *N. H.* 455.—REVIEWED IN *Mason v. Missouri Pac. R. Co.*, 25 *Mo. App.* 473.

Where cattle intended for shipment are placed in a railroad company's stock-pens at a station on its road, the refusal of such company afterward to receive and carry such cattle excuses any further delivery, or offer to deliver, for transportation on the part of the shipper. *Louisville, N. A. & C. R. Co. v. Godman*, 104 *Ind.* 490, 4 *N. E. Rep.* 163.—FOLLOWED IN *Louisville, N. A. & C. R. Co. v. Flannagan*, 113 *Ind.* 488.

Where a common carrier of live stock receives cattle for immediate shipment, it is liable for a loss that occurs by their breaking through defective pens before they are loaded on the cars. *Mason v. Missouri Pac. R. Co.*, 25 *Mo. App.* 473.—QUOTED IN *McCullough v. Wabash W. R. Co.*, 34 *Mo. App.* 23.

Mere permission, to the owner of cattle, by the agent of a railroad company to place them in the company's cattle-pens does not make the company liable for a loss resulting from their escaping therefrom, where it appears that at the time of escaping the cattle had not been received for shipment, nor had the company become responsible therefor,

or chargeable with the escape by reason of any negligence on its part. *Fl. Worth & D. C. R. Co. v. Riley*, (*Tex. App.*) 27 *Am. & Eng. R. Cas.* 49, 1 *S. W. Rep.* 446.

A railroad company holding itself out as a carrier of live stock is obliged to provide suitable facilities for receiving and discharging such stock. In certain cases this duty cannot be performed except by providing inclosed yards in which the stock may be received or discharged; and the carrier cannot, in addition to the customary and legitimate charges for transportation, make a special charge for merely receiving or delivering stock in and through such yards. *Covington Stock Yards Co. v. Keith*, 49 *Am. & Eng. R. Cas.* 149, 139 *U. S.* 128, 11 *Sup. Ct. Rep.* 461.—FOLLOWED IN *Oregon S. L. & U. N. R. Co. v. Ilwaco R. & N. Co.*, 51 *Fed. Rep.* 611.

17. Duty of carrier to furnish facilities for loading.—In respect to the mere loading and unloading of live stock at a particular city, the carrier is required to furnish such suitable and convenient appliances as are reasonably sufficient for the business at that place. *Covington Stock Yards Co. v. Keith*, 49 *Am. & Eng. R. Cas.* 149, 139 *U. S.* 128, 11 *Sup. Ct. Rep.* 461.

18. Duty of shipper to have car loaded before arrival of train. Where the ways and means for loading are in proper condition, and the duty of loading is upon the shipper, it is his duty to have the car loaded so that the train which is to move it may not be unreasonably delayed. *Louisville, N. A. & C. R. Co. v. Godman*, 104 *Ind.* 490, 4 *N. E. Rep.* 163.

Where cattle for shipment were placed in cars and the train that was expected to take them passed the station between ten and eleven o'clock at night, the owner was not negligent in allowing them to remain in the cars until nine o'clock of the next morning before he took them out. *Illinois C. R. Co. v. Waters*, 41 *Ill.* 73.

19. Liability for injuries during loading.—A railroad which undertakes to transport live stock is liable as a common carrier, though the shipper agrees to furnish the cars and to load and unload them entirely. *Fordyce v. M'Flynn*, 56 *Ark.* 424, 19 *S. W. Rep.* 961.

A carrier who relied upon the undertaking of a shipper of live stock to load and unload them will not be liable for an injury to the stock occasioned by the negligent

\* See also *ante*, 3; *post*, 53.

manner in which the loading was done, though there was a general duty resting upon the carrier to see that they were properly loaded. *Fordyce v. M'Flynn*, 56 Ark. 424, 19 S. W. Rep. 961.

Where the property consists of race-horses, accompanied by the agent of the owner, assisted by other persons in the employment of the owner, three of whom are race-riders for the horses, and who travel with and take care of them; and where there was a difficulty in loading one of the horses on the car, such agent insisting on loading it as he thought best, after having been requested by the railroad employes to place the horse under their control, the owner would not be entitled to recover for an injury to the horse sustained under such circumstances. *Bowie v. Baltimore & O. R. Co.*, 1 MacArth. (D. C.) 94.—QUOTING *Smith v. New Haven & N. R. Co.*, 12 Allen (Mass.) 531; *Michigan S. & N. I. R. Co. v. McDonough*, 21 Mich. 165.

On the trial of an action for injury to a race-horse while being loaded upon a car, where there is a conflict of testimony as to whether the agents of the road or those of the owner had charge of the horse when the accident occurred, it is erroneous to charge the jury that, if the servants or agents of the owner refused obedience to the agents of the road the latter would still be responsible for the injury; and that it was their duty, if they could not control the servants of the owner, to refuse transportation of the horse, in order to escape such responsibility. *Bowie v. Baltimore & O. R. Co.*, 1 MacArth. (D. C.) 94.

In an action for negligence in putting upon one of their carriages a mare, which it was alleged had been delivered to and received by them from the plaintiff, to be safely loaded and unloaded and conveyed to A., a witness for the plaintiff swore that he took the mare to the station, where a man assisted him to put her in a car, in doing which the accident happened, and the mare was then taken on the train to A. Held, that the proof was insufficient to sustain the issue, and that, on demurrer to the evidence, judgment in the county court was properly given for the defendants. *Griffin v. Great Western R. Co.*, 15 U. C. Q. B. 507.—REVIEWING *Walker v. Jackson*, 10 M. & W. 161.

**20. Receiving overloaded cars.**—Where a railroad company receives for

shipment a car-load of hogs which is overloaded, it assumes all the responsibility of a common carrier with reference to it, and cannot escape liability for damage to the property on the ground that the car was overloaded. *Kinnick v. Chicago, R. I. & P. R. Co.*, 27 Am. & Eng. R. Cas. 55, 69 Iowa 665, 29 N. W. Rep. 772.

Where there is no misrepresentation on the part of the shipper of live stock, a common carrier waives all exceptions to defects in loading by accepting stock so loaded for transportation. *Kinnick v. Chicago, R. I. & P. R. Co.*, 27 Am. & Eng. R. Cas. 55, 69 Iowa 665, 29 N. W. Rep. 772.

### III. DUTY OF CARRIER DURING TRANSIT.

#### 1. In General.

**21. Care and diligence required.\***—In the absence of a special contract limiting its liability, a railroad company undertaking to carry cattle assumes all the liabilities of a common carrier. *Georgia R. Co. v. Spears*, 66 Ga. 485. *Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 623, 5 Am. Ry. Rep. 260.—QUOTING *Michigan S. & N. I. R. Co. v. McDonough*, 21 Mich. 165; *Dwight v. Brewster*, 1 Pick. (Mass.) 50; *Carr v. Lancashire & Y. R. Co.*, 7 Exch. 711.—APPROVED IN *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117; *Bamberg v. South Carolina R. Co.*, 9 So. Car. 61. NOT FOLLOWED IN *Lupe v. Atlantic & P. R. Co.*, 3 Mo. App. 77.—*Missouri Pac. R. Co. v. Graves*, 2 Tex. App. (Civ. Cas.) 594. *Rixford v. Smith*, 52 N. H. 355, 13 Am. Rep. 42. *Kansas Pac. R. Co. v. Nichols*, 9 Kan. 235, 5 Am. Ry. Rep. 275.—EXPLAINING AND DISTINGUISHING *Michigan S. & N. I. R. Co. v. McDonough*, 21 Mich. 165. QUOTING *Kimball v. Rutland & B. R. Co.*, 26 Vt. 247; *Great Western R. Co. v. Hawkins*, 18 Mich. 427.—APPROVED IN *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117; *Bamberg v. South Carolina R. Co.*, 9 So. Car. 61.—*East Tenn., V. & G. R. Co. v. Johnston*, 22 Am. & Eng. R. Cas. 437, 75 Ala. 596, 51 Am. Rep. 489.—APPROVED IN *Central R. & B. Co. v. Smitha*, 85 Ala. 47, 4 So. Rep. 708.—*Moulton v. St. Paul, M. & M. R. Co.*, 12 Am. & Eng. R. Cas. 13, 31 Minn. 85, 47 Am. Rep. 781, 16 N. W.

\* Liability of carriers of live stock. General rule. Cases in which liability held not to be that of common carriers. See note, 67 AM. DEC. 208.

Duty of carrier of live stock overtaken by snowstorm. Pleading act of God. See 45 AM. & ENG. R. CAS. 351, *abstr.*

*Rep.* 497. *Pringle v. Pennsylvania R. Co.*, 3 *Phila. (Pa.)* 82. *Lupe v. Atlantic & P. R. Co.*, 3 *Mo. App.* 77. *Atchison & N. R. Co. v. Washburn*, 5 *Neb.* 117, 19 *Am. Ry. Rep.* 139.—APPROVING *Kansas Pac. R. Co. v. Reynolds*, 8 *Kan.* 634; *Kansas Pac. R. Co. v. Nichols*, 9 *Kan.* 248; *Wilson v. Hamilton*, 4 *Ohio St.* 722; *Palmer v. Grand Junction R. Co.*, 4 *M. & W.* 749. APPROVING AND QUOTING *Kimball v. Rutland & B. R. Co.*, 26 *Vt.* 247.

The common-law liability of carriers of merchandise applies to carriers of live stock, so far as it may be applicable; and it is only modified so far as made necessary by the peculiar character of the property to be transported. *McCoy v. Keokuk & D. M. R. Co.*, 44 *Iowa* 424.

The duty of a railroad in carrying live stock is the same as a carrier of goods, so far as the route is concerned. *Michigan C. R. Co. v. Myrick*, 9 *Am. & Eng. R. Cas.* 25, 107 *U. S.* 102, 1 *Sup. Ct. Rep.* 425.

When a common carrier undertakes to transport fat cattle to market in a live stock train it must be held to have undertaken a business which calls for diligence and dispatch commensurate with the trust it has accepted. *Leonard v. Chicago & A. R. Co.*, 54 *Mo. App.* 293.

A carrier of live stock, in the absence of a special agreement, is not liable for injuries to the animals which could not be foreseen or prevented by the exercise of due diligence and care. Where there is a special contract the carrier's liability will be regulated by it; in which case he will be held only to the duties specified in the agreement, or for injuries resulting from negligence or wilfulness. *Penn. v. Buffalo & E. R. Co.*, 49 *N. Y.* 204, 3 *Am. Ry. Rep.* 355; *reversing* 3 *Lans.* 443.—APPLIED IN *Steiger v. Erie R. Co.*, 5 *Hun (N. Y.)* 345. QUOTED IN *Central R. & B. Co. v. Smitha*, 85 *Ala.* 47, 4 *So. Rep.* 708.

While a carrier, when overtaken by an occurrence known as the act of God, is not bound to the highest degree of diligence to preserve the property from injury, yet in such an emergency he is required to bestow such care as an ordinarily prudent person or carrier would use under like circumstances, and if he fails to do so and loss results therefrom, he is liable. *Black v. Chicago, B. & Q. R. Co.*, 30 *Neb.* 197, 46 *N. W. Rep.* 428.—QUOTING *Gillespie v. St. Louis, K. C. & N. R. Co.*, 6 *Mo. App.* 554.

If the owner of live stock request that they be transported by a company, as common carriers, he is only to pay a reasonable compensation therefor, and may refuse to enter into any special contract on any other terms, and the company will be responsible for their safe carriage and delivery; and this is so whether transportation of cattle is regarded as the company's principal business or whether it is incidental and subordinate. *Kimball v. Rutland & B. R. Co.*, 26 *Vt.* 247.—FOLLOWING *Carr v. Lancashire R. Co.*, 14 *Eng. L. & Eq.* 340.—APPROVED AND QUOTED IN *Atchison & N. R. Co. v. Washburn*, 5 *Neb.* 117.

Railroads, as carriers of live stock, are not liable to the same extent as carriers of merchandise, but are required to use reasonable care and diligence. *Baker v. Louisville & N. R. Co.*, 16 *Am. & Eng. R. Cas.* 149, 10 *Lea (Tenn.)* 304.—FOLLOWED IN *Louisville & N. R. Co. v. Wynn*, 45 *Am. & Eng. R. Cas.* 312, 88 *Tenn.* 320, 14 *S. W. Rep.* 311.

If it be conceded that carriers of live stock do not assume the same liability as carriers of merchandise, still they are bound to exercise ordinary care. *German v. Chicago & N. W. R. Co.*, 38 *Iowa* 127.

A common carrier of live stock is bound to use reasonable diligence, and, failing to do so, the owner may recover damages for an injury or loss to the stock. *Coles v. Louisville, E. & St. L. R. Co.*, 41 *Ill. App.* 607.

If in transporting the stock the cars can be stopped and started without doing it so abruptly as to throw the cattle down and injure them, it is the duty of the company to so stop and start them. *Gulf, C. & S. F. R. Co. v. Ellison*, 70 *Tex.* 491, 7 *S. W. Rep.* 785.

A railway company is responsible for the safe treatment of animals from the moment they are received until they are unloaded. *Moffatt v. Great Western R. Co.*, 15 *L. T.* 630.

Cattle are injured, within the meaning of § 7 of the Railway and Canal Traffic Act, if they become out of condition during the journey through the default of the company. *Allday v. Great Western R. Co.*, 5 *B. & S.* 903, 11 *Jur. N. S.* 12, 34 *L. J. Q. B.* 5, 13 *W. R.* 43, 11 *L. T.* 267.

A railway company is entitled to the protection against responsibility given by the second proviso in 17 & 18 *Vic. c. 31*, § 7, although no complete contract for carriage of the animal has been entered into, and no complete delivery of it has taken place.

*Hodgman v. West Midland R. Co.*, 5 B. & S. 173, 10 Jur. N. S. 673, 33 L. J. Q. B. 233, 12 W. R. 1054, 10 L. T. 609; affirmed in 13 W. R. 758, 35 L. J. Q. B. 85.

**22. How far carrier is an insurer.\***

—The common-law rule which made carriers practically insurers of property while being carried by them has, from the necessity of the case, been in a measure relaxed in the case of live stock. *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. Rep. 870.

But the company is bound to the exercise of a high degree of diligence, such as a prudent and careful man would exercise in such matters, and is liable for ordinary negligence. *Louisville, C. & L. R. Co. v. Hedger*, 9 Bush (Ky.) 645.

A common carrier of live stock is not an insurer against injuries unavoidably resulting from the inherent nature or propensities of the animals, or against loss caused by the act of God. *Black v. Chicago, B. & Q. R. Co.*, 30 Neb. 197, 46 N. W. Rep. 428.

A common carrier of chattels is not bound to insure them against their own fault or the fault of their owner, and is not liable to him for loss or damage caused by an inherent defect in the thing or animal carried without any fault of the carrier, or by the manner of packing or loading, the responsibility of which the owner has assumed, or by any want of care which the owner was to exercise. *Rixford v. Smith*, 52 N. H. 355, 13 Am. Rep. 42.—QUOTING *Coggs v. Bernard*, 2 Ld. Raym. 909; *Forward v. Pittard*, 1 D. & E. 27.

Carriers of live stock are not absolutely liable as insurers for injuries caused by the kicking of one horse by another, nor for an injury caused by the owner of stock attaching a halter to the jaws of a horse in a manner which might cause or increase restiveness and bad temper, nor for a failure on his part to remove the horse's shoes. *Evans v. Fitchburg R. Co.*, 111 Mass. 142.—QUOTING *Hall v. Renfro*, 3 Metc. (Ky.) 51; *Conger v. Hudson River R. Co.*, 6 Duer (N. Y.) 375.

A railroad company is not responsible for losses occasioned by cattle dying or being injured by heat, unless the loss or damage has been occasioned by some negligence or misfeasance of the company or of its servants. *Maslin v. Baltimore & O. R. Co.*,

14 W. Va. 180.—NOT FOLLOWING *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329, 12 Am. Rep. 275; *Louisville, C. & L. R. Co. v. Hedger*, 9 Bush (Ky.) 645, 15 Am. Rep. 740.

**23. Risks resulting from disease or from inherent vice.**—The law does not hold carriers of live stock liable for injuries which result from the sickness or violence of the animals, or for those due to their viciousness or restlessness excited by the carriage, where there is nothing to show improper loading or transportation. *Illinois C. R. Co. v. Brelsford*, 13 Ill. App. 251.

Where live freight is carried, the shipper, in order to hold the carrier for injury to it, must show that a human agency caused or concurred in causing the injury, the risk resulting from disease or vice inherent to such freight being one which the shipper, and not the carrier, assumes. *Hance v. Pacific Exp. Co.*, 48 Mo. App. 179.—QUOTING *Clark v. Rochester & S. R. Co.*, 14 N. Y. 573.—*Great Western R. Co. v. Blower*, 41 L. J. C. P. 268, L. R. 7 C. P. 655, 20 W. R. 776, 27 L. T. 883, 3 Ky. & C. T. Cas. xii.

**24. Injuries occasioned by the inherent nature or propensities of the animals.\***—The general rule of the absolute liability of a common carrier for the safe transportation and delivery of property committed to it for carriage is applicable, although the property consists of live stock, but subject to the exception that it is not an insurer against injuries resulting from the inherent nature or propensities of the animals, and without fault of the carrier. *Lindsley v. Chicago, M. & St. P. R. Co.*, 31 Am. & Eng. R. Cas. 86, 36 Minn. 539, 33 N. W. Rep. 7.—APPROVED IN *Louisville & N. R. Co. v. Wynn*, 45 Am. & Eng. R. Cas. 312, 88 Tenn. 320, 14 S. W. Rep. 311.—*South & N. Ala. R. Co. v. Henlein*, 52 Ala. 606. *Western R. Co. v. Harwell*, 45 Am. & Eng. R. Cas. 358, 91 Ala. 340, 8 So. Rep. 649. *Coupland v. Housatonic R. Co.*, 55 Am. & Eng. R. Cas. 380, 61 Conn. 531, 23 Atl. Rep. 870. *Indianapolis & St. L. R. Co. v. Jurey*, 8 Ill. App. 160. *Centrai*

\* Liability of carriers of live stock for injury or loss resulting from the nature or propensities of the animals, see note, 67 AM. DEC. 210.

What are injuries resulting from the inherent nature and propensities of animals for which carrier is not liable, and liability where injury is caused by combined negligence of carrier and propensities of animals, see note, 31 AM. & ENG. R. CAS. 91.

\* See also ante, 1.



*R. & B. Co. v. Smitha*, 85 Ala. 47, 4 So. Rep. 708.—APPROVING *Clarke v. Rochester & S. R. Co.*, 14 N. Y. 570; *Michigan S. & N. I. R. Co. v. McDonough*, 21 Mich. 165; *East Tenn., V. & G. R. Co. v. Johnson*, 75 Ala. 596. QUOTING *Penn. v. Buffalo & E. R. Co.*, 49 N. Y. 204.—*St. Louis & S. F. R. Co. v. Clark*, 48 Kan. 321, 29 Pac. Rep. 312. *Hall v. Renfro*, 3 Metc. (Ky.) 51.—QUOTED IN *Evans v. Fitchburg R. Co.*, 111 Mass. 142.—*Evans v. Fitchburg R. Co.*, 111 Mass. 142. *Brown v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 568.—FOLLOWING *Potts v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 394.—*Mynard v. Syracuse, B. & N. Y. R. Co.*, 71 N. Y. 180, 15 Am. Ry. Rep. 412, 27 Am. Rep. 28; reversing 7 Hun 399.—APPLYING *Palmer v. Grand Junction R. Co.*, 4 M. & W. 749. DISTINGUISHING *Cragin v. New York C. R. Co.*, 51 N. Y. 61. FOLLOWING *Clarke v. Rochester & S. R. Co.*, 14 N. Y. 573. QUOTING *Smith v. New Haven & N. R. Co.*, 12 Allen (Mass.) 531.—FOLLOWED IN *Holsapple v. Rome, W. & O. R. Co.*, 86 N. Y. 275.—*Louisville & N. R. Co. v. Wynn*, 45 Am. & Eng. R. Cas. 312, 88 Tenn. 320, 14 S. W. Rep. 311.—APPROVING *Hart v. Pennsylvania R. Co.*, 112 U. S. 331; *Lindsley v. Chicago, M. & St. P. R. Co.*, 36 Minn. 539; *Ayres v. Chicago & N. W. R. Co.*, 71 Wis. 372. FOLLOWING *Baker v. Louisville & N. R. Co.*, 10 Lea (Tenn.) 304; *Nashville & C. R. Co. v. Jackson*, 6 Heisk. (Tenn.) 271; *East Tenn., V. & G. R. Co. v. Hale*, 85 Tenn. 69; *Smitha v. Louisville & N. R. Co.*, 86 Tenn. 198; *Louisville & N. R. Co. v. Mason*, 11 Lea (Tenn.) 116.—*Ayres v. Chicago & N. W. R. Co.*, 35 Am. & Eng. R. Cas. 679, 71 Wis. 372, 5 Am. St. Rep. 226, 37 N. W. Rep. 432.—QUOTING *Richardson v. Chicago & N. W. R. Co.*, 18 Am. & Eng. R. Cas. 530, 61 Wis. 601; *Johnson v. Midland R. Co.*, 4 Exch. 372.—APPROVED IN *Louisville & N. R. Co. v. Wynn*, 45 Am. & Eng. R. Cas. 312, 88 Tenn. 320, 14 S. W. Rep. 311.

And for a stronger reason is this so where they are shipped under a contract requiring the owner to accompany them and to take the charge and oversight thereof. *Wabash, St. L. & P. R. Co. v. McCasland*, 11 Ill. App. 491.

Where the carrier is otherwise free from fault, it is not liable for self-inflicted injuries upon animals during transportation, nor for injuries inflicted by one animal upon another, where they are properly loaded. *Louisville, N. O. & T. R. Co. v. Bigger*, 38

Am. & Eng. R. Cas. 373, 66 Miss. 319, 6 So. Rep. 234. *St. Louis, I. M. & S. R. Co. v. Lesser*, 46 Ark. 236. *Boehl v. Chicago, M. & St. P. R. Co.*, 45 Am. & Eng. R. Cas. 351, 44 Minn. 191, 46 N. W. Rep. 333.

Carriers of animals by a mode of conveyance opposed to their habits and instincts have not the same means of securing absolute safety as the carriers of goods. The animals may die of fright or by refusing to eat, or they may, after every precaution, destroy themselves in attempting to break away, or they may kill each other; and in such cases the carrier is not liable if he has used all proper care and foresight to prevent injury. Where, however, the cause of the injury is unconnected with the conduct or propensities of the animals carried, the ordinary responsibilities of the carrier should attach. *Clarke v. Rochester & S. R. Co.*, 14 N. Y. 570.—APPLYING *Boyce v. Anderson*, 2 Pet. (U. S.) 150; *Palmer v. Grand Junction R. Co.*, 4 M. & W. 749.—APPROVED IN *Central R. & B. Co. v. Smitha*, 85 Ala. 47, 4 So. Rep. 708; *Bamberg v. South Carolina R. Co.*, 9 So. Car. 61. FOLLOWED IN *Mynard v. Syracuse, B. & N. Y. R. Co.*, 71 N. Y. 180. QUOTED IN *Hance v. Pacific Exp. Co.*, 48 Mo. App. 179.

A carrier of live stock is not liable for a loss or injury that results from overexertion or overheating of the animal from its own disposition, which is unprovoked by any misconduct of the carrier or its servants. *Chicago, B. & Q. R. Co. v. Owen*, 21 Ill. App. 339.

A railroad company is not liable for the death of a bullock which, after he has been properly fastened in a proper car, by his own efforts and exertions releases himself. *Great Western R. Co. v. Blower*, 41 L. J. C. P. 268, L. R. 7 C. P. 655, 20 W. R. 776, 27 L. T. 883.

Where the cause of damage to live stock for which recompense is sought from a carrier is connected with the character or propensities of the animals undertaken to be carried, the ordinary responsibility of the carrier does not attach; but where it is shown that such propensities are active only while the car in which the animals are carried is standing still, and it appears that the damage in question occurred on account of unusual delay caused by accident, and that the damage might have been avoided by unloading the animals or by giving them personal attention during the

delay—*held*, that the rule exempting the carrier did not apply. *Kinnick v. Chicago, R. I. & P. R. Co.*, 27 *Am. & Eng. R. Cas.* 55, 69 *Iowa* 665, 29 *N. W. Rep.* 772.

**25. Accidents attributable to the vitality of the freight.**—The common-law rule making common carriers of merchandise liable as insurers, except for injury or loss resulting from the act of God or the public enemy, is modified as to carriers of live stock, to the extent of relieving them from liability for injuries or loss resulting by reason of the vitality of the freight. *Cragin v. New York C. R. Co.*, 51 *N. Y.* 61, 4 *Am. Ry. Rep.* 418.—APPLIED IN *Nicholas v. New York C. & H. R. Co.*, 4 *Hun* (N. Y.) 327; *Steiger v. Erie R. Co.*, 5 *Hun* (N. Y.) 345. DISTINGUISHED IN *Mynard v. Syracuse, B. & N. Y. R. Co.*, 71 *N. Y.* 180. FOLLOWED IN *Hayman v. Philadelphia & R. R. Co.*, 8 *N. Y. S. R.* 86, 22 *J. & S.* 158. QUOTED IN *Rubens v. Ludgate Hill Steamship Co.*, 20 *N. Y. Supp.* 481. RECONCILED IN *Mynard v. Syracuse, B. & N. Y. R. Co.*, 71 *N. Y.* 180.—*Dow v. Portland Steam Packet Co.*, 84 *Me.* 490, 24 *Atl. Rep.* 945. *Hayman v. Philadelphia & R. R. Co.*, 8 *N. Y. S. R.* 86.—FOLLOWING *Cragin v. New York C. R. Co.*, 51 *N. Y.* 61.

In the transportation of live stock, the carrier, in the absence of negligence, is not responsible for such injuries as occur in consequence of the vitality of the freight; that is, such injuries as are liable to occur to live animals by reason of their being alive, and not to ordinary merchandise. *Chicago, R. I. & P. R. Co. v. Harmon*, 12 *Ill. App.* 54.

Where a mare while in a car becomes overheated by reason of the hot weather, and the carrier does not by any act of negligence contribute to the result, it cannot be held liable for her death; that is, if the mare died from her lack of inherent vitality and not from any want of proper ventilation or care. *Chicago, R. I. & P. R. Co. v. Harmon*, 12 *Ill. App.* 54.

**26. Injuries not attributable to any known cause.**—A railway company is not liable for an unexplained injury to a horse delivered to it for carriage, where it shows that nothing unusual occurred to the train during the journey. *Kendall v. London & S. W. R. Co.*, 41 *L. J. Ex.* 184, *L. R.* 7 *Ex.* 373, 20 *W. R.* 886, 26 *L. T.* 735.

Where it appears that the hoof of a mule was torn off, and there is nothing to show

whether it was done on the train or after it left it, but it does appear that the car in which it was carried was suitable, that the track was in good condition, that the equipments and appliances of the train were adequate, and that there was no culpable delay in the transit, and no fault, negligence, or want of care on the part of the carrier in handling the mule or in the management of the train, the carrier is not liable for the injury, which may have been self-inflicted or caused by other mules in the same car. *Louisville, N. O. & T. R. Co. v. Bigger*, 38 *Am. & Eng. R. Cas.* 373, 66 *Miss.* 319, 6 *So. Rep.* 234.

An injury was caused by the breaking of a wheel under a freight car in the train, which threw the car containing plaintiff's horses from the track. The track was in good order; the wheel had been used for only a short time, and, upon inspection after the accident, showed no flaw or defect; and there was no evidence, except the mere fact of its breaking, which tended to show negligence of the company. *Held*, that there was no error in directing a verdict for the defendant. *Morrison v. Phillips & C. Constr. Co.*, 44 *Wis.* 405, 19 *Am. Ry. Rep.* 312.—REVIEWED IN *Ballou v. Chicago & N. W. R. Co.*, 5 *Am. & Eng. R. Cas.* 480, 54 *Wis.* 257, 41 *Am. Rep.* 31.

**27. Notice to carrier of value or peculiar condition of animals.**—The owner of an animal possessing special value is not required to notify the carrier of the fact at the time of shipment, and in not doing so no fraud is committed. Ordinarily one animal is entitled to the same care in shipment as another, regardless of its value, and if the carrier has any special rule or custom binding its servants to give care to animals proportioned to their value, it is its duty to inquire of the shipper whether an animal possesses any special value before it undertakes the carriage. *Chicago, R. I. & P. R. Co. v. Harmon*, 12 *Ill. App.* 54.

The failure of the owner of stock shipped to inform the agent of the carrier that the physical condition of the animals renders extraordinary care necessary in their handling will not release the carrier from liability for negligence causing injury to the stock. *McCune v. Burlington, C. R. & N. R. Co.*, 52 *Iowa* 600, 3 *N. W. Rep.* 615.

Where pregnant cows are shipped, the owner may recover from the carrier damages for a loss of the calves by premature

birth, caused by injuries resulting from the negligence of the carrier, and it is not necessary to show that the company knew that the cows were with calf. *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. Rep. 444; affirming 41 Fed. Rep. 849.

**28. Duty to side-track or lay off car.\***—Where the owner of horses controls the arranging of them in a car for shipment, and arranges them so that it is difficult to take them out, and a lay-off on the route becomes necessary to save the horses from death, the owner cannot insist that the car be laid off and then carried on under the same contract. His right to secure the lay-off depends upon his contracting anew for the use of the car for a longer time; and if he refuses to do this, the carrier may continue the journey, and will not be liable for loss or injury to the horses. *Illinois C. R. Co. v. Peterson*, 49 Am. & Eng. R. Cas. 171, 68 Miss. 454, 10 So. Rep. 43.

Where the shipper of horses sues the company to recover for horses that die by reason of the company refusing to allow a lay-off, the rights of the parties will not be determined by U. S. Rev. St. § 4386, making it a crime to transport animals under an interstate shipment for more than twenty-eight hours' travel without stopping to unload, water, and feed. *Illinois C. R. Co. v. Peterson*, 49 Am. & Eng. R. Cas. 171, 68 Miss. 454, 10 So. Rep. 43.

Where a shipper hires an entire car and loads it with what are termed "emigrants' movables," including horses, under a contract requiring him to feed and care for the animals, and to accompany the car and load and unload it at his own risk and expense, and exempting the company from liability for delays, the company is not required to lay the car off along the route for the purpose of allowing the horses to be rested and the loading of the car rearranged. *Illinois C. R. Co. v. Peterson*, 49 Am. & Eng. R. Cas. 171, 68 Miss. 454, 10 So. Rep. 43.—**DISTINGUISHING** *Kinnick v. Chicago, R. I. & P. R. Co.*, 27 Am. & Eng. R. Cas. 55, 69 Iowa 665.

Where it appeared that the agents of the carrier were informed that the transportation was causing fright to the animals, and that there was danger of their being killed

or hurt by further transportation, it was the carrier's duty to sidetrack the car, upon the request of plaintiff's agents, if it could have done so with reasonable convenience; and whether or not the defendant was guilty of negligence in not stopping the car was a question for the jury, taking into consideration the value of the animals and the fact that their ultimate destination was but a short distance further on. *Coupland v. Housatonic R. Co.*, 55 Am. & Eng. R. Cas. 380, 61 Conn. 531, 23 Atl. Rep. 870.

## 2. Food and Water.

**29. Duty to provide food and water.\***—It is the duty of the company to provide water at suitable points on the line of its road for the use of stock, and where hogs while being transported died for the want of water, it was held that the company was liable. *Toledo, W. & W. R. Co. v. Hamilton*, 76 Ill. 393.—**FOLLOWING** *Illinois C. R. Co. v. Adams*, 42 Ill. 474.

Where a carrier receives live stock for transportation, and a loss is sustained by the owner in consequence of their not being supplied with water, the burden of proof to show an exemption from liability rests upon the carrier. *Toledo, W. & W. R. Co. v. Hamilton*, 76 Ill. 393.

It is *prima-facie* evidence of negligence for a railroad to permit its pump at a station to be out of repair, so that water cannot be provided for live hogs on its train; and it is for the company to explain why the pump is so out of repair, and show that it is not by their negligence. *Toledo, W. & W. R. Co. v. Thompson*, 71 Ill. 434.

A provision in a contract for the shipment of live stock, providing that the shipper shall accompany the stock and feed and care for them at his own risk, does not relieve the carrier from the duty of providing water for the stock at suitable points along the line, so that the owner can give it to the stock. *Wabash, St. L. & P. R. Co. v. Pratt*, 15 Ill. App. 177.

The carrier, having the control of the train, is responsible for any injury to the cattle from their not being watered at a place of detention. The owner was not required to demand that the train should proceed, nor to persist in attempting to water

\* See also *post*, 43.

\* Feeding and watering live stock in transit, see note, 16 AM. & ENG. R. CAS. 171

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Where a shipper of live stock claims damages from the carrier by reason of its failure to feed and water them, it is not error for the court to instruct the jury to find for the shipper if the carrier failed to deliver the cattle according to contract, and delivered them in a bad condition—not worth as much as when shipped—there being no evidence upon which the jury could find damages against the carrier, except for failing to feed and water. *Taylor, B. & H. R. Co. v. Montgomery*, 4 Tex. App. (Civ. Cas.) 401, 16 S. W. Rep. 178.

Cattle are injured, within the meaning of § 7 of the Railway and Canal Traffic Act, where they suffer damage in consequence of delay and from want of food and water. *Allday v. Great Western R. Co.*, 5 B. & S. 903, 11 Jur. N. S. 12, 34 L. J. Q. B. 5, 13 W. R. 43, 11 L. T. 267.

**30. Duty to unload and have facilities therefor.\***—Whenever it may become necessary to unload live stock during transit for the purpose of watering or feeding, it is the duty of the carrier to have the proper facilities for unloading. *Dunn v. Hannibal & St. J. R. Co.*, 68 Mo. 268.

Where the shipper of hogs sues to recover damages by reason of the company not providing suitable pens in which to feed stock, an instruction to the effect "that if the defendant's pens furnished plaintiff's stock were good and suitable in ordinary good weather, but were muddy by reason of recent rains, then defendant would not be responsible for damages resulting from the condition of the pens," is properly refused, as it is the duty of the company to provide suitable pens in any kind of weather, so far as this can be done by the use of proper care. *International & G. N. R. Co. v. McRae*, 82 Tex. 614, 18 S. W. Rep., 672.

**31. Liability under contract or custom that owner will feed and water.†**—A provision in a contract for the shipment of mules, providing that the company shall not be bound to feed, water, or care for them, but that the owner, in con-

sideration of a free pass, shall accompany them for that purpose, releases the company from liability for damages resulting from a want of food or water. *Central R. Co. v. Bryant*, 73 Ga. 722.

Where the stipulation in a special contract contemplated that the shipper or his agent should accompany the stock while *in transitu*, and contained a provision that, in case of accident or delay, it should be the duty of the shipper or agent to feed, water, and take care of the stock, the court should have given the charge requested by defendant, that "under this contract it was the duty of the plaintiff or one of his agents to accompany this stock; and, if the loss or damage was the result of his not accompanying the stock, then he could not recover." *Georgia R. & B. Co. v. Reid*, 55 Am. & Eng. R. Cas. 363, 91 Ga. 377, 17 S. E. Rep. 934.

Where a clause in a contract of shipments stipulates that the consignor is to feed and water the stock while in transit, an instruction that the carrier is liable if it failed to give the consignor an opportunity to feed and water the stock is erroneous, where there is no evidence showing that the consignor asked for an opportunity to feed and water. *Mobile & O. R. Co. v. Francis*, (Miss.) 9 So. Rep. 508.

A provision in a contract for shipment of live stock, providing that the owner was to feed and water the stock, and that the company should afford reasonable facilities for doing so, does not relieve the company from the duty of feeding and watering, where the animals are carried beyond their place of destination and there detained several days before they are returned. *Bryant v. Southwestern R. Co.*, 6 Am. & Eng. R. Cas. 388, 68 Ga. 805.

The duty which the law imposes upon carriers of live stock to properly feed and care for them during transportation cannot be transferred to the owner by a mere custom requiring him to go on the same train and care for them at his own risk and expense. *Missouri Pac. R. Co. v. Fagan*, 35 Am. & Eng. R. Cas. 666, 72 Tex. 127, 9 S. W. Rep. 749, 2 L. R. A. 75.

A requirement by a railroad company that the shipper of live stock shall accompany such stock and provide for it at his own risk and expense, as a condition to receiving such stock as freight, is unreasonable; and defendant, in an action for the loss of such stock, cannot prove such custom in

\* Duty of carriers of live stock to unload, feed, and water, see note, 49 AM. & ENG. R. CAS. 175.

† Effect of contract that shipper of live stock is to accompany them and attend to loading and unloading and feeding, see note, 14 L. R. A. 550.

order to avoid liability for failure to so provide and care for the stock. *Missouri Pac. R. Co. v. Fagan*, 35 *Am. & Eng. R. Cas.* 666, 72 *Tex.* 127, 9 *S. W. Rep.* 749, 2 *L. R. A.* 75.

Where live stock are shipped under a contract that the shipper shall feed and water them while *en route* the carrier cannot avoid liability for a failure to properly feed and water, without showing that it offered the shipper reasonable facilities for doing so; neither will the shipper's failure to notify the carrier of his wish and readiness to feed and water affect the carrier's liability. *Taylor, B. & H. R. Co. v. Montgomery*, 4 *Tex. App. (Civ. Cas.)* 401, 16 *S. W. Rep.* 178.

**32. Refusal to allow shipper to unload.**—Where cattle are shipped under a contract providing that the owner shall accompany them and care for them in feeding and watering, and shall assume the risk of damage sustained by delay, and the train is delayed by a flood submerging the track, the company is not bound to unload the cattle; but, upon being requested to do so, it is bound to place the cars in a convenient and accessible place, if practicable, where the owner can unload and care for the stock; and if it fails to do so it is liable for injuries. *Bills v. New York C. R. Co.*, 3 *Am. & Eng. R. Cas.* 318, 84 *N. Y.* 5.

That the company's stock-yards at its feeding-station were on fire when the train arrived there was no sufficient excuse for not furnishing to the person in charge of the horses, in compliance with the contract of shipment, all proper facilities for taking care of them, nor for not stopping the car containing them there or at some other station, in compliance with the statute, so that they might be unloaded, watered, and fed. *Nashville, C. & St. L. R. Co. v. Heggie*, 86 *Ga.* 210, 12 *S. E. Rep.* 363.

Nor is the company excused from liability by the fact that the person in charge of the stock was deficient in urging compliance with the statute, for the company's servants should have known of such want of diligence on his part, and it was their duty to select the place for stopping with or without his request. *Nashville, C. & St. L. R. Co. v. Heggie*, 86 *Ga.* 210, 12 *S. E. Rep.* 363.

Animals were shipped under a provision of the contract that the owner should accompany, attend, and feed them. At an interme-

diate station the train was delayed 16 hours by reason of a collision at another point. During this time the owner proposed to unload the cattle and water them, but refrained from doing so upon being told that the train might start in ten minutes. *Held*, in an action for damages, that it was proper to submit to the jury whether this amounted to a refusal to permit the owner to unload the cattle. *Harris v. Northern Ind. R. Co.*, 20 *N. Y.* 232.

**33. Loss in reloading after stop to feed and water.**—The defendant company agreed to deliver cattle from a point on its line to a point on the line of the V. M. Railway, to the latter company at Lynchburg, and plaintiff agreed to load, transfer, and unload them at his own cost. At R., a regular feeding-place for stock *in transitu*, necessary arrangements for unloading, feeding, and reloading were provided by the company, and there a mistake in reloading occurred, by defendant's default, whereby some of plaintiff's cattle were sent to another point and other cattle were mixed with his. *Held*, that the company was liable for the consequent loss. *Norfolk & W. R. Co. v. Sutherland*, 89 *Va.* 703.

**34. Penalty for keeping cattle in cars more than 28 consecutive hours.**—Under U. S. Rev. St. § 4386, for a railroad company to keep live stock upon its cars for more than twenty-eight consecutive hours, without unloading for rest, water, and food, is negligence *per se*; and such company is liable, not only for the penalty prescribed in the statute, but also for any damage or injury that may thereby be sustained by the owner of the stock. *Nashville, C. & St. L. R. Co. v. Heggie*, 86 *Ga.* 210, 12 *S. E. Rep.* 363.

The above statute does not apply to the carriage of animals between points in the same state, but only where the carriage is from one state to another. *United States v. East Tenn., V. & G. R. Co.*, 9 *Am. & Eng. R. Cas.* 259, 13 *Fed. Rep.* 642.

The statute is within the power of congress to regulate interstate commerce. *United States v. Boston & A. R. Co.*, 15 *Fed. Rep.* 209.

The penalty provided is not to be reckoned upon the number of animals confined, the confinement of all being carried constituting but one offense. *United States v. Boston & A. R. Co.*, 15 *Fed. Rep.* 209.

One of several connecting lines is liable

only for a violation of the statute which occurs on its own line; but where the stock have been confined a part of the twenty-eight hours on one line, that time is counted against the next succeeding carrier in determining whether it violates the statute. *United States v. Louisville & N. R. Co.*, 18 *Fed. Rep.* 480.

A violation of the statute will not of itself render the carrier liable where the animals are shipped under a special contract providing that the owner shall accompany them and care for, feed, and water them on the road, and where there is no evidence to show what part of the damages was caused by a failure to feed and water. *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 41 *Fed. Rep.* 913.

The statute imposes a penalty "unless prevented from so unloading by storm or other accidental causes." There is a further exception where animals "have proper food, water, space, and opportunity to rest" on the cars. *Held*, that in addition to the penalty imposed by statute, a railway company which failed to comply with the above requirement would be liable in damages to the owner of the stock; but that to state a cause of action the petition must show that the case is not within the exceptions named. *Hale v. Missouri Pac. R. Co.*, 36 *Neb.* 266, 54 *N. W. Rep.* 517.

The statute does not confer upon carriers the privilege of confining the animals for twenty-eight hours, if doing so would be negligent. The question of negligence on the part of the carrier in handling stock, unloading, feeding, and watering, for which a civil action might lie for damages, is still left as at common law, notwithstanding the statute. *Missouri Pac. R. Co. v. Ivy*, 79 *Tex.* 444, 15 *S. W. Rep.* 692.

**35. Penalty for failure to feed during transit.**—Under a statute which imposes upon common carriers a penalty for failure to feed live stock during transit, the statutory grounds of liability should be particularly set forth in an action for the penalty, and should be clearly established by the proof; and where two places were alleged to be the feeding-stations on the route, and the evidence shows that the cattle were fed at one, and it is not satisfactorily shown that they were not fed at the other, there can be no recovery. *Good v. Galveston, H. & S. A. R. Co.*, (*Tex.*) 40 *Am. & Eng. R. Cas.* 98, 11 *S. W. Rep.* 854.

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### 3. Delays in Transit.

**36. Duty to complete transit within a reasonable time.**—A carrier is liable for all damage that is referable to the natural effect of a negligent delay in transportation upon the normal condition or latent propensities of the animals, whereby they are reduced in weight or strength more than they would have been if prompt carriage and delivery had been made. *Richmond & D. R. Co. v. Trousdale*, (*Ala.*) 55 *Am. & Eng. R. Cas.* 400, 13 *So. Rep.* 23.

Where there is unreasonable delay on the part of a carrier in the transportation and delivery of live stock, after which the stock is found to be in an unsound condition, the burden is on the carrier to prove that the bad condition of the stock is not due to the unreasonable delay. *Richmond & D. R. Co. v. Trousdale*, (*Ala.*) 55 *Am. & Eng. R. Cas.* 400, 13 *So. Rep.* 23. *Harris v. Northern Ind. R. Co.*, 20 *N. Y.* 232. *Douglass v. Hannibal & St. J. R. Co.*, 53 *Mo. App.* 473.

Common carriers are not liable for losses occasioned by an inherent defect of the article causing its destruction, nor for the loss of weight in cattle transported by rail; but every reasonable effort must be used to deliver property at its destination in proper time, and an omission to perform this duty creates a liability, and all proximate damages resulting from a neglect of it may be recovered. *Ohio & M. R. Co. v. Dunbar*, 20 *Ill.* 623.

Where a company receives cattle as a common carrier the law imposes the duty to carry them to their destination within a reasonable time, and for a failure through gross negligence to do so an action on the case will lie, whether the cattle were shipped under a special contract or not. *Wabash, St. L. & P. R. Co. v. McCasland*, 11 *Ill. App.* 491.

Before a train reached a point where the track was submerged by unusual water the owner of live stock was informed of the fact, and he requested the conductor to place the cars in which his stock were in a convenient position for unloading, which the conductor refused to do. *Held*, in an action for damages, that it was not error to charge the jury that if they "believed that the conductor had reason to think that he could run the train through without serious detention, defendant would not be liable



because of such refusal." *Bills v. New York C. R. Co.*, 3 *Am. & Eng. R. Cas.* 318, 84 *N. Y.* 5.

Though a railway company which receives cattle for transportation may not contract to carry them on a train devoted for the trip to that exclusive purpose or to carry the cattle at a designated rate of speed, the duty remains to carry them with reasonable dispatch, in view of the character of the freight and its liability to injury from delay; and evidence showing neglect in this regard is admissible, under proper averments, in a suit against the company for damages. *Gulf, C. & S. F. R. Co. v. Ellison*, 70 *Tex.* 491, 7 *S. W. Rep.* 785.

**37. Liability for fall in market price.**\*—Where hogs are delayed in transit by the negligence of the carrier, the measure of damages is the difference between the market value of the hogs at the time they should have been delivered and the time they were delivered, together with any expense that the owner has been put to in consequence of the detention. *Sangamon & M. R. Co. v. Henry*, 14 *Ill.* 156.

Where a company only contracts to carry live stock to the end of its own line, but knows that the stock are destined to a point beyond, it is liable for damages, caused by a delay in not promptly carrying, by reason of a fall in the market at the place of destination, though the fall occurs after it has delivered to the next carrier. *Sisson v. Cleveland & T. R. Co.*, 14 *Mich.* 489.

**38. Knowledge that shipment is intended for immediate sale.**—Where cattle are shipped with the intention of selling in the market on a particular day, in order to charge the carrier with damages caused by delay, whereby the benefit of the market of that day is lost, it must be shown that it had knowledge, or from the circumstances of the case might reasonably have inferred, that the cattle were intended for that day's market. *Philadelphia, W. & B. R. Co. v. Lehman*, 6 *Am. & Eng. R. Cas.* 194, 56 *Md.* 209, 40 *Am. Rep.* 415.

If the agent of a railroad company, at the time of the shipment of cattle to a distant market, knows that they are being shipped there for immediate sale, the carrier is affected with knowledge of this fact. *Fl. Worth & D. C. R. Co. v. Greathouse*, 49 *Am. & Eng. R. Cas.* 157, 82 *Tex.* 104, 17 *S. W. Rep.* 834.

There can be no recovery against a railroad for an unnecessary delay in shipping cattle, whereby they are so reduced and emaciated that the owner could not sell them for the price that he had contracted for, in the absence of an allegation and proof that the company knew that the cattle were being shipped to fill a contract, or that it was important to have them at their destination at a given time. *Gulf, C. & S. F. R. Co. v. Cole*, 4 *Tex. App. (Civ. Cas.)* 144, 16 *S. W. Rep.* 176.

#### 4. Negligence on Part of Company.

**39. When presumed—Burden of proof.**\*—The burden of proof rests upon a carrier of live animals to show that loss resulted, not from its negligence, but from some other cause for which it was not responsible. *Louisville & N. R. Co. v. Wynn*, 45 *Am. & Eng. R. Cas.* 312, 88 *Tenn.* 320, 14 *S. W. Rep.* 311.—QUOTED IN *Louisville & N. R. Co. v. Manchester Mills*, 88 *Tenn.* 653, 14 *S. W. Rep.* 314.

Where a carload of horses are shipped, but two are missing at the place of destination, in the absence of any explanation the carrier is liable for their value. *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 41 *Fed. Rep.* 913.

If property be lost in an injurious accident happening to or by reason of that which a carrier has provided for its transportation, the law, imposing the exercise of utmost care upon him, presumes the accident to be due to the want of that care, and puts upon him the burden of successfully relieving himself from that presumption. But in an action to recover for live stock lost *in transitu*, when the fact of an "injurious accident" is not shown to exist, the presumption of negligence on the part of the defendant does not arise, and the burden of proving it remains with the plaintiff. *Pennsylvania R. Co. v. Raiordon*, 119 *Pa. St.* 577, 12 *Cent. Rep.* 177, 13 *Atl. Rep.* 324, 21 *W. N. C.* 283. *International & G. N. R. Co. v. Smith*, 1 *Tex. App. (Civ. Cas.)* 484. *Smith v. Midland R. Co.*, 57 *L. T.* 813, 6 *Ry. & C. T. Cas.* lxviii.

In an action on a contract for the car-

\* Presumption of negligence where live stock is injured while in transit. States in which presumption exists, and others in which it is denied, see note, 15 *L. R. A.* 39. See also *post*, 147, 148.

Burden of proof of cause of injury to live stock during transportation, see note, 17 *L. R. A.* 339.

\* See also *post*, 158.

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riage of a horse, charging that the horse was killed while in transit through the negligence of the carrier, it is not essential for the plaintiff to establish the negligence in the first instance, since, in the absence of a special contract, the carrier would ordinarily be liable under his common-law obligations. *Doan v. St. Louis, K. & N. W. R. Co.*, 38 Mo. App. 408.

The mere fact that a horse was shipped in good condition, and was delivered sick and dying, is not enough to charge the carrier with negligence, or to charge him with the burden of proof to show that he was not in fault. *Hussey v. Saragossa*, 3 Woods (U. S.) 380.

The loss or injury of live stock while in the custody and care of the company for transportation is *prima-facie* evidence of negligence, but where the owner of the stock agrees to load and unload them, and does in fact do so, the burden of proof is upon him to show negligence causing such loss or injury. *Louisville, C. & L. R. Co. v. Hedger*, 9 Bush (Ky.) 645.—NOT FOLLOWED IN *Maslin v. Baltimore & O. R. Co.*, 14 W. Va. 180. QUOTED IN *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129.

**40. Exposure in stock-yard during snowstorm.**—The defendant accepted for transportation plaintiff's live stock, consisting of cows and calves. Plaintiff paid the freight and was given a receipt, which contained no express contract or limitation of the defendant's common-law liability. The train which carried the stock was delayed by a snowstorm and the cars containing them were put in a stock-yard. Some died, others were injured by cold and exposure. *Held*, that the defendant was liable for damages as a common carrier. *Feinberg v. Delaware, L. & W. R. Co.*, 45 Am. & Eng. R. Cas. 348, 52 N. J. L. 451, 20 Atl. Rep. 33.

**41. Failure to provide proper bedding.**—A failure of a railroad company to provide proper bedding for live stock during transportation is not in itself *prima-facie* evidence of negligence. *East Tenn., V. & G. R. Co. v. Johnston*, 22 Am. & Eng. R. Cas. 437, 75 Ala. 596, 51 Am. Rep. 489.

Where the owner of a horse at the time of shipment asks for tan for bedding, but is informed by the company's agent that it cannot be had, but directs him where he can get straw, the company is liable for injuries to the horse occurring by reason of the straw taking fire from its engine.

*Powell v. Pennsylvania R. Co.*, 32 Pa. St. 414.—FOLLOWED IN *Holsapple v. Rome, W. & O. R. Co.*, 3 Am. & Eng. R. Cas. 487, 86 N. Y. 275.

**42. Refusal to relieve overheated hogs.**—Where hogs while in a car become heated, necessitating the throwing of water upon them, a failure of the conductor to apply the water, after a notice of the necessity of doing so, where it is customary to furnish water, and the necessary conveniences for applying it were provided, constitutes gross negligence, rendering the company liable for any hogs that may die or be injured. *Illinois C. R. Co. v. Adams*, 42 Ill. 474.—FOLLOWED IN *Toledo, W. & W. R. Co. v. Thompson*, 71 Ill. 434; *Toledo, W. & W. R. Co. v. Hamilton*, 76 Ill. 393.

**43. Refusal to side-track or lay off car.**—Where cattle and hogs shipped together in the same car are found to be suffering, it is no excuse for a refusal on the part of a conductor to lay off the car, so that they can be unloaded, because the company's stock-pens at the station were unsafe for hogs, where there is nothing to show that the company was relieved from the duty of making its pens secure, and nothing to show that the cattle could not have been separately unloaded. *Johnson v. Alabama & V. R. Co.*, 69 Miss. 191, 11 So. Rep. 104.

The plaintiff claimed that his agent on the way informed the defendant's agents in charge of the train that a mare of plaintiff's was becoming frightened and acting badly, and was in danger of being killed by further transportation, and requested them to set the car on a side-track at a place where they were next to stop. The court charged the jury that if they found the request to have been made, it was the duty of the defendant's agents to have complied with it if it could reasonably have been done. *Held* to be correct. *Coupland v. Housatonic R. Co.*, 55 Am. & Eng. R. Cas. 380, 61 Conn. 531, 23 Atl. Rep. 870.

**44. When question of negligence is for the jury.**—Live stock were shipped under a special contract requiring the owner to care for the same during transportation. In a suit for injuries there was evidence tending to show that the train did not stop long enough to allow the owner to properly care for them, and, upon inquiry by him whether the train would stop at a station

\* See also *ante*, 28.

long enough to allow him to do so, he was told by the conductor to lie down, that the brakeman was looking after the cattle. *Held*, that there was no error in submitting the question of the carrier's negligence to the jury. *Dawson v. St. Louis, K. C. & N. R. Co.*, 76 Mo. 514.

#### 5. Contributory Negligence of Owner.

#### 45. In general—Burden of proof.\*

—Where the property which a railroad company agreed to carry was live stock, and the owner undertook, by special contract entered into with the company, to go with the stock and care for it, he is bound to show that the injury or loss for which he is seeking to recover damages was not attributable to the failure to perform or the negligent or improper performance of acts which he undertook to perform. He must show that the injury was caused by the carrier's breach of duty. *Terre Haute & L. R. Co. v. Sherwood*, 55 Am. & Eng. R. Cas. 326, 132 Ind. 129, 31 N. E. Rep. 781.—DISTINGUISHING *Inman v. South Carolina R. Co.*, 129 U. S. 128. QUOTING *Hull v. Chicago, St. P., M. & O. R. Co.*, 41 Minn. 510, 16 Am. St. Rep. 722; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 Ark. 397, 7 Am. St. Rep. 104; *McBeath v. Wabash, St. L. & P. R. Co.*, 20 Mo. App. 445; *Louisville, C. & L. R. Co. v. Hedger*, 9 Bush (Ky.) 645.

While a carrier is held to be an insurer of the safety of property while he has it in his possession as a carrier, the rule does not apply where horses were transported in a car which was left in the exclusive control of the shipper's agent, and they were destroyed by his act; and in such case it is immaterial whether the agent was careful or negligent. *Hart v. Chicago & N. W. R. Co.*, 27 Am. & Eng. R. Cas. 59, 69 Iowa 485, 29 N. W. Rep. 597.

The owner of live stock, by agreement with the carrier, undertook to care for it in the course of transportation. The property was destroyed through the act of the owner. Sec. 1308 of the Code Iowa provides that "no contract, receipt, rule, or regulation shall exempt any corporation engaged in transportation of persons or property by railway from liability of common carrier." *Held*, that the carrier was not liable for the loss, although the agreement between the

owner and carrier may have been in violation of the above section. *Hart v. Chicago & N. W. R. Co.*, 27 Am. & Eng. R. Cas. 59, 69 Iowa 485, 29 N. W. Rep. 597.

Where a railroad company has provided but one chute and one apron for the shipment of stock at a station, a shipper who exercises due care in the use thereof is not guilty of contributory negligence precluding a recovery for personal injuries, although he uses them in the knowledge that they are defective. *White v. Cincinnati, N. O. & T. P. R. Co.*, 42 Am. & Eng. R. Cas. 547, 89 Ky. 478, 12 S. W. Rep. 936.

A common carrier will not be liable for injury to a horse occasioned by the improper or unwarrantable interference of the plaintiff or his agent with the management of the car by the servants or employes of the company. *Roderick v. Baltimore & O. R. Co.*, 7 W. Va. 54.—RECONCILING *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. (U. S.) 262.

**46. Failure to close or lock door of car—Unsafe door.**—Where the owner of cattle contracts to do the loading, and his employes allow the car to be attached to the train and started before the doors are closed, the company is not liable for cattle killed by jumping through the open doors. *Newby v. Chicago, R. I. & P. R. Co.*, 19 Mo. App. 391.

The shipper of horses cannot recover for a loss that occurs by a horse jumping from the car, though there be negligence on the part of the carrier, where the shipper is charged with loading the horses, and negligently leaves the car-door open from which the horse jumped. *Hutchinson v. Chicago, St. P., M. & O. R. Co.*, 37 Minn. 524, 35 N. W. Rep. 433.

Under a contract with a common carrier for the transportation of horses, they were placed in a car, and an employe of the company was directed to lock it, but was prevented from doing so by an agent of the owner of the horses, and while in passage some of them were lost by escaping through the door. *Held*, that the company was not liable for the loss. *Lee v. Raleigh & G. R. Co.*, 72 N. Car. 236.

Where the shipper of live stock agrees to load them on the cars, and knows that a car-door is unsafe, and neglects to inform the station agent, who has no knowledge of the fact, he cannot recover for the cattle that escape through the door. *Betts v.*

\* Liability of carriers of live stock where owner or his agent contributes to loss or injury, see note, 67 AM. DEC. 212; see also *post*, 146.

*Farmers' L. & T. Co.*, 21 Wis. 80.—FOLLOWED IN *Miltimore v. Chicago & N. W. R. Co.*, 37 Wis. 190; *Jenkins v. Chicago, M. & St. P. R. Co.*, 41 Wis. 112.

**47. Placing combustible matter in car.**—When sued for an injury to live stock the carrier set up the defense that the injury occurred by reason of plaintiff violating a rule of the company by putting straw and other combustible matter in the cars, which took fire. *Held*, that the company was not liable, independent of any such rule, if the injury complained of was occasioned by the neglect or wrongful act of the plaintiff in putting such material in the car without the knowledge or consent of the company. *Pratt v. Ogdensburg & L. C. R. Co.*, 102 Mass. 557.

**48. Overcrowding of hogs, causing suffocation.**—A railroad may let its cars to a shipper for the purpose of transporting hogs therein, and in such case the shipper may control the loading of his freight upon the cars, subject to certain implied restrictions as to weight, injury to the cars, etc.; and the carrier will not be liable for injuries caused to animals by being overcrowded by the owner, who has chartered the cars. *East Tenn. & G. R. Co. v. Whittle*, 27 Ga. 535.

Where the shipper of hogs contracts to have them carried at a reduced rate, in consideration that the company be exempted from certain risks, including a loss by suffocation, the company cannot be held liable for injuries arising from overcrowding and suffocation, to which the negligence of the person sent by the owner to attend the transportation contributed. *Squire v. New York C. R. Co.*, 98 Mass. 239.

**49. Neglect to feed and water.**—The shipper of live stock by railway, under a special contract in which he agrees that, "in case of accidents to or delays of time from any cause whatever," he "is to feed, water, and take proper care of the stock at his own expense," cannot recover damages resulting from his own failure to perform his part of the contract, although the company may have consumed more time than necessary in effecting the transportation. *Boas v. Central R. Co.*, 87 Ga. 463, 13 S. E. Rep. 711.

Where live hogs are shipped in cars and are doing well, and are not suffering for water at a given station, it is not negligence on the part of the shippers attending them not to water them at that point, in the absence

of information that water cannot be had at the next station; and if it is a fact that water is scarce at the next station, it is the duty of the company to inform the shippers of the fact. *Toledo, W. & W. R. Co. v. Thompson*, 71 Ill. 434.

When sued for injuries to horses the carrier set up contributory negligence of the owner in failing to properly feed and water them, as he was required to do under the contract of shipment. There was evidence tending to show that when the defendant company received the horses from a preceding carrier they were in apparently good condition, and that they were not transferred and started on defendant's road for several hours after their arrival on the other road, and that the owner was prevented from feeding and watering them by being informed by the train-dispatcher that they would be forwarded promptly; but such evidence was contradicted by the company. *Held*, that the question of contributory negligence was for the jury, and that it was error to charge, as a matter of law, that there was no contributory negligence, if the owner was informed that the horses would be forwarded promptly. *Mobile & O. R. Co. v. Mullins*, 70 Miss. 730, 12 So. Rep. 826.

#### IV. DELIVERY BY THE CARRIER.

##### 1. In General.

**50. Obligation to deliver.**—The common-law liability of a carrier for delivery of live animals is the same as that for the delivery of inanimate things, with this exception to the rule, as generally stated, that he is not liable for injuries caused by the peculiar character and propensities of the animals. *Bamberg v. South Carolina R. Co.*, 9 So. Car. 61.—APPROVING *Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 623; *Kansas Pac. R. Co. v. Nichols*, 9 Kan. 235, 12 Am. Rep. 494; *Clark v. Rochester & S. R. Co.*, 14 N. Y. 570; *Great Western R. Co. v. Blower*, 2 Moak 700. DISAPPROVING *Michigan S. & N. I. R. Co. v. McDonough*, 21 Mich. Rep. 165, 4 Am. Rep. 466; *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329, 12 Am. Rep. 275. QUOTING *Smith v. New Haven & N. R. Co.*, 12 Allen (Mass.) 531.—*North Pa. R. Co. v. Commercial Bank*, 35 Am. & Eng. R. Cas. 556, 123 U. S. 727, 8 Sup. Ct. Rep. 266.

In undertaking the carriage of live stock, the carrier assumes the obligation to deliver

safely and within a reasonable time, having due respect to the circumstances of the case. *Philadelphia, W. & B. R. Co. v. Lehman*, 6 *Am. & Eng. R. Cas.* 194, 56 *Md.* 209, 40 *Am. Rep.* 415.

A promise "to deliver" in a bill of lading for the carriage of live stock implies unloading them; so also does a provision to the effect that the carrier would store them unless called for. This being so, a usage of the company's agent at the place of destination requiring the owner or consignee to unload is of no consequence. The usage cannot override the contract. *Benson v. Gray*, 154 *Mass.* 391, 28 *N. E. Rep.* 275.

The duty of the carrier of live stock is to deliver the animals alive; and where, during transportation, they are killed by an accident for which the carrier is not responsible, he is not required to deliver their dead bodies, though they may have a market value. *Lee v. Marsh*, 28 *How. Pr. (N.Y.)* 275, 43 *Barb.* 102.

#### 51. Place and manner of delivery.

—Where the carrier and shipper of live stock enter into a written contract regulating the terms upon which the stock shall be carried and delivered, a mere usage concerning the manner of delivery cannot affect the rights of the parties when it is in conflict with the written contract, especially when such usage is not known to the shipper. *Myrick v. Michigan C. R. Co.*, 9 *Biss. (U.S.)* 44.

Although the contract required the appellants to unload the stock, it was the duty of the company to provide a safe mode of delivery by having a platform suitable for the purpose of unloading stock; and if the agents of the company required appellant's agent to remove a horse from the car onto a platform not ordinarily safe for the delivery of stock, and the horse was injured thereby, the company is responsible, although the agent of the owners may have been apprised of the danger. *Owen v. Louisville & N. R. Co.*, 35 *Am. & Eng. R. Cas.* 687, 87 *Ky.* 626, 9 *S. W. Rep.* 698.

If the servants of a railway company in unloading horses from a car leave a space between the flap and the body of the car, into which a horse steps and is injured, the company is liable. *Combs v. London & S. W. R. Co.*, 31 *L. T.* 613.

Where a cow is killed owing to the porter letting her out of the car without waiting a reasonable time, the railway company is liable to the owner for its value. *Gill v.*

*Manchester, S. & L. R. Co.*, 42 *L. J. Q. B.* 89, 1. *R. 8 Q. B.* 186, 21 *W. R.* 525, 28 *L. T.* 537.

A railway company is not bound to provide fences at a station where live stock may be landed, so as to prevent the animals straying onto the track. *Roberts v. Great Western R. Co.*, 4 *Jur. N. S.* 1240, 4 *C. B. N. S.* 506, 27 *L. J. C. P.* 266.

A calf died from overexertion soon after delivery to the consignee. The negligence charged against the carrier was in unloading at the station instead of at cattle-pens, and that the number of persons assisting were too great and frightened it. *Held*, that unloading at the station would not render the company liable, where it was the custom to unload single animals there; neither would the large number of persons employed, when they seemed necessary, owing to the animal's very vicious disposition and actions. *Chicago, B. & Q. R. Co. v. Owen*, 21 *Ill. App.* 339.

#### 52. Sufficiency of delivery.—

A common carrier of live stock is required neither to deliver the stock to the consignees, nor to give them notice of its arrival. Its obligation as a common carrier ceases when it has delivered the stock at their place of destination, and unloaded them from its cars; after which its only duty is to store them in a proper place, to see that they are properly cared for, and to deliver them on demand to the shipper or his consignees. *Chicago & E. I. R. Co. v. Pratt*, 13 *Ill. App.* 477.

Plaintiff shipped horses by rail consigned to a third party, proceeded himself to the place of destination, and went with the consignee to the company's office, but could not find the animals. After some delay they were found in a city across a river from the place of destination, in stables, where they had been put by the employés of the carrier, but for what reason did not appear. Thereupon plaintiff, without any communication with the company, directed the owner of the stables to keep the horses until he went home and returned, taking the consignee with him, who was a man in his employ. During his absence the horses were destroyed by an accidental fire in the stables. *Held*, that there was a sufficient delivery to plaintiff to relieve the company from liability. *Cleveland & P. R. Co. v. Sargent*, 19 *Ohio St.* 438.

Cattle arriving at a station were placed in pens by the servants of the company, as-

sisted by a man who was employed by the owner. After midnight, when it was allowable to drive cattle through the streets, the owner's drover went to take them away and found that two were dead. The company's servants would not let him take the remainder away unless he signed a receipt for the whole number. Afterward the owner came himself and took them away; but in the meantime the Monday's market was lost. *Held*, that the liability of the company as carrier was over before the damage occurred. *Shepherd v. Bristol & E. R. Co.*, 37 L. J. Ex. 113, L. R. 3 Ex. 189, 16 W. R. 982, 18 L. T. 528.

**53. Duty to provide yards and pens.**—Carriers of live stock must make some preparation in the way of yards or pens whereby the stock can be safely and properly kept and cared for until a delivery can be made to the consignee according to the terms of the shipment. *Myrick v. Michigan C. R. Co.*, 9 Biss. (U. S.) 44.

Where a railroad company carries cattle to their destination and places them in pens which are too small, and the cattle are being damaged by crowding, the owners may turn them out, and, having done all they could to herd them, may recover from the company for those that escape and are not recovered. Such damages are not too remote. *Gulf, C. & S. F. R. Co. v. York*, 2 Tex. App. (Civ. Cas. 718.

**54. Delay in unloading.**—Where it is sought to recover damages for an injury to horses by reason of a delay in not promptly unloading them after reaching their place of destination, the damages are not confined to the difference in the market value of the animals between the time when they arrived and when they were unloaded; but the damages are measured by the effect of the delay, and there is no better way of ascertaining this than by proving the appearance, symptoms, and condition of the animals immediately after being unloaded, together with any subsequent injuries or sickness that may have resulted. *Lake Erie & W. R. Co. v. Rosenberg*, 31 Ill. App. 47.

A shipper of horses was assured that there would be no delay in unloading them at the place of destination, and by reason of such assurance was induced to ship so that the horses reached their place of destination in the nighttime, very much heated by reason

of the weather and of the excitement caused by the transportation. They were not promptly unloaded, and were injured by cooling off too suddenly. *Held*, that the carrier was liable for the injury. *Lake Erie & W. R. Co. v. Rosenberg*, 31 Ill. App. 47.

**55. Delivery in bad order.**—Where a carrier is delayed in delivering live stock to market, it may excuse the delay by proof of misfortune or accident, although not inevitable or produced by the act of God. But evidence of such accident and delay is not admissible to excuse the delivery of the stock in bad order, unless there is offered with it evidence to prove that it used the highest degree of care during the delay for the preservation and safety of the animals. *Kinnick v. Chicago, R. I. & P. R. Co.*, 27 Am. & Eng. R. Cas. 55, 69 Iowa 665, 29 N. W. Rep. 772.—**DISTINGUISHED** IN *Illinois C. R. Co. v. Peterson*, 68 Miss. 454.

When an animal is delivered to the carrier in a sound, healthy condition, and when delivered at the place of destination is found to be lame or diseased, if the carrier would excuse himself, the burden is upon him to prove that the injury to the animal was without his fault. *Dow v. Portland Steam Packet Co.*, 84 Me. 490, 24 Atl. Rep. 945.

**56. Wrongful refusal to deliver.**—The plaintiff delivered cattle, carriage prepaid, to the defendant railway company for carriage on the terms of signed conditions whereby, in consideration of an alternative reduced rate, it was agreed that the company was "not to be liable in respect of any loss or detention of or injury to the said animals, or any of them, in the receiving, forwarding, or delivery thereof, except upon proof that such loss, detention, or injury arose from the wilful misconduct of the company or its servants." The cattle were carried; but, on application made for them by the plaintiff, the defendant, in consequence of their clerk having negligently omitted to enter the cattle on the consignment note as "carriage paid," refused to deliver them, and alleged that the carriage was not paid. The cattle were kept exposed to the weather until the next day, when, the mistake having then been ascertained, they were delivered. They were damaged by the exposure. In an action for damages by reason of wrongful detention and negligence—*held*, that the withholding of the cattle, un-

\* See also *ante*, 3, 16.

\* See also *post*, 81-84.



der a groundless claim to retain them, at the end of the transit was not "detention" within the conditions, and that the company was therefore liable. *Gordon v. Great Western R. Co.*, 3 Am. & Eng. R. Cas. 619, L. R. 8 Q. B. D. 44.

## 2. Delivery to the Wrong Person.

**57. Carrier, when liable.\***—Plaintiff loaded his live stock into a car that was pointed out to him by the company's agent, but by a mistake of a clerk in the car-number it was billed to another party, and the stock were delivered to him and lost to plaintiff. *Held*, that as plaintiff took the specific car designated by the company's agent, and the matter of car-numbers concerned the carrier alone, it was liable to plaintiff for the loss. *Chicago & N. W. R. Co. v. Ames*, 40 Ill. 249.—**DISTINGUISHED** IN *Indianapolis, B. & W. R. Co. v. Murray*, 72 Ill. 128; *Illinois C. R. Co. v. Cobb*, 72 Ill. 148.

A shipper of hogs was told to put them in a certain car, which he did, but by a mistake in making out the shipping bills the number of another car containing inferior hogs was put on the margin of the contract, and the inferior hogs were delivered to plaintiff's consignee, his own hogs going to another person. *Held*, that a provision in the contract providing that a claim for loss or damage must be made within five days from the time the stock were removed from the cars did not apply; neither could plaintiff be affected by the mistake of the company's employé in writing the wrong car-number on the contract. *Wilson v. Wabash, St. L. & P. R. Co.*, 23 Mo. App. 50.

**58. When not liable.**—A carrier who is sued for improperly surrendering the plaintiff's cattle to a constable cannot be held liable where the writ is valid on its face. *McAlister v. Chicago, R. I. & P. R. Co.*, 7 Am. & Eng. R. Cas. 373, 74 Mo. 351.

Plaintiffs shipped certain hogs by defendant's road, prepaying charges; at the place of destination they were taken from the carrier by a stranger and a drayman who was an employé of the consignees, and taken by them to consignees, the stranger representing that he had bought them of consignors, and exhibiting an ex-

pense bill which he had obtained from the carrier, whereupon he was paid for them by the consignees. *Held*, that the shipper could not recover from the carrier, and that his remedy was against the consignees. *Ryder v. Burlington, C. R. & N. R. Co.*, 51 Iowa 460, 1 N. W. Rep. 747.

**59. Delivery without production of bill of lading.**—Where a railroad company receives for transportation cattle consigned to the order of the shipper, with directions to notify a certain person at the place of destination, and delivers them to the party whom it is directed to notify, without the production of the bill of lading, it will be liable to a bank discounting consignor's draft upon the person whom it was directed to notify for the value of the cattle so delivered; and the fact that it has been customary for defendant to so deliver other shipments of cattle between the same parties is no defense, where it is not shown that such custom was brought to the knowledge of the consignor. *North Pa. R. Co. v. Commercial Bank*, 35 Am. & Eng. R. Cas. 556, 123 U. S. 727, 8 Sup. Ct. Rep. 266.

## V. SHIPPING CONTRACTS.

### 1. Consideration and Construction.

**60. Consideration.**—A complaint against a railroad company alleged a breach, by the defendant, of an agreement between the plaintiff and the defendant, whereby the latter agreed to ship certain live stock which the plaintiff agreed and attempted to deliver to the defendant for shipment. *Held*, that the agreement was based upon a sufficient consideration. *Pittsburgh, C. & St. L. R. Co. v. Hollowell*, 65 Ind. 188.

Plaintiff made a parol contract with defendant to furnish a special live-stock train to ship his cattle to the Chicago market within a certain time. The train was furnished and the cattle were loaded as agreed, and just as the train was about to move off defendant's agent presented him a contract, which defendant signed. *Held*, that the written contract was substituted for the original verbal one, and that the cancellation thereby of the old oral contract was a sufficient consideration for the substituted written one. *Leonard v. Chicago & A. R. Co.*, 54 Mo. App. 293.\*

\* Liabilities of carriers of live stock for mis-carriage and wrongful delivery, see note, 9 L. R. A. 451.

\* Merger of oral and written contracts, see 55 AM. & ENG. R. CAS. 324, *abstr.*

**61. How construed.\***—A written contract entered into by the shipper of live stock with the carrier, reciting, *inter alia*, that he had examined the car and accepted it, after he had orally agreed to accept the car only on condition that the doors were left open and slatted, construed to mean that he had accepted the car on condition that the door was to remain open and be slatted, as previously agreed. *Kansas City, M. & B. R. Co. v. Holland*, 68 *Miss.* 351, 8 *So. Rep.* 516.

Where animals were shipped under such agreement as the above, but without the car-door being left open and slatted, and some of the animals died, as was claimed by the owner, from insufficient ventilation, it is proper, in an action for damages, to leave the question of the suitability of the car to the jury. *Kansas City, M. & B. R. Co. v. Holland*, 68 *Miss.* 351, 8 *So. Rep.* 516.

Plaintiff made a contract for the shipment of cattle containing this stipulation: "In consideration that the party of the first part will transport for the party of the second part one car of cattle and one car of hogs to the National Stock Yards station, at the rate of thirty-five dollars per car, with privilege of Chicago at forty-five dollars per car-load, etc.," and providing that plaintiff should unload and reload at transfer points, and St. Louis was the end of defendant's line, and there would be a transfer to some other line at that point if the stock should be taken to Chicago, and the fact is admitted that the defendant did not transport the stock further than St. Louis—*held*, that the contract of shipment meant that plaintiff could ship to St. Louis, and that he would there have the privilege of determining, in a reasonable time, whether he would go on to Chicago, and that, upon plaintiff's demand to furnish transportation, within a reasonable time, to Chicago, and the failure of defendant so to furnish it, the plaintiff was entitled to recover. *White v. Missouri Pac. R. Co.*, 19 *Mo. App.* 400.

## 2. Limitation of Liability, Generally.

**62. Power to limit the common-law liability.**†—A railroad company transporting live stock may contract with the shipper for a consideration, that the com-

pany shall be released from all liability for damages accruing to the stock, disconnected and apart from the conduct or running of the trains, as from overloading, suffocation, heat, and the like. *Georgia R. Co. v. Beattie*, 66 *Ga.* 438, 42 *Am. Rep.* 75.—*QUOTING Georgia R. Co. v. Spears*, 66 *Ga.* 485.—*QUOTED IN Mitchell v. Georgia R. Co.*, 68 *Ga.* 644.—*Mitchell v. Georgia R. Co.*, 68 *Ga.* 644.—*QUOTING Georgia R. Co. v. Spears*, 66 *Ga.* 485; *Georgia R. Co. v. Beattie*, 66 *Ga.* 438.

A usage cannot be a good one if it is contrary to law or public policy. So a usage or custom of railroads not to receive live stock for transportation unless under certain conditions modifying their common-law liability cannot be shown as a defense, because railroads cannot legally refuse to ship live stock. *Missouri Pac. R. Co. v. Fagan*, 35 *Am. & Eng. R. Cas.* 666, 72 *Tex.* 127, 9 *S. W. Rep.* 749, 2 *L. R. A.* 75.—*QUOTED IN Missouri Pac. R. Co. v. Childers*, 1 *Tex. Civ. App.* 302.

**63. By mere notice.**—A common carrier of live stock cannot relieve itself from liability by mere notice appended or printed on the contract. So a printed statement appended to a contract, providing that the carrier, in cases of damage, will only be liable for a certain limited value, and a provision that valuable blooded animals will only be carried on special contract, do not constitute part of the contract, and are not available as a defense. *Ormsby v. Union Pac. R. Co.*, 2 *McCrory (U. S.)* 48, 4 *Fed. Rep.* 706.—*QUOTING Michigan C. R. Co. v. Mineral Springs Mfg. Co.*, 16 *Wall. (U. S.)* 328.

While common carriers may limit their liability by special contract, mere notice that a carrier will not transport live stock unless the shipper will enter into a contract limiting the carrier's liability for loss or injury to \$100, does not constitute such special contract, without anything to show that the shipper assented to it. *Chicago, R. I. & P. R. Co. v. Harmon*, 12 *Ill. App.* 54.

**64. — by stipulation in receipt.**—A shipper of horses cannot recover for injury to them owing to the negligence of the company's servants, where the ticket or receipt delivered to the shipper stipulated that he assumed all risks, and that the company would not be liable for any damages whatsoever. *Austin v. Manchester, S. & L. R. Co.*, 10 *C. B.* 454, 7 *Railw. Cas.* 300, 16

\* See also *post*, 96.

† Limitation of liability of carriers of live stock, see note, 49 *AM. & ENG. R. CAS.* 169.

*Jur.* 763, 21 *L. J. C. P.* 179. *Chippendale v. Lancashire & Y. R. Co.*, 7 *Railw. Cas.* 824, 15 *Jur.* 1106, 12 *L. J. Q. B.* 22. *Shaw v. York & N. M. R. Co.*, 6 *Railw. Cas.* 87, 13 *Q. B.* 347, 13 *Jur.* 385, 18 *L. J. Q. B.* 181.

It is not the duty of a carrier's agent, on giving a receipt for goods to be shipped, to call the shipper's attention to its language limiting the carrier's liability; it is the shipper's duty to read it. *Snider v. Adams Exp. Co.*, 63 *Mo.* 376, 20 *Am. Ry. Rep.* 435.

A railroad company's custom was to carry horses at the owner's risk, and at reduced rates for that reason, and the letters "O. R.," signifying "Owner's Risk," were upon the receipt given to plaintiff for his horses, and retained and put in evidence by him; and he testified that "he did not see" those letters, but not that he did not understand their meaning. *Held*, that the restricted liability of the company clearly appeared from plaintiff's evidence. *Morrison v. Phillips & C. Constr. Co.*, 44 *Wis.* 405, 19 *Am. Ry. Rep.* 312.

**65. General rule denying right to limit liability for negligence.\***—A common carrier may limit his common-law liability for live stock transported by him, but may not exempt himself from liability for his own negligence. *East Tenn., V. & G. R. Co. v. Johnston*, 22 *Am. & Eng. R. Cas.* 437, 75 *Ala.* 596, 51 *Am. Rep.* 489. *Sprague v. Missouri Pac. R. Co.*, 23 *Am. & Eng. R. Cas.* 684, 34 *Kan.* 347, 8 *Pac. Rep.* 465. *Chicago, R. I. & P. R. Co. v. Witte*, 32 *Neb.* 275, 49 *N. W. Rep.* 183.—FOLLOWING *Atchison & N. R. Co. v. Washburn*, 5 *Neb.* 117.—*Louisville & N. R. Co. v. Wyan*, 45 *Am. & Eng. R. Cas.* 312, 88 *Tenn.* 320, 14 *S. W. Rep.* 311.—APPROVING *Coward v. East Tenn., V. & G. R. Co.*, 16 *Lea (Tenn.)* 225; *Moulton v. St. Paul, M. & M. R. Co.*, 31 *Minn.* 85; *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 *Kan.* 645; *Chicago, St. L. & N. O. R. Co. v. Abels*, 60 *Miss.* 1017; *United States Exp. Co. v. Backman*, 28 *Ohio St.* 144; *Black v. Goodrich Transp. Co.*, 55 *Wis.* 319; *Alabama G. S. R. Co. v. Little*, 71 *Ala.* 611; *Rosenfeld v. Peoria, D. & E. R. Co.*, 103 *Ind.* 121; *Missouri Pac. R. Co. v. Fagan*, 72 *Tex.* 127. DISAPPROVING *Squires v. New York C. R. Co.*, 98 *Mass.* 239; *South & N. Ala. R. Co. v. Henlein*,

52 *Ala.* 606; *Magnin v. Dinsmore*, 56 *N. Y.* 168; *St. Louis, I. M. & S. R. Co. v. Weakly*, 50 *Ark.* 397. DISTINGUISHING *Hart v. Pennsylvania R. Co.*, 112 *U. S.* 331; *Harvey v. Terre Haute & I. R. Co.*, 74 *Mo.* 539; *Graves v. Lake Shore & M. S. R. Co.*, 137 *Mass.* 33; *Brehme v. Dinsmore*, 25 *Md.* 329; *Louisville & N. R. Co. v. Sherrod*, 84 *Ala.* 178.—DISTINGUISHED IN *Louisville & N. R. Co. v. Sowell*, 90 *Tenn.* 17.

A common carrier cannot lawfully stipulate for exemption from responsibility for the negligence of himself or his servants, or the insufficiency of his cars for the transportation of the freight deposited in them. *St. Louis, I. M. & S. R. Co. v. Lesser*, 46 *Ark.* 236.—QUOTING *New York C. R. Co. v. Lockwood*, 17 *Wall. (U. S.)* 357; *Welsh v. Pittsburg, Ft. W. & C. R. Co.*, 10 *Ohio St.* 65; *Rhodes v. Louisville & N. R. Co.*, 9 *Bush (Ky.)* 688.

**66. Contrary rule.—Such limitation valid.**—Common carriers cannot by contract stipulate for immunity against gross negligence, but may stipulate for a partial exemption from its full liability. *Chicago, R. I. & P. R. Co. v. Harmon*, 17 *Ill. App.* 640.

Where a railroad company contracts for exemption from liability from the negligence of its servants or from the insecurity of its cars, it will not be liable for an injury to stock carried in a grain car, unsafe for stock but suitable for grain, there being other and suitable cars provided by the company, which its servants neglected to use. *Wilson v. New York C. & H. R. R. Co.*, 21 *Am. & Eng. R. Cas.* 148, 97 *N. Y.* 87; affirming 27 *Hun* 149.—DISTINGUISHING *Nicholas v. New York C. & H. R. R. Co.*, 89 *N. Y.* 370.

**67. Limitation of liability for wilful acts.**—A contract by a railway company carrying cattle by sea, exempting it from liability for acts of wilful misconduct on the part of seamen and crew, is unreasonable. *Ronan v. Midland R. Co.*, *L. R.* 14 *Ir.* 157.

A contract for the shipment of cattle partly by rail and partly by sea, exempting the company, among other things, from liability for the fault, negligence, or mistake of seamen or crew of the vessel, does not in its terms exempt the company from liability for acts or wilful misconduct on the part of the seamen and crew. *Ronan v. Midland R. Co.*, *L. R.* 14 *Ir.* 157.

\* Limitation of liability for negligence, see 55 *AM. & ENG. R. CAS.* 353, *abstr.*

### 3. Special Contracts Limiting Liability.

**68. Power to limit liability by special contract.**—Carriers of live stock may limit their liability in respect thereto by special contract. *Georgia R. Co. v. Spears*, 66 Ga. 485; *Morrison v. Phillips & C. Constr. Co.*, 44 Wis. 405, 19 Am. Ry. Rep. 312.—FOLLOWING *Betts v. Farmers' L. & T. Co.*, 21 Wis. 80.—REVIEWED IN *Annas v. Milwaukee & N. R. Co.*, 27 Am. & Eng. R. Cas. 102, 67 Wis. 46, 57 Am. Rep. 388, note.—*Central R. Co. v. Bryant*, 73 Ga. 722. *Great Western R. Co. v. McCarthy*, 29 Am. & Eng. R. Cas. 87, 12 App. Cas. 218; reversed in *Ir. L. R. 18 Q. B. D. 1*.—APPROVING *Peek v. North Staffordshire R. Co.*, 10 H. L. Cas. 473; *Manchester, S. & L. R. Co. v. Brown*, 8 App. Cas. 703.

Where a person ships cattle over a railway under a special contract of carriage, he cannot elect to charge the railroad company with the liabilities of a common carrier. *Lake Shore & M. S. R. Co. v. Bennett*, 6 Am. & Eng. R. Cas. 391, 89 Ind. 457.

A railway company is bound, as a common carrier, to receive and transport live animals, when offered for transportation from one point to another in Texas, as other property, and is liable, after receiving them, as an insurer against loss from any cause, except the act of God or of the public enemy, the act of the owner of the stock, or the vicious propensities or inherent character of the animals. This liability a railroad company cannot limit by special contract, even in regard to matters concerning which it might legally contract at common law. *Gulf, C. & S. F. R. Co. v. Trawick*, 30 Am. & Eng. R. Cas. 49, 68 Tex. 314, 4 S. W. Rep. 567.

Whenever railroad companies receive cattle or live stock to be transported over their road from one place to another, such companies assume all the responsibilities of a common carrier, except so far as such responsibilities may be modified by a special contract; and under the Tex. St. the modifications which may be made by a special contract, and are to operate within the limits of the state, can only be such as will not diminish the common-law liability of a railroad company as a common carrier. *Missouri Pac. R. Co. v. Harris*, 1 Tex. App.

(Civ. Cas.) 730. *Texas & P. R. Co. v. Hamm*, 2 Tex. App. (Civ. Cas.) 437.

A reasonable condition contained in a contract for the carriage of live stock is valid as a limitation of the carrier's common-law liability, where the contract is made in another state and the carriage is to be interstate. In such case the inhibition of the Texas statute against common carriers limiting their liability does not apply. *International & G. N. R. Co. v. Watt*, 2 Tex. App. (Civ. Cas.) 686.

**69. What limitations are valid and binding, generally.**—In so far as a contract for the carriage of live stock undertakes to relieve the company from liability on account of any delay in transportation, it is void; and it is also void in so far as it requires the shipper to give notice of his claim before he unloads his stock. But it is valid in so far as it provides that the owner shall go with the stock and shall take care of it, and prepare the car for the use of the stock, and shall see to the loading and unloading. *Ormsby v. Union Pac. R. Co.*, 2 McCrary (U. S.) 48, 4 Fed. Rep. 706.—QUOTING *Michigan C. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 328.

A special contract by which, in consideration of reduced rates and a free passage for himself, a shipper of live stock assumes (releasing the railroad company from) all injuries, loss, or damage the animals may sustain from injuries to themselves or to each other, or from heat, suffocation, overloading, fright, viciousness, and from "any damages incidental to railroad transportations which shall not have been caused by the fraud or gross negligence of said railroad," is reasonable and valid, except in the attempt to limit the liability of the railroad to gross negligence. *Central R. & B. Co. v. Smitha*, 85 Ala. 47, 4 So. Rep. 708.—FOLLOWING *South & N. Ala. R. Co. v. Henlein*, 52 Ala. 606.—DISTINGUISHED IN *Georgia Pac. R. Co. v. Hughart*, 90 Ala. 36.

When a carrier contracts for exemption from liability for loss occurring by fire, the owner of goods lost by fire cannot recover for them without affirmative proof that the fire was the result of negligence. *Little Rock, M. R. & T. R. Co. v. Harper*, 21 Am. & Eng. R. Cas. 97, 44 Ark. 208.

Limitations upon the common-law liability of a carrier, contained in a bill of lading for the shipment of live stock, are unreasonable

\* Limitation of liability of carriers of live stock by contract, see note, 67 AM. DEC. 213.

able and void, notwithstanding it is recited therein that the limitations were agreed to by the shipper in consideration of a reduced rate, if the carrier's rules, printed upon the bill of lading, would not have permitted the live stock to be shipped unless the shipper accepted the bill of lading with its limitations. *St. Louis, I. M. & S. R. Co. v. Spann*, 57 Ark. 127.—FOLLOWING *Little Rock & Ft. S. R. Co. v. Craven*, 57 Ark. 112.

The common carrier of live stock may by special contract relieve itself from liability for injury to the animals resulting "in consequence of any of them being wild, unruly, or weak, or of different ages and classes, or maiming each other or themselves." *Illinois C. R. Co. v. Scruggs*, 69 Miss. 418, 13 So. Rep. 698.—FOLLOWING *Chicago, St. L. & N. O. R. Co. v. Abels*, 60 Miss. 1017.

The following provisions in a contract for the transportation of sheep were held valid and binding: (1) That the carrier should be released from all injury or depreciation which any of the animals might suffer from being weak or escaping, or injuring themselves or each other, or from overloading, heat, suffocation, fright, viciousness, or by being injured by fire; (2) that the business of the carrier should not be delayed by the detention of trains to unload and reload the sheep for any cause whatever; (3) that should damage occur the value of the sheep at the date and place of shipment should govern. *Texas & P. R. Co. v. Davis*, 2 Tex. App. (Civ. Cas.) 156.

**70. Special contracts assuming risks, when blind shipper.**—A common carrier of live stock may contract that the owner shall assume all risk of damage, from whatever cause, in course of transportation. *Betts v. Farmers' L. & T. Co.*, 21 Wis. 80.—FOLLOWED IN *Morrison v. Phillips & Co. Constr. Co.*, 44 Wis. 405. QUOTED IN *Richardson v. Chicago & N. W. R. Co.*, 18 Am. & Eng. R. Cas. 530, 61 Wis. 596. REVIEWED IN *Potts v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 394.

A stipulation that horses should be carried at the owner's risk is not unreasonable or void. *M'Cance v. London & N. W. R. Co.*, 7 H. & N. 477, 31 L. J. Exch. 65. *S. P. Gannell v. Ford*, 5 L. T. 604. *Harrison v. London, B. & S. C. R. Co.*, 2 B. & S. 122, 8 Jur. N. S. 740, 31 L. J. Q. B. 113.

A stipulation in a special contract, by which the shipper agrees "to load, unload, and transfer the stock at his own risk with

the assistance of the railroad agents, and, in case of accidents or delays from any cause whatever, to feed, water, and take care of the stock at his own expense," being furnished with all proper facilities by the railroad, contemplates that he shall himself accompany the stock the entire route and perform the stipulated services; and the fact that, at one of the stations on the route, on presentation of his bill of lading the agent in charge gave him a ticket which enabled him to travel on a passenger train, though he might have travelled on the train with his stock, does not show a waiver of these stipulations or relieve him of the performance of the specified services. *Central R. & B. Co. v. Smitha*, 85 Ala. 47, 4 So. Rep. 708.

Under provisions in a contract for the transportation of live stock releasing the company from liability for delays at terminal points, and for delays at points where the stock were to be delivered to connecting lines, the shipper agreeing to assume the risk of transportation, a carrier is not liable for the injury that results to the stock by reason of a delay caused by a strike on its road, which it could not control. *Bartlett v. Pittsburgh, C. & St. L. R. Co.*, 18 Am. & Eng. R. Cas. 549, 94 Ind. 281.

Where live stock are shipped under a contract that the shipper assumes all risk of delay caused by a "strike" or threatened violence to personal property, there can be no recovery against the company for a delay caused by a "strike" of such magnitude as to require the military force of the state to suppress it. *Gulf, C. & S. F. R. Co. v. Gatewood*, 79 Tex. 89, 14 S. W. Rep. 913.

Where, by the terms of a contract for the shipment of sheep, the shipper, in consideration of reduced rates, is to care for them while in transit, and attend to loading and unloading them, and assume all risks incident thereto, and of all injuries from any cause, he cannot cast the duty upon the carrier of caring for the sheep after being unloaded at their destination, although its stock-yards were too small to hold them all. *Myers v. Wabash, St. L. & P. R. Co.*, 27 Am. & Eng. R. Cas. 53, 90 Mo. 98, 2 S. W. Rep. 263.

A provision in a bill of lading of live stock providing that the owner should accompany them and take care of them, and should assume the risk of injury that they

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might do to themselves or to each other, will not be treated as waived upon proof that the company had been in the habit of conveying cattle for the same party without his presence on the train. *Chicago & N. W. R. Co. v. Van Dresar*, 22 Wis. 511.

To a declaration against a railroad, setting out a special contract entered into with plaintiff to carry certain cattle, whereby plaintiff undertook "all risk of loss, injury, damage, and other contingencies in loading, unloading, transportation, conveyance, and otherwise, no matter how caused," and alleging the consequent duty on defendants' part to furnish suitable and safe carriages, and the breach of such duty, whereby some of the cattle were killed and others injured, defendants pleaded this special contract, and that while said cattle were being so conveyed a door of one of the cars became open and some of the cattle fell out and were injured. *Held*, that the terms of the special contract protected defendants against liability for the damage caused by the accident. *Hood v. Grand Trunk R. Co.*, 20 U. C. C. P. 361.—FOLLOWING *O'Rorke v. Great Western R. Co.*, 23 U. C. Q. B. 427. DISAPPROVING *Shaw v. York & N. M. R. Co.*, 13 Q. B. 347; *McManus v. Lancashire R. Co.*, 2 H. & N. 693.

**71. Special contracts assuming risks, when do not bind shipper.\*—**

A provision in a contract for the shipment of live stock, providing that the owner assumed risks of injury resulting from heat or suffocation, or from being crowded in the cars, does not relieve the company from liability for a loss of stock which results from insufficient ventilation. *Kansas City, M. & B. R. Co. v. Holland*, 68 Miss. 351; 8 So. Rep. 516.

A contract for the shipment of live stock by a railroad company provided that, in consideration of a certain reduced rate of transportation, the owner of said stock should assume all risks of injuries which the animals, or either of them, might receive in consequence of any of them being wild, unruly, vicious, weak, escaping, maiming and killing themselves or each other, or from delays, or in consequence of heat, suffocation, or the ill effects of being crowded upon the cars of said company, or on account of being injured by the burning of hay, straw, or any other material used

by the owner in feeding the stock, or otherwise, and any damage occasioned thereby, and also all risks of any loss or damage which might be sustained by reason of any delay, or from any other cause or thing in or accident to, or from or in the loading or unloading of, said stock; that said owner should load or unload said stock at his own risk, the railroad company furnishing the necessary laborers to assist, under the direction and control of said owner, who should examine for himself all the means used in loading and unloading, to see that they were of sufficient strength, of the right kind, and in good repair and order; that each person riding free to take care and charge of said stock should do so at his own risk of personal injury from whatever cause; and that the owner should release and hold harmless and keep indemnified the railroad company from all damages, actions, claims, and suits on account of any and every injury, loss, and damage heretofore referred to, if any should occur or happen. In a suit against the railroad company to recover for certain animals shipped by the plaintiff under this contract, and lost while in course of transportation by escaping through a window open in the end of the car in which they had been loaded by the plaintiff's agent, who accompanied them on the route, and who, after the escape of one of the animals, told the conductor to fix said window, and, the conductor not doing so, fixed it himself—*held*, that the railroad company was liable for the loss. *Indianapolis, P. & C. R. Co. v. Allen*, 31 Ind. 394.

A railroad company undertook the transportation of cattle under a special agreement, by which the owner of the cattle assumed the risk of all injury, loss, or damage which might be occasioned in certain contingencies, including the escaping of the cattle and possible injury to them by fright or their own viciousness, as well as any other injury which might happen to them incidental to railroad transportation, not caused by the fraud or gross negligence of the railroad company. *Held*, that while this special contract devolved on the owner the personal care of the cattle, with the duties and risks connected with it, including the risk of their escaping or being injured in consequence of their own restiveness or viciousness, it did not exonerate the company from responsibility for damages

\* See also *post*, 127, 128.



resulting from a failure to provide a suitable and safe car for the carriage of the cattle. If the car furnished was insufficient and unsuitable, the company is responsible for the damage resulting therefrom, even though the restiveness or viciousness of the cattle may have contributed to the injury incurred. *Rhodes v. Louisville & N. R. Co.*, 9 *Bush* (Ky.) 688.

A contract for the shipment of live stock provided that the owners assumed "all and every risk of injuries which the animals might receive in consequence of being wild, unruly, and vicious, weak, escaping, maiming, or the killing of themselves or each other, or from delays, and risk of any loss or damage which may be sustained by reason of any delay, or from any other cause or thing in or incident to or from or in the loading or unloading of the stock." *Held*, that this provision referred to loss or damage by reason of injuries to the stock caused by delay, etc., upon the cars, and to loss or damage by reason of delay in loading or unloading, and had no reference to losses which the delays of the carriers might cause. *Sisson v. Cleveland & T. R. Co.*, 14 *Mich.* 489.

**72. Rule that carrier cannot exempt himself from liability for negligence by provisions in special contract.\***—A common carrier cannot relieve himself from responsibility for his own negligence or the negligence of his employes by any contract that he may enter into with the shipper. He may, however, enter into stipulations which do not relieve him in any degree from his responsibility for negligence, if the shipper assents and agrees to them by a special contract, either verbal or in writing. *Ormsby v. Union Pac. R. Co.*, 2 *McCrary* (U. S.) 48, 4 *Fed. Rep.* 706. *Louisville, C. & L. R. Co. v. Hedger*, 9 *Bush* (Ky.) 645.—FOLLOWED IN *Rhodes v. Louisville & N. R. Co.*, 9 *Bush* (Ky.) 688.

A provision in a contract for the carriage of horses, providing that the carrier is not to be liable for any one of certain specified causes of injury, will not relieve it from injuries that result from a want of ordinary care. *Welch v. Boston & A. R. Co.*, 41 *Conn.* 333, 6 *Am. Ry. Rep.* 95.

As the carrier did not stipulate, by his special contract, against liability for his own

negligence, even if he could do so effectively, the existence of a special contract for the shipment of live stock, with certain stipulations therein exempting the carrier from liability, is no obstacle to the maintenance of an action of tort based on his legal duty and a breach thereof by negligence. *Nicoll v. East Tenn., V. & G. R. Co.*, 89 *Ga.* 260, 15 *S. E. Rep.* 309.—RECONCILING *Boaz v. Central R. Co.*, 87 *Ga.* 463.

In the absence of fault by a shipper of live stock, a contract by the carrier, limiting its liability to a certain value, is not enforceable where a loss occurs through the negligence of the carrier or its employes. *Baughman v. Louisville, E. & S. T. L. R. Co.*, (Ky.) 21 *S. W. Rep.* 757.

It is not competent for a railroad company to provide by special contract that it will not be responsible for its neglect or the unsafe condition of the doors of its cattle-cars. *Welsh v. Pittsburg, Ft. W. & C. R. Co.*, 10 *Ohio St.* 65.—APPROVING *Sager v. Portsmouth, S. & P. & E. R. Co.*, 31 *Me.* 228. NOT FOLLOWING *Chippendale v. Lancashire & Y. R. Co.*, 7 *Eng. L. & Eq.* 395.—APPROVED IN *Atchinson & N. R. Co. v. Washburn*, 5 *Neb.* 117. QUOTED IN *St. Louis, I. M. & S. R. Co. v. Lesser*, 46 *Ark.* 236.

A railroad company acting as a common carrier of live stock cannot by special contract procure exemption from responsibility for losses arising from its own neglect of the duties incident to such employment. It is liable for damage resulting from defective and unsafe cars or vehicles, notwithstanding an express contract to the contrary. *Welsh v. Pittsburg, Ft. W. & C. R. Co.*, 10 *Ohio St.* 65.—FOLLOWED IN *Potts v. Wabash, St. L. & P. R. Co.*, 17 *Mo. App.* 394; *Baltimore & O. R. Co. v. Campbell*, 36 *Ohio St.* 647.

When a railroad company is sued for damages to live stock while being carried, it cannot set up as a defense a provision in the contract of shipment that the shipper agreed to accept the cars furnished to him by the company, so far as such agreement tends to relieve the company from liability for injuries resulting from defective or insufficient cars. Such a stipulation is unreasonable and invalid, as a carrier cannot relieve himself from liability for loss and injury caused by his own negligence. *Gulf, C. & S. F. R. Co. v. Wilhelm*, 3 *Tex. App. (Civ. Cas.)* 558.

\* Exemption from liability for negligence, see note, 16 *AM. & ENG. R. CAS.* 149, 157.

**75. New York rule allowing liability for negligence to be limited.**—The common-law liability of common carriers of merchandise, making them insurers against loss or injury, except it be by the act of God or the public enemy, does not apply in its full extent to the carriage of

live stock; and in New York it is well settled that a common carrier may by express contract exempt itself from damages resulting from any degree of negligence on the part of its servants, agents, or employes. Therefore, where hogs are shipped under an agreement entered into for reduced rates, whereby the owner assumes the risk of injuries to them in consequence of heat, the contract will exempt the carrier from loss by heat, due to its negligence in not watering and cooling the hogs, as otherwise the contract would be meaningless in not giving more than the law gives. *Cragin v. New York C. R. Co.*, 51 N. Y. 61, 4 Am. Ry. Rep. 418.—DISTINGUISHED IN *Magnin v. Dinsmore*, 56 N. Y. 168; *Holsapple v. Rome, W. & O. R. Co.*, 3 Am. & Eng. R. Cas. 487, 86 N. Y. 275.

The shipment of horses under a special contract by which the owner assumes "all risk of loss, injury, damage, and other contingencies in loading, unloading, conveyance, and otherwise," relieves the company from liability, and a nonsuit is properly allowed, even though the horses are wilfully and negligently run on a side-track and there left locked up for four days without food, it being impossible to feed them in the car, and the agent of the company refuses to permit them to be unloaded. *Heinemann v. Grand Trunk R. Co.*, 31 How. Pr. (N. Y.) 430, 1 *Sheld.* 95.—COMMENTED ON IN *Keeney v. Grand Trunk R. Co.*, 59 Barb. (N. Y.) 142.

**76. Cases not within the New York rule.**—A provision in a contract for the shipment of live stock which attempts to relieve the company from liability resulting from negligence in the loading, unloading, or conveyance, or in failing to transport them promptly, does not apply to a case where the cars are wilfully detached and placed on a side-track to allow other freight to pass, and are kept there for several days locked up where it is impossible to feed or water the stock, as such conduct is not negligence, but a wilful breach of contract. *Keeney v. Grand Trunk R. Co.*, 47 N. Y. 525, 1 Am. Ry. Rep. 466; affirming 59 Barb. 104.

A contract with two railroad companies for the transportation of certain sheep, by its terms, in consideration of a reduction of the charges for freight, released them from liability for injuries to the sheep "caused by burning of hay, straw, or other material

used for feeding said animals, or otherwise."

The contract contained no words expressly exempting the carriers from liability for their own negligence. A fire occurred in the cars which destroyed a number of the sheep, the loss resulting, as found by the jury in an action brought to recover damages, from the negligence of the defendant, one of said companies, in omitting to supply the train with such appliances as would have enabled those in charge to have stopped it and extinguished the fire before serious damage had resulted. *Held*, that the exemption did not include negligence, and that defendant was liable. *Holsapple v. Rome, W. & O. R. Co.*, 3 Am. & Eng. R. Cas. 487, 86 N. Y. 275.—DISTINGUISHING *Cragin v. New York C. R. Co.*, 51 N. Y. 61. FOLLOWING *Mynard v. Syracuse, B. & N. Y. R. Co.*, 71 N. Y. 180; *Pratt v. Ogdensburg & L. C. R. Co.*, 102 Mass. 557; *Powell v. Pennsylvania R. Co.*, 32 Pa. St. 414.—QUOTED IN *Zimmer v. New York C. & H. R. Co.*, 42 N. Y. S. R. 63.

**77. English and Canadian rule.**—A condition upon a shipping bill, as well as upon a pass granted to a drover, that defendants will not be responsible for any negligence, default, or misconduct, gross, culpable, or otherwise, on the part of defendants or their servants, or of any other person causing or tending to cause the death, injury, or detention of an animal shipped, will protect defendants where it sufficiently appears that the loss must have happened from some cause described within the conditions. *Farr v. Great Western R. Co.*, 35 U. C. Q. B. 534.—QUOTING *Shaw v. York & N. M. R. Co.*, 13 Q. B. 347; *Wise v. Great Western R. Co.*, 1 H. & N. 63; *Pardington v. South Wales R. Co.*, 1 H. & N. 392. REVIEWING *Austin v. Manchester, C. L. R. Co.*, 10 C. B. 454.

Under the general railway act 1868, 31 Vic. ch. 68, § 20, sub-sec. 4, as amended by 34 Vic. ch. 43, § 5, re-enacted by Consol. Ry. Act 1879 (42 Vic. ch. 9), § 25, sub-secs. 2, 3, 4, prohibiting railway companies from protecting themselves against liability for negligence by notice, condition, or declaration, and which applies to the Grand Trunk Railway Company, that company cannot avail themselves of a stipulation, in a contract for the carriage of live stock, that they should not be responsible for the negligence of themselves or their servants. *Grand Trunk R. Co. v. Vogel*, 27 Am. &

*Eng. R. Cas.* 18, 11 *Can. Sup. Ct.* 612; *affirming* 10 *Ont. App.* 162, which *affirms* 2 *Ont.* 197.

**78. Limitation of liability to cases involving "gross or wilful" negligence.**—A railroad company receiving cattle for transportation as a common carrier cannot by special stipulations limit its liability to injuries caused by "gross or wanton negligence," or to that of a mere agent of the consignor, in the matter of delivering the cattle to the next connecting road, such stipulations being contrary to public policy. *Alabama G. S. R. Co. v. Thomas*, 32 *Am. & Eng. R. Cas.* 464, 83 *Ala.* 343, 3 *So. Rep.* 802.

Though under the contract of shipment a railroad may have been liable only for damages arising from gross negligence in not attending to live stock, yet where it carried the stock beyond the agreed destination, and there kept them for a time, its liability as to such time was not limited to the results of gross negligence. *Bryant v. Southwestern R. Co.*, 6 *Am. & Eng. R. Cas.* 388, 68 *Ga.* 805.

By the contract releasing the company from all claims for damage to stock while in the cars of the company, or for delay in their carriage, or for escape thereof from the cars, and generally from all claims relating thereto, except such as might arise from the gross negligence of the company, the burden is on the plaintiff of proving not merely that the live stock were injured and damaged by accident and delay occurring in their transportation, but also that these were caused by the gross negligence or default of the defendant's agents. *Bankard v. Baltimore & O. R. Co.*, 34 *Md.* 197.

The fact that cattle were injured by accidents while in the course of transportation, that considerable delays occurred in their carriage, and that they were lessened in weight and value from these causes, does not raise the presumption of negligence against the company, within the meaning of a contract limiting the company's liability to cases of gross negligence only. *Bankard v. Baltimore & O. R. Co.*, 34 *Md.* 197.

Provisions in the contract for transportation of horses, attempting to discharge the carrier from any liability for any cause, except wilful negligence of its agents, or providing that the damage in no case should exceed \$100 per head, are not valid, as being an attempt, in whole or in part, to exempt

the carrier from liability for its own negligence. *Moulton v. St. Paul, M. & M. R. Co.*, 12 *Am. & Eng. R. Cas.* 13, 31 *Minn.* 85, 47 *Am. Rep.* 781, 16 *N. W. Rep.* 497.—APPROVED IN *Louisville & N. R. Co. v. Wynn*, 45 *Am. & Eng. R. Cas.* 312, 88 *Tenn.* 320, 14 *S. W. Rep.* 311. DISAPPROVED IN *Hart v. Pennsylvania R. Co.*, 112 *U. S.* 331.

The doctrine once held that carriers of animals did not incur the responsibilities of common carriers, that they were private carriers, and were subject only to such liabilities as the law imposed upon such bailees, or as the contract between the parties fixed, does not obtain in Texas. The carriers of such property are common carriers, subject to the same responsibilities imposed by law on carriers of other property, except as these are modified by the inherent character of such property. It follows that a special contract which by its terms purports to exempt a railway company from liability for injury in the transportation of cattle, except such as might result from the wilful negligence of the company, cannot be enforced. *Missouri Pac. R. Co. v. Harris*, 28 *Am. & Eng. R. Cas.* 107, 67 *Tex.* 166, 2 *S. W. Rep.* 574.—FOLLOWED IN *Missouri Pac. R. Co. v. Cornwall*, 70 *Tex.* 611. QUOTED IN *Good v. Galveston, H. & S. A. R. Co.*, 40 *Am. & Eng. R. Cas.* 98, 11 *S. W. Rep.* 854.—*Missouri Pac. R. Co. v. Cornwall*, 70 *Tex.* 611, 8 *S. W. Rep.* 312.—FOLLOWING *Missouri Pac. R. Co. v. Harris*, 67 *Tex.* 166.

Where a bridge was washed away and a shipment of stock delayed such a length of time that loss was occasioned by extra feeding, etc., and it appeared that had the railroad company forwarded the stock promptly they would have been transferred to another road before the bridge went down, and the delay avoided—*held*, that the delay of the railroad company was such gross negligence as to invalidate a release executed to them by the plaintiff exempting the company from all liability except that occasioned by their own gross negligence, and that a judgment for plaintiff should be affirmed. *Indianapolis & St. L. R. Co. v. Adams*, 36 *Ill. App.* 629.

**79. Limitation of liability in consideration of reduced rates.**\*—A provision in a contract for the shipment of live stock entered into in consideration that the

\* Carrying at reduced rate in consideration that carrier's liability be limited, see 35 *Am. & Eng. R. Cas.* 614, *abstr.*

shipper gets reduced rates, to the effect that he shall attend and care for the stock at his own expense, is reasonable, and will relieve the carrier from liability for loss or injury if it is not the result of its want of diligence. *South & N. Ala. R. Co. v. Henlein*, 52 Ala. 606.

A common carrier cannot limit his common-law liability by a special contract in writing with the shipper, unless it is freely and fairly made; and the carrier cannot exact as a condition precedent for carrying stock or goods that the shipper must sign a contract in writing, limiting or changing the common-law liability. If the carrier has two rates or charges for carrying stock or goods—one, if carried under the old common-law liability; and the other, if carried under a special contract—the shipper must have real freedom of choice in making his selection. *Atchison, T. & S. F. R. Co. v. Dill*, 55 Am. & Eng. R. Cas. 375, 48 Kan. 210, 29 Pac. Rep. 148.

Where a contract for the shipment of live stock recites that the company's liability is limited, as to certain specified matters, "in consideration of reduced rates," but the fact shows that no reduced rates were given, there is no consideration for such limitation, and the shipper is not bound thereby. *Gulf, C. & S. F. R. Co. v. McCarty*, 82 Tex. 608, 18 S. W. Rep. 716.—REVIEWED IN *Gulf, C. & S. F. R. Co. v. Wright*, 1 Tex. Civ. App. 402.

#### 80. Stipulation requiring notice of claim before removal of stock.—

(1) *Validity of the stipulation.*—A common carrier of live stock may limit its liability except as against negligence or misconduct, and may contract that no claim will be allowed for loss or injury unless it is presented in writing at or before the stock are unloaded; but it is competent for the carrier to require such written notice. *Rice v. Kansas Pac. R. Co.*, 63 Mo. 314, 20 Am. Ry. Rep. 424.—FOLLOWING *Southern Exp. Co. v. Caldwell*, 21 Wall, (U. S.) 264.—DISTINGUISHED IN *Dunn v. Hannibal & St. J. R. Co.* 68 Mo. 268. FOLLOWED IN *Dawson v. St. Louis, K. C. & N. R. Co.*, 76 Mo. 514; *Carroll v. Missouri Pac. R. Co.*, 88 Mo. 239. QUOTED IN *Wabash, St. L. & P. R. Co. v. Black*, 11 Ill. App. 465.

A provision in a contract for the shipment of horses, that in case of injury the shipper shall give notice of his claim to some officer of the company, or to its nearest

station agent, before the horses are removed from the place of destination or mingled with other stock, is reasonable and binding, if fairly entered into. *Sprague v. Missouri Pac. R. Co.*, 23 Am. & Eng. R. Cas. 684, 34 Kan. 347, 8 Pac. Rep. 465.—FOLLOWING *Goggin v. Kansas Pac. R. Co.*, 12 Kan. 416. DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Temple*, 47 Kan. 7.—*Owen v. Louisville & N. R. Co.*, 35 Am. & Eng. R. Cas. 687, 87 Ky. 626, 9 S. W. Rep. 698. *Selby v. Wilmington & W. R. Co.*, 113 N. Car. 588, 18 S. E. Rep. 88.—DISTINGUISHING *Capehart v. Seaboard & R. R. Co.*, 81 N. Car. 438. FOLLOWING *Rice v. Kansas Pac. R. Co.*, 63 Mo. 314; *Goggin v. Kansas Pac. R. Co.*, 12 Kan. 416.—*Texas C. R. Co. v. Morris*, 16 Am. & Eng. R. Cas. 259, 1 Tex. App. (Civ. Cas.) 158. *Galveston, H. & S. A. R. Co. v. Harman*, 2 Tex. App. (Civ. Cas.) 128. *Texas & P. R. Co. v. Scrivener*, 2 Tex. App. (Civ. Cas.) 284.—FOLLOWING *McMillan v. Michigan S. & N. I. R. Co.*, 16 Mich. 112.

Where live stock are shipped under a bill of lading containing a provision that the shipper, in case of loss or damage, will give notice in writing, verified by affidavit, of his claim to some general officer of the company, or to its nearest station agent, the giving of such notice is a condition precedent to the shipper's right to recover, and it is necessary to both allege and prove that such provision was complied with. *Texas & P. R. Co. v. Hamm*, 2 Tex. App. (Civ. Cas.) 436.

In order that a carrier may take advantage of a stipulation requiring the shipper to give notice of his claim before removing the cattle from the place of delivery, he must prove that such a condition in the contract is reasonable, and must show by proper pleadings and evidence the existence of facts that call for an enforcement of the condition. *Fl. Worth & D. C. R. Co. v. Greathouse*, 49 Am. & Eng. R. Cas. 157, 82 Tex. 104, 17 S. W. Rep. 834.

A condition in a bill of lading for a through shipment of live stock, providing that the owner or consignee shall give written notice of any claim for damage to the company issuing the bill of lading, before the stock is removed from its place of destination, or mixed with other stock, is unreasonable and cannot be enforced. *Coles v. Louisville, E. & St. L. R. Co.*, 41 Ill. App. 607. *Gulf, C. & S. F. R. Co. v. Vaughn*.

4 *Tex. App. (Civ. Cas.)* 269, 16 *S. W. Rep.* 775.

Such a contract is void for uncertainty as to the person to whom the notice should be given, and because it is an attempt to protect the carrier from liability from losses caused by its own fault, by imposing an unreasonable and difficult duty on the shipper as a condition precedent to his right to recover. *Smith v. Louisville & N. R. Co.*, 86 *Tenn.* 198, 6 *S. W. Rep.* 209.—FOLLOWED IN *Louisville & N. R. Co. v. Wynn*, 45 *Am. & Eng. R. Cas.* 312, 88 *Tenn.* 320, 14 *S. W. Rep.* 311.

Where a railroad company sets up, in an action against it for failing to deliver cattle within a reasonable time, a special contract by which it was agreed that as a condition precedent to the plaintiff's right to recover damages for loss or injury the shipper should give notice in writing of his claim to the officers of the company or to its nearest station agent before the cattle were removed from the place of destination or mingled with other stock, and it appears that the defendant's line of railway does not extend to the point of destination, and that both parties understood that the cattle were to pass to a connecting road, the provision is unreasonable and invalid, and will not be enforced. *Missouri Pac. R. Co. v. Harris*, 28 *Am. & Eng. R. Cas.* 107, 67 *Tex.* 166, 2 *S. W. Rep.* 574.—QUOTING *Southern Exp. Co. v. Caperton*, 44 *Ala.* 103. REVIEWING *Southern Exp. Co. v. Caldwell*, 21 *Wall. (U. S.)* 264; *United States Exp. Co. v. Harris*, 51 *Ind.* 127; *Westcott v. Fargo*, 61 *N. Y.* 542; *Adams Exp. Co. v. Reagan*, 29 *Ind.* 21. QUOTED IN *Missouri Pac. R. Co. v. Childers*, 1 *Tex. Civ. App.* 302.

(2) *The person to be notified.*—Where a contract for shipment provides that notice shall be given to some officer of the company, before the stock are removed, of any claim for damages, but the company has no officer at the place of destination, and not even in the state, the burden is upon it to show that such provision is reasonable. *St. Louis, A. & T. R. Co. v. Turner*, 1 *Tex. Civ. App.* 625, 20 *S. W. Rep.* 1008.

Where a railroad company relies upon a noncompliance with such provision it must allege and prove that it had an officer or agent at or near the place at which the property was to be delivered, to whom the notice could be given, and in the absence of proof of such facts the provision as to notice will

be deemed unreasonable and not binding. *Galveston, H. & S. A. R. Co. v. Boothe*, 3 *Tex. App. (Civ. Cas.)* 433.—QUOTING *Missouri Pac. R. Co. v. Harris*, 67 *Tex.* 166.—*Good v. Galveston, H. & S. A. R. Co. (Tex.)* 40 *Am. & Eng. R. Cas.* 98, 11 *S. W. Rep.* 854.—QUOTING *Missouri Pac. R. Co. v. Harris*, 67 *Tex.* 172.

Where live stock, for injury to which damages are claimed from the railroad company which transported it, was shipped from a point at which the company had no agent, it is incompetent for defendant to show a custom among railroad companies to require the shipper of live stock to agree, as a condition precedent to his right of recovery for loss or damage to the stock during shipment or transportation, that he will immediately and before removal of the stock from the point of shipment, or from the possession of the company at its destination, as the case may be, give notice of his claim to an agent or officer of the road; for it is not reasonable to require such a notice where the company has no agent at the point of shipment upon whom such a notice can be served. *Missouri Pac. R. Co. v. Fagan*, 35 *Am. & Eng. R. Cas.* 666, 72 *Tex.* 127, 9 *S. W. Rep.* 749.

(3) *Sufficiency of the notice, generally.*—Where a railroad company contracts to carry stock beyond its own terminus, and there is a stipulation in the contract, which is a condition precedent to a right to recover for loss or injury, that the shipper must give written notice of his claim to an officer of the company, or to its nearest station agent, before the stock are removed from the place of destination or delivery, or is mingled with other stock, the officers and agents of the connecting company used and adopted by the contracting company should, for the purposes of the contract, be treated as the officers and agents of the latter company; and notice given to the agent of the connecting company at the place of destination will be sufficient. *Wichita & W. R. Co. v. Koch*, 55 *Am. & Eng. R. Cas.* 452, 47 *Kan.* 753, 28 *Pac. Rep.* 1013.

A contract between a railroad company and a shipper of stock stipulated that, as a condition precedent to his right to recover damages for any loss or injury to such stock, he should give notice in writing to some officer of the railroad company, or its nearest station agent, before the removal of such stock from the place of delivery. In an action to recover damages for injuries to such



stock while *en route*, where the condition of the stock was made known to the station agent of the railroad company at the place of destination, and such agent consented to the removal of the stock from the car, and had an opportunity to examine and inspect the animals after such removal and before they had mingled with other stock, or had been removed from the place of destination, and a written notice for damages was transmitted to the claim agent of the railroad company within four days after the removal of the stock from the car; and, ten days thereafter, upon the death of one of the animals, a subsequent notice for damages was given to the railroad company—*held*, that there had been a substantial compliance with the contract upon the part of the shipper. *Atchison, T. & S. F. R. Co. v. Temple*, 47 Kan. 7, 27 Pac. Rep. 98.—DISTINGUISHING *Goggin v. Kansas Pac. R. Co.*, 12 Kan. 416; *Sprague v. Missouri Pac. R. Co.*, 34 Kan. 352.

A letter written by a shipper of cattle to the general freight agent of a railroad company, complaining that his cattle had been delayed *en route* and that an agent had compelled him to pay \$15, expense of transportation, in addition to the contract price per car, without making any mention of loss or injury to the cattle, or any claim for damages thereto, is not a compliance with a condition in the bill of lading requiring him to give notice in writing, of any claim for damages, to some general officer of the company or to the nearest station agent before removing the cattle, and will prevent any recovery for damage to the cattle. *Texas & P. R. Co. v. Jackson*, 3 Tex. App. (Civ. Cas.) 65.

(4) *When verbal notice is sufficient.*—The object of such a provision in a contract for the shipment of cattle is to give the company and plaintiff time to inspect the stock before they are mixed with others, or slaughtered, so as to ascertain their true condition; and such a provision is substantially complied with where stock arrived at the place of destination in the nighttime, and the owner asserted a claim for damages to the company's yard-master, and notified him that he would not receive the cattle unless under protest, and the yard-master assured the owner, without making any objection to the demand not being in writing, that it was not necessary to go to the company's office that night, and advised the owner, on account of the rain and the condition of the

stock-yards, to remove the cattle at once to his own place; and so far as such contract was not complied with, it was waived, where the written notice was not given till after the stock were removed. *Rice v. Kansas Pac. R. Co.*, 63 Mo. 314, 20 Am. Ry. Rep. 424.—DISTINGUISHING *Goggin v. Kansas Pac. R. Co.*, 12 Kan. 416.—DISTINGUISHED IN *Oxley v. St. Louis, K. C. & N. R. Co.*, 65 Mo. 629.

Mules were shipped under a special contract providing that the shipper should give notice in writing to the agent of the carrier of his claim for damages before the stock should be removed from the place of destination, and before it was mingled with other stock. At the place of destination one mule was unloaded in the presence of the station agent, who saw that it was injured, and the owner refused to receive it, and it was allowed to run on the commons about the station. *Held*, in an action to recover for the injuries, that it was proper to refuse to instruct the jury that the plaintiff could not recover because of his failing to give notice in writing of his claim for damages, as the mule had never been removed from its place of destination, nor mingled with other stock, within the meaning of the provision in the contract. *Chicago, St. L. & N. O. R. Co. v. Abels*, 21 Am. & Eng. R. Cas. 105, 60 Miss. 1017.

Where cattle are shipped under such a contract, a verbal notice to the superintendent of a stock-yard and to the conductor of the train is not a sufficient compliance with the condition requiring notice. And being informed by these parties that a member of the company would come and settle with him did not amount to a waiver on the part of the company of such written notice. *Missouri Pac. R. Co. v. Scott*, 2 Tex. App. (Civ. Cas.) 279.

Cattle shipped under such a contract reached the place of destination at night, when it was dark and raining, and they were put off without the company having pens to put them in. They scattered, and it was several days before they could be collected, and some of them never were recovered. *Held*, under the circumstances, that verbal notice on the night of the arrival and a written notice as soon as the cattle were recovered were a reasonable compliance with the provision of the contract. *Houston & T. C. R. Co. v. Hester*, 2 Tex. Unrep. Cas. 296.

(5) *Construction—Reasonable time to give notice.*—A stipulation requiring notice of the injury before the removal of animals at the place of delivery is not to be strictly construed against the shipper, and the shipper has a reasonable time after the removal, in case the injury is not then discovered, in which to give the notice, and what is a reasonable time is a question for the jury. *Western R. Co. v. Harwell*, 97 Ala. 341, 11 So. Rep. 781. *Western R. Co. v. Harwell*, 45 Am. & Eng. R. Cas. 358, 91 Ala. 340, 8 So. Rep. 649.

Where a railway company, being a common carrier of live stock, transports a car-load of cattle for the plaintiff at special rates, under a special contract signed by both parties, by the terms of which the plaintiff is to accompany the stock and superintend it on the way; and where, by another clause in the contract it is stipulated that damages to such stock in transit shall not be allowed unless notice in writing of a claim therefor be given to the company at or before the time of unloading the cattle; and it appears that plaintiff did accompany the stock and knew at the time that they had been injured, but did not give notice of such injury for more than a year, he cannot recover. *Goggin v. Kansas Pac. R. Co.*, 12 Kan. 416.—RECONCILING *Adams Exp. Co. v. Reagan*, 29 Ind. 21; *Southern Exp. Co. v. Carperton*, 44 Ala. 101.—DISTINGUISHED IN *Atchison, T. & S. F. R. Co. v. Temple*, 47 Kan. 7; *Rice v. Kansas Pac. R. Co.*, 63 Mo. 314. FOLLOWED IN *Sprague v. Missouri Pac. R. Co.*, 23 Am. & Eng. R. Cas. 684, 34 Kan. 347.

Where notice was not given to the carrier until twelve days after the delivery and removal of the stock, such notice was not given as the contract required, or within a reasonable time. *Wichita & W. R. Co. v. Koch*, 47 Kan. 753, 28 Pac. Rep. 1013.

Where stock is shipped to a distant point, and the contract of affreightment provides that notice shall be given, before removal of the stock from the place of destination, of any claim for loss or damage, and the shipper does not accompany the stock, it is his duty to send the contract to the consignee that he may give it. *Galveston, H. & S. A. R. Co. v. Harman*, 2 Tex. App. (Civ. Cas.) 128.

(6) *Impossibility of giving notice.*—Such a provision in a contract for the shipment of live stock does not apply where the animals

are ill at the time of reaching their place of destination, and it was impossible at the time and for some time thereafter to know the full extent of the injury. *Ormsby v. Union Pac. R. Co.*, 2 McCrary (U. S.) 48, 4 Fed. Rep. 706; affirming 4 Fed. Rep. 170.

A company having been sued for a loss of cattle which it had carried set up as a defense a condition in the bill of lading that in case of loss the owners would give notice before taking the cattle away from the place of delivery. It appeared that the loss was caused at the place of delivery by certain of the cattle straying away by reason of the company failing to furnish sufficient pens. Held, that the defense was not good, (1) because the company had rendered it impossible for the owners to give the notice; (2) that to enforce the contract would be allowing the company to take advantage of its own misconduct. *Gulf, C. & S. F. R. Co. v. York*, 2 Tex. App. (Civ. Cas.) 718.

(7) *Waiver of notice by company.*—Appellants contracted with appellee to carry a horse from Shelbyville, Ky., to the fair grounds, near Chicago, the contract containing the stipulation as to notice of claim for damages above referred to. In removing the horse from the cars at the place of destination he was injured. The fact of the injury and of appellant's claim for damages was not only known to the officers and agents of the company, but an examination of the horse was made by a surgeon at the instance of the company. In his crippled condition the horse was brought back from Chicago on the same line of road and delivered at the same depot from which he had been originally shipped. Held, that the removal, although at the instance of the owner, must be regarded as by the consent of both parties and as a waiver of the notice required by the contract. *Owen v. Louisville & N. R. Co.*, 35 Am. & Eng. R. Cas. 687, 87 Ky. 626, 9 S. W. Rep. 698.

**81. Stipulation requiring notice of claim within stated time after injury.**—A provision in a bill of lading, providing that the shipper shall give notice within a certain time of any damage to the stock shipped, does not apply to a claim for damages already due to him by reason of the company having failed to furnish cars as agreed. *Missouri, K. & T. R. Co. v. Graves*, 4 Tex. App. (Civ. Cas.) 149, 16 S. W. Rep. 102.

Plaintiff shipped a car-load of goods, in-

cluding some horses, from R., Ill., to C., over the C., S. F. & C. R. R., which terminated in C. He intended to have the property transported to L., in this state, and verbally agreed with the C., S. F. & C. R. R. Co. as to what the charge should be to that point. He, however, entered into a written contract with that company merely for transportation to C. for a specified price, and that a person in behalf of the plaintiff should have passage with the car to take care of the property. Plaintiff sent a man with the car, giving him money to pay the freight, but gave him no express authority to enter into any contract in his behalf. At C. this agent, in behalf of his principal, contracted with the defendant for the further transportation from there to L., in which contract it was provided that no claim for loss or damage to the stock should be valid unless made in writing within 30 days after the same should have occurred. After the car reached its destination the defendant retained possession for a few days for nonpayment of freight. In an action for alleged negligence in the care of one of the horses after the transportation had ceased—*held*: (1) that the above condition as to notice was applicable in respect to the carrier's conduct as a warehouseman, that relation being properly incident to that of carrier; (2) that such a contract, if made by the owner, or if authorized by him, is reasonable and valid; (3) that from the circumstances it must be inferred that the agent in charge of the property was authorized to make any necessary and reasonable contract, as he did do, for its transportation from C. to L., for which purpose he stood in place of the owner. *Armstrong v. Chicago, M. & St. P. R. Co.*, 53 Minn. 183, 54 N. W. Rep. 1059.

### 82. — or after date of shipment.

—The shipper of live stock is not debarred from the right to sue for a loss by a provision in the contract of shipment providing that any claim for loss or damage must be presented within thirty days from date of shipment "in order to receive attention," the words "to receive attention" being too vague and uncertain as to what results would follow for a failure to present a claim to deprive a party of a right of action. *Dunn v. Hannibal & St. J. R. Co.*, 68 Mo. 268.—*DISTINGUISHING Rice v. Kansas Pac. R. Co.*, 63 Mo. 314.

### 83. — or after arrival at destination.—A stipulation in a contract of af-

freightment, that notice for loss must be made at the time the goods are delivered, will not protect the carrier where the claim is made in a reasonable time after the loss is ascertained; and where a calf was shipped under a contract requiring service of notice of loss within one day after delivery, and the injuries sustained were such as to take time to ascertain their nature and extent, and when ascertained notice was given and reparation demanded, the compliance was sufficient; and besides, in this case, such compliance was waived by the carrier's agent admitting the possession of the notice and promising to settle the claim on its merits. *Harned v. Missouri Pac. R. Co.*, 51 Mo. App. 482.

The provision of a shipping contract, that the shipper shall give notice of his damages within five days after the train's arrival at its destination, relates to damage to the cattle themselves and not to damage suffered by a change in the market; nor does a provision relieving the carrier from liability for loss or damage after delivering upon stock-yards tract refer to loss by fall in market. *Leonard v. Chicago & A. R. Co.*, 54 Mo. App. 293.

A provision in the contract for the shipment of live stock, providing that there should be no recovery for damages unless the owner gave notice in writing of his claim to the station agent or a general officer of the road carrying the cattle to their destination, within one day after their arrival, is on its face unreasonable, casting the burden on the company to show that it is in fact reasonable. *Missouri Pac. R. Co. v. Paine*, 1 Tex. Civ. App. 621, 21 S. W. Rep. 78.

A provision in a contract of shipment of live stock, providing that in case of damage in transportation the owner must, within twenty-four hours after arrival at the point of destination, give notice thereof in writing, verified by affidavit, is waived where a written unverified demand is made and received, without objection, under a promise to look up the claim and adjust it. *Hess v. Missouri Pac. R. Co.*, 40 Mo. App. 202.

### 84. — or after removal from car.

—A stipulation in a shipping contract, voluntarily and understandingly entered into by a shipper of live stock for transportation, that in consideration of a reduced rate no claim for damages accruing to the shipper

shall be allowed or paid by the carrier, or sued for in any court, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the shipper or his agent, and delivered to the general freight agent of the carrier, at his office, within five days from the time such stock are removed from the cars, will be binding upon the shipper, and is not void as being contrary to any law or to public policy. *Black v. Wabash, St. L. & P. R. Co.*, 25 Am. & Eng. R. Cas. 388, 111 Ill. 351.—REVIEWED IN *Coles v. Louisville, E. & St. L. R. Co.*, 41 Ill. App. 607.—*Dawson v. St. Louis, K. C. & N. R. Co.*, 76 Mo. 514.—FOLLOWING *Rice v. Kansas Pac. R. Co.*, 63 Mo. 314.—FOLLOWED IN *Brown v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 568.—*McBeath v. Wabash, St. L. & P. R. Co.*, 20 Mo. App. 445.

The five days within which notice is to be given only begin to run from the time the stock were removed from the car. *Wilson v. Wabash, St. L. & P. R. Co.*, 23 Mo. App. 50.

The word "goods," in a contract of shipment, providing that no claim in respect of goods will be allowed unless made within three days after delivery, and that all goods are received subject to the company's general lien for carriage, does not include horses or cattle. *Moore v. Great Northern R. Co.*, L. R. 8 Ir. 95.

**85. Limitation of time within which to sue.**—A common carrier of live stock may contract with the shipper, that any claim for damages must be brought within forty days after the occurrence of the damage, and such contract will bar a suit brought seventy-seven days after the delivery of cattle, where the company notified the shipper twenty-five days after the delivery that his claim would not be paid. *Gulf, C. & S. F. R. Co. v. Gatewood*, 79 Tex. 89, 14 S. W. Rep. 913.—FOLLOWING *Gulf, C. & S. F. R. Co. v. Trawick*, 68 Tex. 314.

**86. Limitation of amount recoverable, when valid.**—A provision in a contract for the transportation of live stock, limiting the carrier's liability in case of loss to a certain specified sum, entered into in consideration of reduced rates, is valid. *Zimmer v. New York C. & H. R. R. Co.*, 42 N. Y. S. R. 63, 62 Hun 619, 16 N. Y. Supp. 631.

A stipulation, in a contract for the shipment of mules, that in consideration of a reduced rate of freight the carrier shall in

no case be liable for more than one hundred dollars for a mule, is valid. *Western R. Co. v. Harwell*, 97 Ala. 341, 11 So. Rep. 781. *St. Louis, I. M. & S. R. Co. v. Weekly*, 35 Am. & Eng. R. Cas. 635, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. Rep. 134.—QUOTING AND FOLLOWING *Hart v. Pennsylvania R. Co.*, 112 U. S. 331. REVIEWING *New York C. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357; *South & N. Ala. R. Co. v. Henlein*, 52 Ala. 606.

Such is a proper and lawful mode of securing a due proportion between the amount for which they might be responsible and the freight which they received, and of protecting themselves against extravagant and fanciful valuations. *Squire v. New York C. R. Co.*, 98 Mass. 239.—APPROVED IN *Hart v. Pennsylvania R. Co.*, 112 U. S. 331. DISAPPROVED IN *Louisville & N. R. Co. v. Wynn*, 45 Am. & Eng. R. Cas. 312, 88 Tenn. 320, 14 S. W. Rep. 311. REVIEWED IN *Nelson v. Hudson River R. Co.*, 48 N. Y. 498.

Where a railroad limits its liability on "ordinary horses" to \$200, one who ships a valuable horse as an "ordinary horse" is estopped from claiming more than \$200 damages if an injury is received in transit. *Duntley v. Boston & M. R. Co.*, (N. H.) 20 Atl. Rep. 327.—APPLYING *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. Rep. 151.

A regulation requiring the shipper of a valuable race-horse to notify the carrier of the character and value of the animal, and to offer to make a special contract for his transportation, is reasonable; and if the shipper remains silent on that point when entering into an agreement providing what his loss shall be if the animal is killed, he is estopped from claiming more than the agreed amount as fixed in the contract; in which case the contract will be construed not as an attempt to exempt the carrier from the consequences of his own negligence, but as a reasonable limitation of its liability. *Hart v. Pennsylvania R. Co.*, 2 McCrary (U. S.) 333.—REVIEWED IN *Black v. Goodrich Transp. Co.*, 55 Wis. 319, 42 Am. Rep. 713.

A common carrier is bound to serve the public without discrimination, and has no right to demand the signing of a special contract as a condition precedent to receiving and carrying freight for a particular individual; but although a shipper has the right to refuse to sign a contract for the shipment

of live stock by which the carrier's liability is limited to a certain amount in case of loss or injury, yet if he does sign it he is bound thereby, though the actual loss may be greater than the amount specified in the contract. *Hart v. Pennsylvania R. Co.*, 2 *McCrary (U. S.)* 333.

The agent of plaintiff brought a cow to a railroad connecting with defendant's road for shipment. The agent signed a shipping agreement in which it was provided that the carrier assumed no liability for injuries to the animal except from collision of trains, in which case it was not to be liable for a greater sum than that specified in the agreement, namely, seventy-five dollars. Cows of greater value were to be charged at an additional rate. While in the course of transportation the cow was injured by fire, and died in consequence. *Held*, that plaintiff was bound by the shipping agreement signed by his agent, and that the liability of defendant was limited to the value expressed therein. *Hill v. Boston, H. T. & W. R. Co.*, 28 *Am. & Eng. R. Cas.* 87, 144 *Mass.* 284, 10 *N. E. Rep.* 836.—FOLLOWING *Graves v. Lake Shore & M. S. R. Co.*, 137 *Mass.* 33.

**87. Limitation of amount recoverable, when invalid.**—A stipulation in a contract for the carriage of live stock that in case of total loss the carrier shall only be liable for "the actual cash value at the time and place of shipment, but in no case to exceed \$100 per head," is invalid as an exemption of the carrier from liability for negligence. *Southern Pac. R. Co. v. Maddox*, 42 *Am. & Eng. R. Cas.* 528, 75 *Tex.* 300, 12 *S. W. Rep.* 815. *Ells v. St. Louis, K. & N. W. R. Co.*, 55 *Am. & Eng. R. Cas.* 339, 52 *Fed. Rep.* 903.—DISTINGUISHING *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 *Sup. Ct. Rep.* 151. FOLLOWING *Scruggs v. Baltimore & O. R. Co.*, 18 *Fed. Rep.* 318; *York Mfg. Co. v. Illinois C. R. Co.*, 3 *Wall. (U. S.)* 107; *New York C. R. Co. v. Lockwood*, 17 *Wall. (U. S.)* 357; *Bank of Ky. v. Adams Exp. Co.*, 93 U. S. 174; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655.—*Missouri Pac. R. Co. v. Edwards*, 78 *Tex.* 307, 14 *S. W. Rep.* 607.—DISTINGUISHING *International & G. N. R. Co. v. Tisdale*, 74 *Tex.* 17.—*St. Louis, A. & T. R. Co. v. Robbins*, 4 *Tex. App. (Civ. Cas.)* 63, 14 *S. W. Rep.* 1075.—DISAPPROVING *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 *Sup. Ct. Rep.* 157. FOLLOWING *Southern Pac. R. Co. v. Maddox*, 42 *Am. & Eng. R. Cas.* 528, 75 *Tex.* 300, 12

*S. W. Rep.* 815. OVERRULING *International & G. N. R. Co. v. Caldwell*, 3 *Tex. App. (Civ. Cas.)* 530.

A custom among railroad companies limiting their liability for injuries to or loss or destruction of live stock to the sum of \$100 is against the policy of the law and will not be enforced, as it might enable the carrier to contract against its own negligence or that of its servants. *Chicago, R. I. & P. R. Co. v. Harmon*, 12 *Ill. App.* 54.

A regulation of a railway company to the effect that no animal possessing a special value, such as blooded stock, shall be received for shipment until a contract is signed by the owner releasing the company from liability for injury to such stock above the value of ordinary stock, is void under Iowa Code, § 1308, providing that "no contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from the liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into." *McCune v. Burlington, C. R. & N. R. Co.*, 52 *Iowa* 600, 3 *N. W. Rep.* 615.

Where the owner of a horse sent it in care of a boy to be shipped, and the agent had knowledge of the fact that it was a racehorse and very valuable, and, without any inquiries as to its actual value, and against the protest of the boy, arbitrarily inserted a provision in the bill of lading limiting the company's liability to \$100, the owner will not be bound thereby, and may recover full damages. *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 16 *Am. & Eng. R. Cas.* 158, 2 *Pac. Rep.* 821, 30 *Kan.* 645, 46 *Am. Rep.* 104.—DISAPPROVED IN *Hart v. Pennsylvania R. Co.*, 112 U. S. 331. DISTINGUISHED IN *Pacific Exp. Co. v. Foley*, 46 *Kan.* 457.

**88. Such limitation inoperative where negligence is the cause of loss.**—A provision in a bill of lading fixing the carrier's liability at \$100 for an animal worth \$800 is not the measure of the carrier's liability in case of loss through its negligence, where there was no agreed valuation adopted as a basis for freight charges. *Louisville & N. R. Co. v. Wynn*, 45 *Am. & Eng. R. Cas.* 312, 88 *Tenn.* 320, 14 *S. W. Rep.* 311.—DISAPPROVED IN *Pacific Exp. Co. v. Foley*, 46 *Kan.* 457.

The company gave the owner's agent a receipt for a number of horses, stating that

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in consideration of special rates the liability assumed could not exceed \$100 per head, unless by special agreement noted thereon. This clause was held void as against gross negligence, but would have been valid as respects damages resulting from any casualty against which the carrier might limit his liability if knowingly assented to by the shipper. *Chicago & N. W. R. Co. v. Chapman*, 42 Am. & Eng. R. Cas. 392, 133 Ill. 96, 24 N. E. Rep. 417; affirming 30 Ill. App. 504.

**89. Limitation to cash value at place of shipment.**—A provision in a contract for the shipment of live stock entered into in consideration of the shipper getting reduced rates, limiting the carrier's liability in case of injury or loss to the value of the animals at the place of shipment, and in no case exceeding \$50 per head for ordinary beef cattle, is valid, and will be held as the measure of the carrier's liability. *South & N. Ala. R. Co. v. Henlein*, 52 Ala. 606.—APPROVED IN *Hart v. Pennsylvania R. Co.*, 112 U. S. 331. FOLLOWED IN *Louisville & N. R. Co. v. Oden*, 80 Ala. 38.—*South & N. Ala. R. Co. v. Henlein*, 56 Ala. 368, 19 Am. Ry. Rep. 200.—FOLLOWING *South & N. Ala. R. Co. v. Henlein*, 52 Ala. 606.—*Missouri Pac. R. Co. v. Ryan*, 2 Tex. App. (Civ. Cas.) 378.

Independent of any right of a common carrier of live stock to stipulate against negligence, a contract between the shipper and carrier, to the effect that the value of the animals at the place of shipment shall constitute the measure of damages in case of loss, is neither unreasonable nor against public policy. *Chicago, R. I. & P. R. Co. v. Harmon*, 17 Ill. App. 640.

A carrier has no right to require, as a condition precedent to receiving live stock for transportation, an agreement by the shipper that, in case of total loss of the live stock, the measure of damages shall not exceed its cash value at the place of shipment. *Missouri Pac. R. Co. v. Fagan*, 35 Am. & Eng. R. Cas. 666, 72 Tex. 127, 9 S. W. Rep. 749.

Where cattle are shipped by rail and injuries and damages result from a violation of the contract of shipment, growing out of the negligence of the carrier, the carrier cannot restrict and limit its liability to less than the true value of the property, and a stipulation that in case of loss or partial loss the shipper's damages shall be limited to

the value of the cattle at the place of shipment cannot affect the shipper's right to recover the value of the cattle at the place of their destination. *Fl. Worth & D. C. R. Co. v. Greathouse*, 49 Am. & Eng. R. Cas. 157, 82 Tex. 104, 17 S. W. Rep. 834.—QUOTED IN *Missouri Pac. R. Co. v. Childers*, 1 Tex. Civ. App. 302.

A common carrier of live stock cannot limit its liability in the bill of lading by a provision that in case of loss the damage shall not exceed the value of the stock at the place of shipment, regardless of its value at the place of destination. *Taylor, B. & H. R. Co. v. Montgomery*, 4 Tex. App. (Civ. Cas.) 401, 16 S. W. Rep. 178.—APPROVING *Southern Pac. R. Co. v. Maddox*, 75 Tex. 300, 12 S. W. Rep. 815.

**90. Limitation to value agreed upon at time of shipment.\***—Where a shipper of stock by special contract agrees upon a value to be placed upon such stock in case of loss, and in consideration thereof obtains a reduced rate of transportation, he is bound by such stipulation, and is estopped from showing that the real value of the stock was greater than that specified in the contract; and he will not be relieved from the terms of the agreement merely because he signed the contract hurriedly and without reading it. *Johnstone v. Richmond & D. R. Co.*, 55 Am. & Eng. R. Cas. 346, 39 So. Car. 55, 17 S. E. Rep. 512. *M'Cance v. London & N. W. R. Co.*, 3 H. & C. 343, 34 L. J. Ex. 39, 10 Jur. N. S. 1058, 12 W. R. 1086, 11 L. T. 426; affirming 7 H. & N. 477, 31 L. J. Ex. 65, 7 Jur. N. S. 1304, 10 W. R. 154.

Where the shipper of live stock, in consideration of reduced rates, contracts with the carrier that, in case of a total loss of any of the stock, the valuation shall not exceed a specified sum, in case of a partial injury the damages will be the proportion of that sum to the lessened value of the stock by reason of the injury. *St. Louis, I. M. & S. R. Co. v. Lesser*, 46 Ark. 236.—QUOTING *Hart v. Pennsylvania R. Co.*, 112 U. S. 337.—FOLLOWED IN *St. Louis, I. M. & S. R. Co. v. Weakly*, 35 Am. & Eng. R. Cas. 635, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. Rep. 134.

A stipulation in a bill of lading of live stock at reduced rates, fixing values of the

\* Right of company to limit its liability to loss or damage to live stock according to value fixed thereon, see 45 AM. & ENG. R. CAS. 357, *abstr.*



respective animals, is not an unlawful limitation upon the carrier's liability, if fair and reasonable in itself, and based upon a sufficient consideration, and freely and understandingly assented to by the shipper, it is valid, although the values agreed upon are much below those proved. *Louisville & N. R. Co. v. Sowell*, 49 Am. & Eng. R. Cas. 166, 90 Tenn. 17, 15 S. W. Rep. 837.—DISTINGUISHING *Coward v. East Tenn., V. & G. R. Co.*, 16 Lea (Tenn.) 225; *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 320; *New York C. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357.

A common carrier may, by special agreement, just and reasonable in itself, and fairly made between it and the consignor of a horse at the time of shipment, fix the value of such horse, upon consideration that the rate of charges for transportation shall be commensurate with the value of the horse thus ascertained, and may also limit its liability in case of loss to the amount thus agreed upon, even though the loss may be the result of negligence on the part of the carrier, provided said negligence be not gross, wanton, or wilful; but it cannot wholly exempt itself from liability for loss resulting from negligence. *Zouch v. Chesapeake & O. R. Co.*, 36 W. Va. 524, 15 S. E. Rep. 185.—FOLLOWING *Maslin v. Baltimore & O. R. Co.*, 14 W. Va. 180; *Hart v. Pennsylvania R. Co.*, 112 U. S. 331. DISAPPROVING *Gould v. Hill*, 2 Hill (N. Y.) 623.

The bill of lading gave one hundred dollars as the value of a mare. The plaintiff now claims that she was worth two thousand dollars. *Held*, that the liability of the defendant was limited to the value stated in the bill of lading. And this, although the plaintiff was not informed and did not understand, in giving the value, that he would be limited to that sum if the mare was injured. *Coupland v. Housatonic R. Co.*, 55 Am. & Eng. R. Cas. 380, 61 Conn. 531, 23 Atl. Rep. 870.—FOLLOWING *Hart v. Pennsylvania R. Co.*, 112 U. S. 331.

The owner of horses delivered them to a common carrier for transportation under a contract signed by him, stating the terms and conditions upon which the property was to be transported, by which it was agreed "that the value of the live stock to be transported under this contract does not exceed the following-mentioned sums, to wit: Each horse, \$100; each ox, \$50; each bull, \$50; each cow, \$30; \* \* \* such valuation being that whereon the rate of com-

pensation to the company for its services and risk connected with said property is based." *Held*, that, assuming that the contract was fairly made for the purposes therein expressed, the sums named being approximately the average values of ordinary domestic animals, this was a just and reasonable mode of securing a due proportion between the amount for which the carrier becomes responsible and the freight which he receives, and of protecting himself against extravagant valuation in case of loss, and that the recovery of the owner will be limited to the sums named, even though the loss occurred through the negligence of the carrier or his servants. *Alair v. Northern Pac. R. Co.*, 55 Am. & Eng. R. Cas. 357, 53 Minn. 160, 54 N. W. Rep. 1072.—REVIEWING *New York C. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357.

**91. Statutory limitation of amount recoverable.**—Where an animal delivered to a railway company for carriage is injured through the negligence of its servants, and no declaration of its value is made, the liability of the company is limited to the amount specified in the second proviso of § 7 of the Railway and Canal Traffic Act, although no written contract was made. *Hill v. London & N. W. R. Co.*, 42 L. T. 513.

**92. What limitations are "just and reasonable" in England.**—It is not an unreasonable condition within § 7 of the Railway and Canal Traffic Act for a railway company to make a special agreement to carry cattle at a lower rate, on condition that it shall be liable for negligence only. *Harris v. Midland R. Co.*, 25 W. R. 63.

A condition in a special contract for the carriage of live stock, relieving the carrier from liability for the suffocation of the animals, the drover who signed the condition being given a free pass and seeing in what sort of cars the cattle were loaded—*held* to be just and reasonable, although the cattle were put into ordinary freight-cars and were suffocated owing to the lid of the only opening in the car becoming closed. *Pardington v. South Wales R. Co.*, 1 H. & N. 392, 2 Jur. N. S. 1210, 26 L. J. C. P. 105.

A condition stipulating that the carrier shall not be liable for any loss or damage to animals, unless their value is declared and increased charges are paid, is just and reasonable, and is not to be construed as exempting the company from liability for loss

caused by its wilful neglect or misconduct. *Harrison v. London, B. & S. C. R. Co.*, 2 B. & S. 122, 8 Jur. N. S. 740, 31 L. J. Q. B. 113, 6 L. T. 466.—OVERRULED IN *Ashenden v. London, B. & S. C. R. Co.*, L. R. 5 Ex. D. 190, 42 L. T. 586, 28 W. R. 511, 44 J. P. 203.

A condition that horses shall be carried entirely at the owner's risk is just and reasonable where there is the alternative of a higher rate under a different contract, but such a condition will not protect the company from liability for delay where the contract was to deliver in a reasonable time. *Robinson v. Great Western R. Co.*, 14 W. R. 206, 1 H. & R. 97, 35 L. J. C. P. 123, L. R. 1 C. P. 329.—FOLLOWED IN *D'Arc v. London & N. W. R. Co.*, L. R. 9 C. P. 325, 30 L. T. 763, 22 W. R. 919.

**93. — what are "unjust" or "unreasonable."**—A special contract entered into respecting the carriage of live stock, providing that the stock shall be conveyed "at the owner's risk in connection with the sea part of the transit," is unjust and unreasonable. *Corrigan v. Great Northern & M. F. L. R. Cos.*, L. R. 6 Ir. 90. *Doolan v. Midland R. Co.*, 25 W. R. 882, 37 L. T. 317; *reversing L. R. 10 Ir. C. L.*, and *restoring 9 Ir. C. L. 20*.

A condition in a special contract for the carriage of live stock, to the effect "that where the charge of conveyance is per wagon, as the owner or his servant is required to superintend the loading of the stock and is allowed to place as many animals in such wagons as he considers may be conveyed with safety, the company will not be responsible for loss arising in any way from the overcrowding of such wagons, or for injuries done in the loading or unloading thereof, or in consequence of one animal injuring another," is unjust and unreasonable. *Corrigan v. Great Northern & M. F. L. R. Cos.*, L. R. 6 Ir. 90.

A condition in a carrier's offer to carry at certain reasonable rates, "that it would not be accountable for the correct selection of the owners' cattle on landing, nor on loading into the wagon at L." (the termination of the sea journey), "nor on unloading at destination," is unreasonable and unjust. *McNally v. Lancashire & Y. R. Co.*, L. R. 8 Ir. 81.

A condition in a special contract for the carriage of live stock that the owner shall undertake all risks, and that the company

shall not be liable for any loss or injury from any cause whatsoever, is unreasonable, although by another condition the company undertakes to give free passes to persons having the care of live stock, as an inducement to owners to send proper persons to take care of them. Such conditions do not relieve the company from its common-law duty to keep its station in a proper condition and to deliver the cattle at a proper place. *Roß v. Northeastern R. Co.*, 36 L. J. Exch. 83, L. R. 2 Exch. 173, 15 W. R. 695, 15 L. T. 624.

A condition is unreasonable, within the meaning of § 7 of the Railway and Canal Traffic Act 1854, where it stipulates that the company is not to be liable for any consequences arising from over-carriage, detention, or delay in or in relation to the conveying or delivering of the cattle to be carried, no matter how caused, there being no reduced rate as a consideration for the special contract. *Allday v. Great Western R. Co.*, 5 B. & S. 903, 11 Jur. N. S. 12, 34 L. J. Q. B. 5, 13 W. R. 43, 11 L. T. 267.

A condition whereby a railway company stipulates to be free from any injury to cattle in consequence of over-carriage, detention, or delay is unreasonable, although a reduced rate is charged. *Allday v. Great Western R. Co.*, 5 B. & S. 903, 11 Jur. N. S. 12, 34 L. J. Q. B. 5, 13 W. R. 43, 11 L. T. 267.

Under the Railway and Canal Traffic Act 1854, § 7, a railway company cannot stipulate that it will not be liable "in any case" above certain specified values for loss or damage to a horse or dog, unless the value is declared; such a condition is not just and reasonable within the meaning of the act. *Ashenden v. London & B. R. Co.*, L. R. 5 Ex. D. 190, 42 L. T. 586, 28 W. R. 511.

Conditions in a contract for the carriage of cattle that the company is to be relieved from all liability and that the owner is to see to the efficiency of the car before his stock is placed therein, complaint to be made in writing to the company's agent before the car leaves the station, are neither just nor reasonable. *Gregory v. West Midland R. Co.*, 2 H. & C. 944, 10 Jur. N. S. 243, 33 L. J. Exch. 155, 12 W. R. 528.

A condition in a special contract for the carriage of horses, exempting the company from all liability whatsoever, is unjust and unreasonable, although the horses are carried at a reduced rate. Such condition

is not aided by an alternative condition whereby the company assumes the risk upon payment of additional charges, but refuses to entertain any claim unless the injuries are pointed out to the company's agent at the time of unloading, that condition also not being in itself just and reasonable. *Lloyd v. Waterford & L. R. Co.*, 15 *Ir. C. L.* 37, 9 *L. T.* 89.

A condition in a contract for the carriage of horses, relieving the company of all liability whatsoever, is neither just nor reasonable; and if the truck in which the horses are conveyed is defective, owing to which the horses are injured, the company is liable. *M'Manus v. Lancashire & Y. R. Co.*, 4 *H. & N.* 327, 5 *Jur. N. S.* 651, 28 *L. J. Ex.* 353, 33 *L. T.* 259; *reversing* 27 *L. J. Ex.* 201, 2 *H. & N.* 693.

**94. Execution of the contract—Duress.**—Where the owner of live stock has contracted with the carrier for cars for several loads and has himself delivered one car-load and signed a contract containing provisions limiting the carrier's liability, it will be presumed that persons whom he sends with others are authorized to sign contracts containing similar provisions. *Illinois C. R. Co. v. Morrison*, 19 *Ill.* 136.

A provision in a contract for the shipment of live stock to the effect that the owner should have a pass on the road for the purpose of taking care of the stock, and that he should assume the risk of injury to the stock by each other, but not signed until after most of the stock had been shipped, is without consideration, and will not relieve the carrier from the duty of exercising ordinary care. *German v. Chicago & N. W. R. Co.*, 38 *Iowa* 127.

The Railway and Canal Traffic Act 1854 applies to cases where a special contract has been signed, in accordance with the proviso in § 7, that no special contract between company and shipper respecting the receiving of animals shall be binding unless signed by the shipper or the person delivering the animals. *M'Manus v. Lancashire & Y. R. Co.*, 4 *H. & N.* 327, 5 *Jur. N. S.* 651, 28 *L. J. Ex.* 353, 33 *L. T.* 259; *reversing* 27 *L. J. Ex.* 201, 2 *H. & N.* 693.

After plaintiff had purchased certain horses he contracted with the soliciting agent of defendant railroad company to ship by its line, and he delivered the horses to the agent, who afterward handed plaintiff a bill of lading which was signed by the agent in

the name of the persons from whom plaintiff bought, and contained conditions limiting the carrier's liability, plaintiff having given no authority to either party to sign such a bill of lading. *Held*, that he was not bound thereby. *Ohio & M. R. Co. v. Hamilton*, 42 *Ill. App.* 441.

Where a railway company had in fact only one rate at which it carried or offered to carry cattle from O. to S., although it had posted up, in the office of its agent at O., other and higher rates, and an owner of cattle, without anything being said about any special contract, but with the consent of the company, placed his cattle in the company's cars at O., to be transported to S., and the agent of the company at O. then presented to the shipper a certain special contract for carrying such cattle at the full rate at which the company carried cattle, though less than the posted rates, and with certain restrictions, limitations, etc., as to the company's responsibility, and demanded that the shipper should sign such special contract or have his cattle unloaded, and gave to the shipper no other option or alternative, whereupon the shipper signed such special contract—*held*, that the special contract, so far as it attempted to restrict the liability of the railway company, or to impose additional burdens upon the shipper, as conditions precedent to a recovery for damages resulting from the negligence of the railway company, was without consideration and void. *Kansas Pac. R. Co. v. Reynolds*, 17 *Kan.* 251.

**95. Ignorance of shipper as to contents of special contract.**—Where a party who can read accepts a bill of lading containing limitations of the carrier's liability for injuries to live stock shipped, in the absence of proof of fraud or coercion, he cannot relieve himself from its terms on the ground that he did not know its contents, where lack of such knowledge was because he did not choose to read it and inform himself. *Wabash, St. L. & P. R. Co. v. Black*, 11 *Ill. App.* 465.

Where a common carrier enters into a contract for the carriage of live stock, with conditions limiting its common-law liability such as are reasonable and binding, the shipper can only recover for a breach by declaring upon the contract; and he cannot avoid such conditions on the ground that he had not read them or did not know their contents when he executed the contract.

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Plaintiff sent some cattle from B. by defendants' railway, signing a paper which declared he undertook all risk of loss, injury, or damage, in conveyance and otherwise, whether arising from the negligence, default, or misconduct, criminal or otherwise, on the part of defendants and their servants. He was told by the station-master that he would have to sign these conditions, which he did, without taking time to read them. To an action for negligence in the carriage of the cattle, by which five of them were killed, defendants pleaded these conditions, which the jury found that the plaintiff had signed. *Held*, that he was bound by them, though he might not have read or understood the paper. *O'Rorke v. Great Western R. Co.*, 23 U. C. Q. B. 427.—DISTINGUISHING *Simons v. Great Western R. Co.*, 2 C. B. N. S. 620.—FOLLOWED IN *Hood v. Grand Trunk R. Co.*, 20 U. C. C. P. 361.

There was also a count in trover for conversion of the five cattle, as to which the defendants paid into court \$52, being the price for which they were sold by defendants' station-master after they had been killed. *Held*, that such payment admitted only a cause of action, not the particular cause sued for, and that the evidence proved no conversion by defendants, the sale not being the ordinary duty of a station-master. *O'Rorke v. Great Western R. Co.*, 23 U. C. Q. B. 427.—QUOTING *Perren v. Monmouthshire R. Co.*, 11 C. B. 865.

**96. Interpretation of special contracts limiting liability.\***—A clause in a contract for the shipment of live stock, among other things exempting the carrier from liability for loss caused by suffocation, will not relieve the company in case of loss, if the suffocation is the result of unnecessary delay. *Ball v. Wabash, St. L. & P. R. Co.*, 25 *Am. & Eng. R. Cas.* 384, 83 *Mo.* 574.

A provision in a contract for the transportation of horses, that the carrier should not be liable for various specified injuries, including "being injured by the burning of hay, straw, or any other material for feeding the stock, or in any way," does not relieve the carrier from liability for a horse that is killed by a collision. The words "in any way" should be restricted to a

burning in any way, or at least they are too indefinite to include a loss from any cause. *Zimmer v. New York C. & H. R. R. Co.*, 42 *N. Y. S. R.* 63, 62 *Hun* 619, 16 *N. Y. Supp.* 631.—QUOTING *Holsapple v. Rome, W. & O. R. Co.*, 86 *N. Y.* 278.

Where cattle are shipped under a contract providing "that in case of accident to or delay from any cause whatever the owners or shippers are to feed, water, and take proper care of the stock," it is error to charge that in all cases, except of unavoidable delay, accident, or collision, the carrier was obliged to feed and water the stock, as the contract does not undertake to bind the carrier to feed and water in all cases where the owner is not to do so. *Louisville & N. R. Co. v. Trent*, 16 *Am. & Eng. R. Cas.* 170, 11 *Lea (Tenn.)* 82.

Where by special contract a railway company is relieved of all liability for damage to horses carried, it is not liable for injury to a horse which, at its destination, is forgotten and left tied up in the car in an exposed place for twenty-four hours. *Wise v. Great Western R. Co.*, 1 *H. & N.* 63, 25 *L. J. Ex.* 258.

Where a shipper of horses signs a special contract relieving the company from liability for injuries occasioned by the fear or restiveness of the animals, the company is not relieved from liability in cases where the injury flowed immediately from the fear and restiveness of the animals, directly occasioned by some act of negligence on the part of the company. *Moore v. Great Northern R. Co.*, *L. R.* 10 *Ir.* 95.

**97. — Illustrations.**—A shipper of live stock signed a bill of lading which provided that the railroad company should not "be liable for damage or loss \* \* \* by reason of breaking, chafing, weather, fire, or water, except where collision or running from the track, resulting from negligence of the corporation's agents, shall cause the same, and the shipper and owner hereby promise to pay the freight, and to claim no deduction therefrom by reason of any damage or loss." *Held*, that the breaking of an animal's leg, and other injuries occasioned by the movement of the car, were not properly described by the words "breaking" and "chafing" in the bill of lading, and were not, therefore, injuries against which the defendant undertook to exempt itself from liability; and that the bill of lading did not prevent recovery from the defend-

\* See ante, 61.

ant under its common-law "liability as carrier of live stock." *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. Rep. 870, 55 Am. & Eng. R. Cas. 380.

In an action for delay in transporting hogs, it appeared that the contract was that the company should not be liable for loss "by delay of trains, or any damage said property might sustain, except such as might result from a collision of a train," or when cars were thrown from the track, while all the cars containing the hogs remained on the track. *Held*, that the company were liable for whatever hogs were lost, or whatever shrinkage occurred by reason of the delay caused by the accident; but not for injury resulting from delay caused by cold weather. *Illinois C. R. Co. v. Owens*, 53 Ill. 391.

A contract of affreightment provided that in case of total loss of any of the stock shipped the actual cash value at the time and place of shipment, but in no case to exceed \$100 per head, should be taken and deemed full compensation. *Held*, that the provision did not fix the actual cash value of the stock, but only limited the compensation, and that parol evidence was admissible to show that the shipper had agreed with the carrier's agent at the time of shipping at \$10 per head. *Harned v. Missouri Pac. R. Co.*, 51 Mo. App. 482.

Cattle were shipped under a contract providing that the owner assumed the risk of all damage from delays, or in consequence of heat, suffocation, or the ill effects of being crowded on the cars, and was to have a man accompany the stock, and was to load and unload them at his own risk, with the carrier's "assistance, if required." While in transit the car was detained some three days by reason of a snowstorm, and the cattle remained during a large part of the time in the car without proper attention, by reason of the carrier failing to provide a platform, or the necessary means of unloading, whereby some of the cattle died and others were injured. *Held*, that the provision that the carrier should assist if necessary in loading and unloading referred only to the ends of the route, and did not require it to furnish facilities for unloading at any other point. *Penn v. Buffalo & E. R. Co.*, 49 N. Y. 204, 3 Am. Ry. Rep. 355; reversing 3 Lans. 443.

Contracts are to be construed so as to give to every part of them such meaning as

will best effectuate the intention of the parties. A written bill of lading of live stock in one provision recited that the place of destination was the terminal point of the receiving company's line, and in other provisions recited that an intermediate point was the end of its line, and contained provisions limiting its liability to its own line. *Held*, that upon a comparison of all of the provisions it was apparent that the intermediate point was the terminus of the receiving company's line, and that it was therefore not error to introduce oral evidence to show the fact, as it only tended to make certain what was a fair construction of the contract itself. *Swank v. San Antonio & A. P. R. Co.*, 1 Tex. Civ. App. 675, 23 S. W. Rep. 249.

The plaintiff delivered cattle, carriage prepaid, to the defendant railway company for carriage on the terms of signed conditions, whereby, in consideration of an alternative reduced rate, it was agreed that the company were "not to be liable in respect of any loss or detention of or injury to the said animals, or any of them, in the receiving, forwarding, or delivery thereof, except upon proof that such loss, detention, or injury arose from the wilful misconduct of the company or its servants." The cattle were carried; but, on application made for them by the plaintiff, the defendants, in consequence of their clerk having negligently omitted to enter the cattle on the consignment note as "carriage paid," refused to deliver them, and alleged that the carriage was not paid. The cattle were kept exposed to the weather until the next day, when, the mistake having been discovered, they were delivered. They were damaged by the exposure. In an action for damages by reason of wrongful detention and negligence—*held*, that the withholding of the cattle under a groundless claim to retain them at the end of the transit was not "detention" within the conditions, and the company were therefore liable. *Gordon v. Great Western R. Co.*, 8 Q. B. D. 44, 51 L. J. Q. B. 58, 4 Ry. & C. T. Cas. xix.

**98. Proof of oral agreement notwithstanding written contract.**—A prior verbal understanding as to the terms of the shipment of live stock cannot be proven as against the provisions of a written bill of lading, where it is delivered to the shipper without fraud or mistake, though it contains conditions limiting the

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carrier's liability, and is presented to him for signature after the stock are loaded in the cars, and when he has not sufficient time to examine its contents. *St. Louis, K. C. & N. R. Co. v. Cleary*, 16 *Am. & Eng. R. Cas.* 122, 77 *Mo.* 634, 46 *Am. Rep.* 13.—QUOTING *O'Bryan v. Kinney*, 74 *Mo.* 125. REVIEWING *Mulligan v. Illinois C. R. Co.*, 36 *Iowa* 181.—FOLLOWED IN *Brown v. Wabash, St. L. & P. R. Co.*, 18 *Mo. App.* 568.

Where a shipper of live stock pays the carrier the freight charges and receives a writing, without reading it, which he supposes contains merely a receipt, but which contains a contract exempting the carrier from liability for a failure to carry promptly, the shipper may show by parol a contract to deliver with dispatch. *King v. Woodbridge*, 34 *Vt.* 565.—CRITICISED IN *Hadd v. United States & C. Exp. Co.*, 6 *Am. & Eng. R. Cas.* 443, 52 *Vt.* 335, 36 *Am. Rep.* 757. FOLLOWED IN *Boorman v. American Exp. Co.*, 21 *Wis.* 152.

In an action to recover damages for the death of hogs which had been transported over the railroad, the shipper claimed and testified that an oral contract was made for transportation to a point beyond the line of the contracting company, in which there was no limitation of liability, and that the stock was shipped under that contract; that, after the stock were loaded and had left the station, he signed a paper which he could not well read, and did not read, but which he supposed to be a receipt containing nothing inconsistent with the contract under which the stock were shipped. The company contended, and offered testimony to show, that the only contract made with the shipper was the written one embodied in the paper or bill of lading signed by the shipper, and which, to a great extent, limited the liability of the company for losses that might occur. *Held*, that the court was warranted in submitting to the jury the question of what constituted the contract of the parties, and also in defining what the common-law liability of the company was, in case they should find in favor of the theory of the shipper. *St. Louis & S. F. R. Co. v. Clark*, 55 *Am. & Eng. R. Cas.* 367, 48 *Kan.* 321, 29 *Pac. Rep.* 312.—FOLLOWING *Missouri Pac. R. Co. v. Beeson*, 30 *Kan.* 298.—FOLLOWED IN *St. Louis & S. F. R. Co. v. Clark*, 48 *Kan.* 329.

**99. Effect of deviation by company from terms of special contract.**—If a

railroad company deviates from a contract to transport live stock by shipping them by freight service instead of passenger service, as agreed upon, and the stock are injured by the delay and rougher service, the company cannot avail itself of the stipulation in the contract relieving it from liability as insurer at common law; but such deviation does not relieve the shipper from notifying the company of his claim for damages within five days, where the contract provides for such notice. *Pavitt v. Lehigh Valley R. Co.*, 153 *Pa. St.* 302, 25 *Atl. Rep.* 1107.

Where a contract for the shipment of live stock contains mutual conditions and limitations, such as that the shipper shall be entitled to ride free on the train with his stock, and other conditions in favor of the carrier limiting its common-law liability, a violation by the carrier of the contract, in failing to carry the shipper, releases him from all stipulations that are favorable to the carrier. *Texas & P. R. Co. v. Davis*, 2 *Tex. App. (Civ. Cas.)* 156.

**100. Burden on carrier to show loss within limitation.\***—In an action for the death of live stock in the course of transportation and while wholly under the care of the carrier, the burden is upon the defendant to show that the death was within the exception qualifying its general liability. *Lindsley v. Chicago, M. & St. P. R. Co.*, 31 *Am. & Eng. R. Cas.* 86, 36 *Minn.* 539, 33 *N. W. Rep.* 7.

## VI. CONNECTING LINES.

**101. Rights and liabilities of initial carrier, generally.**—A company which receives live stock as a common carrier for transportation over its own line and delivery to another railroad, to be thus carried to its destination in another state, is liable only for the proper and safe transportation of such stock over its own road and its proper delivery to the next connecting line. *Alabama G. S. R. Co. v. Thomas*, 32 *Am. & Eng. R. Cas.* 464, 83 *Ala.* 343, 3 *So. Rep.* 802.—DISTINGUISHING *Mobile & G. R. Co. v. Copeland*, 63 *Ala.* 219; *Buckland v. Adams Exp. Co.*, 97 *Mass.* 124; *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 *N. H.* 339; *Cutts v. Brainerd*, 42 *Vt.* 566; *Wilcox v. Parmelee*, 3 *Sandf. (N. Y.)* 610; *Mercan-*

\* Burden of proof in action against carrier where its liability has been limited, see note, 45 *AM. & ENG. R. CAS.* 367; see also *post*, 147, 148.



tile Mut. Ins. Co. v. Chase, 1 E. D. Smith (N. Y.) 115; East Tenn., V. & G. R. Co. v. Rogers, 6 Heisk. (Tenn.) 143; St. Louis, K. C. & N. W. R. Co. v. Piper, 13 Kan. 505.

When a company contracts to ship stock to a given point, it is bound to forward and deliver it at that point within a reasonable time. It will not be released by a delivery to a connecting road, but will still be liable for any unreasonable delay, although the same is caused by the crowded condition of such road. In order to guard against delay on a connecting road the company should so provide in the contract, or contract only to transport over its own road and deliver to the next succeeding line to the place of destination. *Toledo, W. & W. R. Co. v. Lockhart*, 71 Ill. 627.

Where a company contracts to forward cattle from a point on its line to a point beyond its line, the word "forward" means the same as transport or carry, and it becomes responsible as a common carrier, except so far as its liability is limited by special contract; and a provision in the contract of shipment, that the owner assumes the risk of loss or injury for certain specified causes, except gross negligence of the carrier, does not apply, and it will become liable as a common carrier for ordinary negligence. *St. Louis, K. C. & N. W. R. Co. v. Piper*, 13 Kan. 505, 8 Am. Ry. Rep. 204.—DISTINGUISHED IN *Alabama G. S. R. Co. v. Thomas*, 32 Am. & Eng. R. Cas. 464, 83 Ala. 343, 3 So. Rep. 802.

A contract for the shipment of live stock was made by using a printed blank. Following an acknowledgment of the receipt of the stock by the carrier were the printed words: "To be delivered at \* \* \*," and here were inserted in writing the words, "Consigned to T., B. & Co. Chicago, Ill." The further agreement was expressed that, where stock should pass over more than one road to reach its destination, the company upon whose road any damage should occur should alone be liable therefor. This contract is not an agreement on the part of the carrier to transport the stock to Chicago, if in fact its line of transportation did not extend to that point. *Ortt v. Minneapolis & St. L. R. Co.*, 36 Minn. 396, 31 N. W. Rep. 519.

**102. Duty to notify second carrier.**—A bill of lading given by a railroad for live stock which recites that the company is to notify a party beyond its own

line, is not in itself a contract to carry the cattle to that point. *Michigan C. R. Co. v. Myrick*, 9 Am. & Eng. R. Cas. 25, 107 U. S. 102, 1 Sup. Ct. Rep. 425.—REVIEWED IN *Phifer v. Carolina C. R. Co.*, 89 N. Car. 311, 45 Am. Rep. 687.

Where a carrier undertakes to transport cattle to a point beyond its own line, it is liable for a delay at the end of its line caused by the train on the connecting line having departed before the one carrying the cattle arrived; and it is proper to admit evidence to show that the owner had requested an agent to telegraph ahead, notifying the connecting line that the stock were coming, where it appeared that it was usual to give such telegraphic notice, and for one road to hold its trains for cars on the other; and evidence to show the condition of the stock at the place of destination, their value, and what the value would have been if there had been no delay. *Dunn v. Hannibal & St. J. R. Co.*, 68 Mo. 268.

**103. Delivery to succeeding carrier.**\*—A railroad company receiving cattle as a common carrier for transportation over its own road, to be delivered at its terminus to the next connecting road, and thence by other connecting roads to the place of destination in another state, is liable only for the safe transportation of the cattle over its own road and their proper delivery at its terminus to the next connecting road. *Alabama G. S. R. Co. v. Thomas*, 32 Am. & Eng. R. Cas. 464, 83 Ala. 343, 3 So. Rep. 802.—DISTINGUISHING *Mobile & G. R. Co. v. Copeland*, 63 Ala. 219; *Buckland v. Adams Exp. Co.*, 97 Mass. 124; *Nashua Lock Co. v. Worcester & N. R. Co.*, 48 N. H. 339; *Cutts v. Brainerd*, 42 Vt. 566; *Wilcox v. Parmelee*, 3 Sandf. (N. Y.) 610; *Mercantile Mut. Ins. Co. v. Chase*, 1 E. D. Smith (N. Y.) 115; *East Tenn., V. & G. R. Co. v. Rogers*, 6 Heisk. (Tenn.) 143; *St. Louis, K. C. & N. W. R. Co. v. Piper*, 13 Kan. 505.

The defendant company having received cattle for transportation over its own road and safe delivery at its terminus to a connecting road, and having transferred them at its terminus to cars furnished by the connecting road, was bound to permit the consignor to put the cars in proper condi-

\* Duty of carrier of live stock to forward by connecting lines, see note, 3 L. R. A. 766.

Duty of company in receiving stock for through shipment to deliver to next connecting carrier, see note, 9 L. R. A. 450.

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dition for the safe transportation of the cattle, as he had agreed to do, or to have that duty performed by its own servants with reasonable care and diligence, providing suitable bedding, necessary partitions, etc., and avoiding undue crowding of the animals in the cars; and, the injury to the cattle resulting from the negligent performance of this duty by defendant's servants, after plaintiff had offered to discharge it himself, the defendant is liable. *Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294, 7 So. Rep. 762.

In such a case it is competent to prove that, on the arrival of the cars at the defendant's terminus, plaintiff asked the depot agent if the cattle were to be transferred to other cars, as he desired to superintend the transfer and preparation of the cars, and was told by the agent that no transfer would be made; that the cattle were afterwards transferred during his temporary absence, and that he then notified the agent that if any injury resulted from the improper transfer or preparations he would hold the defendant liable for it. As to these matters, the agent was acting within the scope of his authority and duties, and the evidence tends to show an offer by plaintiff to perform the duties imposed on him by the contract. *Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294, 7 So. Rep. 762.

Where cattle have been carried to the end of the first line, it is gross negligence for the carrier to hold them for three hours before delivering to a connecting line, or to fail to notify the connecting line or the consignees, during which time repeated inquiries are made therefor. *Rock Island & P. R. Co. v. Potter*, 36 Ill. App. 590.

Though the owner of mules is travelling with them, under a contract with the carrier that he shall take care of them while in transit, still if a delay is necessary in delivering them to a second carrier, it is the duty of the company to unload and feed and water them, and this duty cannot be imposed upon the owner until the contract of shipment. *Dunn v. Hannibal & St. J. R. R. Co.*, 68 Mo. 268.

A common carrier of live stock has a right to unload them, upon receiving them from a connecting carrier, for the purpose of transferring them to its own cars, provided there be no delay in doing so, and where there is no contract nor circumstances making it its duty to carry them

through without a change of cars. *McAlister v. Chicago, R. I. & P. R. Co.*, 7 Am. & Eng. R. Cas. 373, 74 Mo. 351.

**104. Right of initial carrier to limit liability to its own line.**—(1) *General rule.*—A carrier of live stock may limit the damages recoverable from it for loss or injury thereto to injuries occurring on its own line. *Gulf, C. & S. F. R. Co. v. Thompson*, (Tex. Civ. App.) 21 S. W. Rep. 186.—FOLLOWING *McCarv v. International & G. N. R. Co.*, 84 Tex. 352, 19 S. W. Rep. 547.

An initial carrier of live stock is not liable for an injury thereto after it has been reloaded on cars of a connecting carrier, where the stock is shipped under a contract providing that the initial carrier shall not be liable for injuries received after delivery to a connecting line. *Gulf, C. & S. F. R. Co. v. Tennant*, (Tex. Civ. App.) 22 S. W. Rep. 761.

A bill of lading whereby a carrier agrees to ship cattle over its own line and certain connecting lines at a fixed rate for the whole distance, is construed to be a through bill of lading; and a stipulation therein limiting the liability of the carrier to loss on its own line is not binding. *Gulf, C. & S. F. R. Co. v. Vaughn*, 4 Tex. App. (Civ. Cas.) 269, 16 S. W. Rep. 775.—QUOTING *Bank of Ky. v. Adams Exp. Co.*, 93 U. S. 180.

(2) *Illustrations.*—Cattle were shipped to a point in another state which would require them to pass over connecting lines. The bill of lading provided that suit for damages should be brought within forty days; that the company would not be liable for delays caused by "strikes" or mobs, and that the company would only be liable while the cattle were on its road. The shipment was delayed in another state by a connecting line failing to carry them promptly on account of a "strike." Held, that the limitations of liability contained in the bill of lading were valid, whether the contract of shipment were deemed interstate or to be wholly performed within the state. *Gulf, C. & S. F. R. Co. v. Gatewood*, (Tex.) 14 S. W. Rep. 913.—APPROVING *Gulf, C. & S. F. R. Co. v. Trawick*, 68 Tex. 314, 4 S. W. Rep. 567.

A company operated another road under a lease, and contracted to carry certain live stock from a point on the line of the lessee company to a point out of the state, and beyond the line of either lessor or lessee, the contract containing a provision limiting the

liability for damages to loss upon its own line. *Held*, in an action against the lessee, that the provision as to the exemption would inure to the benefit of each carrier over whose line the stock went, and that the defendant company would not be liable beyond its own line. *International & G. N. R. Co. v. Mahula*, 1 Tex. Civ. App. 182, 20 S. W. Rep. 1002.—FOLLOWED IN *International & G. N. R. Co. v. Thornton*, 3 Tex. Civ. App. 197.

The Missouri P. R. Co., while operating the International & G. N. Railway, contracted to carry certain cattle from P., on the line of the International & G. N. Railway to Chicago. Injury to the cattle was alleged to have been caused at D., Texas, on the Missouri, K. & T. Railway. Suit against the International & G. N. R. Co. for damages. *Held*, that the shipping contract, providing that in case the cattle are shipped over other roads than the Missouri P. Railway the latter should be released from all liability after they shall have left its road, protected the International & G. N. R. Co. against loss, regardless of its being the lessor of the road upon which the cattle were first shipped. The loss happening after the stock had left the line of the Missouri P. R. Co., it would be unjust to impose the burdens of the contract upon the lessor and not give it the benefit of its restrictions. *International & G. N. R. Co. v. Thornton*, 3 Tex. Civ. App. 197, 22 S. W. Rep. 67.—FOLLOWING *Gulf C. & S. F. R. Co. v. Baird*, 75 Tex. 256; *Ft. Worth & D. C. R. Co. v. Williams*, 77 Tex. 121; *International & G. N. R. Co. v. Mahula*, 1 Tex. Civ. App. 182; *Hunter v. Southern Pac. R. Co.*, 76 Tex. 195; *Texas & P. R. Co. v. Adams*, 78 Tex. 373.

Plaintiff made a contract for through shipment of stock from a point in Texas to Chicago. Certain sheep shipped under the contract were placed in cars with double decks. On reaching St. Louis a connecting line removed the sheep from the cars with double-decks, and refused to carry them further, compelling plaintiff to ship his sheep over a different line of railroad under a new contract, and he brought suit against the company that he first contracted with for the wrongful taking and conversion of his double-decks, for extra freight, extra expenses, and loss of time. *Held*, that the plaintiff had a right to recover, though the contract of shipment provided that the initial carrier's liability should cease at the end

of its own line. *Texas & P. R. Co. v. Scrivener*, 2 Tex. App. (Civ. Cas.) 284.

**105. Rights and liability of second carrier, generally.\***—One railroad company is not bound to receive cars from a connecting road loaded with hogs so crowded that they are in danger from suffocation; and if it does it makes the act of that road its own, and is bound for the damages resulting to the hogs from suffocation or improper loading. *Paramore v. Western R. Co.*, 53 Ga. 383.

A carrier receiving freight from another company is liable directly to the consignor for any breach of the contract between him and its connecting line, and it is also entitled to the benefit of any valid exemption or limitation on the liability of the carrier contained in such contract. *St. Louis, I. M. & S. R. Co. v. Weakly*, 35 Am. & Eng. R. Cas. 635, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. Rep. 134.—FOLLOWING *St. Louis, I. M. & S. R. Co. v. Lesser*, 46 Ark. 236.

When one carrier received live stock at Atlanta to be transported to Americus over its own road and that of another carrier, and, by a mistake on the part of the first road they were consigned to a point beyond Americus, and were so received and carried by the connecting road, such facts would not relieve the latter from damages occurring by reason of inattention to the stock at the place to which they were actually carried. *Bryant v. Southwestern R. Co.*, 6 Am. & Eng. R. Cas. 388, 68 Ga. 805.—FOLLOWED IN *Southwestern R. Co. v. Thornton*, 71 Ga. 61.

When live stock are received by a carrier for transportation over its own road, limiting its liability by special exemptions, a connecting carrier receiving the property at the terminus of the first road cannot claim the benefit of these exemptions for injuries happening on its own road; but, when the receiving carrier contracts for the through transportation of the freight over connecting lines to its destination, or, by authority of the connecting lines fixes the compensation for the entire transportation, the special exemptions of the contract inure to their benefit, unless otherwise expressly limited; and also when the receiving carrier, while limiting its liability to its own road, con-

\* Upon a through shipment of live stock, as to the authority of agent of connecting line to change stock to other cars, and the liability of the company for sufficiency of cars, see 45 AM. & ENG. R. CAS. 356 *abstr.*

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tracts also for its "connecting lines," and it is declared that the exemptions shall inure to the benefit of the connecting lines, "unless they shall otherwise stipulate" on receiving the goods. *Western R. Co. v. Harwell, 45 Am. & Eng. R. Cas. 358, 91 Ala. 340, 8 So. Rep. 649.*

Where the initial carrier by accepting live stock destined to a point beyond its line makes a contract for the entire journey, and places the stock in cars belonging to a connecting line, and some of the stock are found to be injured on arriving at their destination at a station on such connecting line owing to a defect in one of the cars, the connecting line is not liable. *Coxen or Coxon v. Great Western R. Co., 5 H. & N. 274, 29 L. J. Exch. 165, 1 L. T. S. 442.*

**106. As respects damage done before stock reached second carrier's line.**—Where the initial carrier of live stock contracts for transportation beyond its own line, but limits its liability to its own road, the last of several connecting lines which carries the stock to their place of destination is not liable as a joint contractor or partner for injuries received by the stock before they reach its line. *Ft. Worth & D. C. R. Co. v. Williams, 42 Am. & Eng. R. Cas. 464, 77 Tex. 121, 13 S. W. Rep. 637.*—FOLLOWED IN *International & G. N. R. Co. v. Thornton, 3 Tex. Civ. App. 197; McCarn v. International & G. N. R. Co., 84 Tex. 352.*

Receiving live stock by a railroad company from a connecting line, as it is bound to do under the Texas statute, without any arrangement constituting a partnership or other agreement for through shipments between the different companies, will not render it liable for injuries occurring before it received the stock. *Fort Worth & D. C. R. Co. v. Fuller, 3 Tex. Civ. App. 340, 22 S. W. Rep. 1006.*—FOLLOWING *Gulf, C. & S. F. R. Co. v. Baird, 75 Tex. 256, 12 S. W. Rep. 530.*

Texas Rev. St. art. 4251, makes it the duty of railroad companies in the state to receive the passengers and merchandise of any connecting road. Where cattle are shipped from a point in another state under a contract limiting the initial carrier's liability to its own road, the mere fact of a road in Texas receiving the stock from an intermediate carrier is not sufficient proof of a joint contract, or of a partnership, to make it liable for injuries before the stock reached its line, as under the above statute

it had no choice about receiving the stock. *Gulf, C. & S. F. R. Co. v. Baird, 40 Am. & Eng. R. Cas. 160, 75 Tex. 256, 12 S. W. Rep. 530.*—FOLLOWED IN *Ft. Worth & D. C. R. Co. v. Williams, 42 Am. & Eng. R. Cas. 464, 77 Tex. 121, 13 S. W. Rep. 63; McCarn v. International & G. N. R. Co., 84 Tex. 352; International & G. N. R. Co. v. Campbell, 1 Tex. Civ. App. 509; Missouri Pac. R. Co. v. Weisman, 2 Tex. Civ. App. 86; International & G. N. R. Co. v. Thornton, 3 Tex. Civ. App. 197.*

It is the duty of the carrier to receive live stock from a connecting line for shipment whenever tendered, unless it has a legal excuse for not doing so; and if a wrongful refusal on its part contributes to causing an injury, it will be liable for the whole damage, even though the preceding connecting carrier has been guilty of negligence which aided in producing the damage, it being settled that where two wrongdoers contribute in causing an injury both are liable for the whole damage, though they have acted separately. *Gulf, C. & S. F. R. Co. v. Godair, 3 Tex. Civ. App. 514, 22 S. W. Rep. 777.*

**107. Subsequent carriers as agents of initial carrier.**—Where the initial carrier contracts for the shipment of cattle beyond its own line it is its duty to notify each succeeding carrier of the conditions of the shipment, and each of them becomes the agent of the initial carrier for the safe transportation and delivery of the cattle; and this will apply to the managers of a stock-yard to whom the cattle are delivered by the last carrier, making the initial carrier liable for their mismanagement. *Myrick v. Michigan C. R. Co., 9 Biss. (U. S.) 44.*

Where one of two railways having arrangements respecting through traffic is the agent of the other to make carriage contracts, and makes a contract for the carriage of live stock under conditions which do not protect its associate company, an action will lie against the latter company for the loss of the stock. *Gil. v. Manchester, S. & L. R. Co., 42 L. J. Q. B. 89, L. R. 8 Q. B. 186, 21 W. R. 525, 28 L. T. 587.*

**108. Lien of connecting carrier for freight charges.**—Though a shipper has entered into a contract with the initial carrier for a through freight rate on live stock shipped he cannot demand the stock from a connecting carrier at the place of destination upon tendering the amount of

the agreed freight, unless he shows that such initial carrier was authorized to enter into the contract for himself and the connecting line. *Lewis v. Richmond & D. R. Co.*, 25 So. Car. 249.

A shipper of horses who is present and permits a carrier to receive his horses from a prior carrier and pay advance charges, so as to have a lien therefor on the horses, cannot set off damages done to the horses by the prior carrier against such lien, though the connecting carrier knew of the damages, and that the shipper intended to demand compensation from the prior carrier. *St. Louis, I. M. & S. R. Co. v. Lear*, 55 Am. & Eng. R. Cas. 414, 54 Ark. 399, 15 S. W. Rep. 330.

#### VII. TRANSPORTATION OF DISEASED LIVE STOCK.

##### 109. Constitutionality of statutes.

—A statute of a state which prohibits driving or conveying any Texas, Mexican, or Indian cattle into the state between the first day of March and the first day of November in each year, is in conflict with the clause of the constitution which ordains: "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 15 Am. Ry. Rep. 325.—APPROVED in *Gilmore v. Hannibal & St. J. R. Co.*, 67 Mo. 323. FOLLOWED in *Adams Exp. Co. v. Board of Police*, 65 How. Pr. (N. Y.) 72; *Chicago & A. R. Co. v. Erickson*, 91 Ill. 613. QUOTED in *State v. Baltimore & O. R. Co.*, 18 Am. & Eng. R. Cas. 466, 24 W. Va. 783; *Hardy v. Atchison, T. & S. F. R. Co.*, 18 Am. & Eng. R. Cas. 432, 32 Kan. 698; *Fry v. State*, 63 Ind. 552; *Commonwealth v. Wilson*, 14 Phila. (Pa.) 384; *Norfolk & W. R. Co. v. Commonwealth*, 88 Va. 95. REVIEWED in *Bagg v. Wilmington, C. & A. R. Co.*, 109 N. Car. 279.

The act in relation to Texas and Cherokee cattle (Illinois Rev. St. 1874, p. 141) is void, as being repugnant to the constitution of the United States, art. 1, § 8, which provides that "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." *Chicago & A. R. Co. v. Erickson*, 91 Ill. 613.—FOLLOWING *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465. OVERRULING *Yeazel v. Alexander*, 58 Ill.

254; *Stevens v. Brown*, 58 Ill. 289; *Somerville v. Marks*, 58 Ill. 371; *Chicago & A. R. Co. v. Gasaway*, 71 Ill. 570.

The Missouri statute, Wagn. Mo. St. p. 251, § 1, known as the Texas cattle act, prohibiting the introduction of Texas, Mexican, or Indian cattle into the state between March 1 and November 1, unless they had been kept the entire previous winter in the state, is in conflict with that provision of the constitution of the United States conferring upon congress the power to regulate commerce among the states. *Gilmore v. Hannibal & St. J. R. Co.*, 67 Mo. 323.—FOLLOWING *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465. OVERRULING *Wilson v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 184; *Dimond v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 393; *Mercer v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 397; *Kenney v. Hannibal and St. J. R. Co.*, 62 Mo. 476.

**110. Illinois.**—A railroad is not bound, as a common carrier, to receive for transportation that which the law prohibits it from carrying, and it is liable for any injury occasioned by its bringing Texas or Cherokee cattle into this state, the same as an individual is. *Chicago & A. R. Co. v. Gasaway*, 71 Ill. 570.

An unconstitutional law, prohibiting railways from carrying Texas or Cherokee cattle into or through the state, being void, will afford no excuse for a refusal or delay in receiving and shipping such cattle when offered. *Chicago & A. R. Co. v. Erickson*, 91 Ill. 613.

In an action for bringing Texas and Cherokee cattle into this state by one who purchased the same, to recover for a fatal disease communicated to his native cattle, the declaration will be fatally defective if it fails to aver that the cattle were not brought into the state between October 1 and the 1st of the following March, as without this his purchase and ownership is illegal, and, being a violation of the law, he can maintain no action for an injury growing out of his wrongful act. *Frye v. Chicago, B. & Q. R. Co.*, 73 Ill. 399.

**111. Iowa.**—The Iowa St. (c. 126, Acts 21st Gen. Assem.) prohibiting any person or corporation from bringing into the state cattle in such condition as to infect other cattle with pleuro-pneumonia or Texas fever, and giving any person damaged by violation of the act a right of action to recover the damage suffered from the person

or corporation violating the statute, does not impose upon a railroad company an absolute liability to pay all damages arising by reason of the carrying of infected animals into the state. Such a statute only makes the fact of an injury so occurring *prima facie* evidence of negligence, which may be rebutted by the railroad company showing that it had no notice, and could not, by the use of reasonable care, have ascertained that the animal was diseased. *Furley v. Chicago, M. & St. P. R. Co.*, 57 Am. & Eng. R. Cas. 26, (Iowa) 57 N. W. Rep. 719.

**112. Kansas.**—Under the Kansas Act of 1881, ch. 161, as amended in 1883, ch. 145, and 1884, ch. 3, for the protection of cattle against contagious diseases, a railroad company is not liable for transporting cattle into the state where it acts in good faith and without knowledge, or upon such facts as to charge it with knowledge, that the cattle are of a kind liable to communicate disease to the domestic cattle of the state. *Missouri Pac. R. Co. v. Finley*, 38 Kan. 550, 16 Pac. Rep. 951.

Where a railway company, transporting through Kansas cattle diseased with the Texas splenic or Spanish fever, has its train wrecked within the state, so as to make it necessary to unload the cattle, and thereupon is notified that the cattle are from Texas, and will spread disease if permitted to run at large or driven on the highway, it should corral the cattle at or near the wreck, or otherwise prevent them from running at large or getting upon the public highway; and if it drives the cattle upon the highway or allows them to run at large after receiving such notice, it is liable for diseases communicated, unless the owners of the domestic cattle are guilty of contributory negligence. *Missouri Pac. R. Co. v. Finley*, 38 Kan. 550, 16 Pac. Rep. 951.

**113. Missouri.**—Under Wagn. Mo. St. p. 251, § 1, prohibiting the importation of Texas, Mexican, or Indian cattle between March 1 and November 1, unless they had been kept in the state the previous winter, it makes no difference where the cattle started from, whether in or out of the state. If the cattle have not been kept in the state for an entire previous winter, the driving or conveying of them into another county of the state is prohibited, and the statute makes the persons wrongfully bringing in such cattle liable for all damages, direct or remote, due to his wrongful act; and

this will apply to diseases communicated while they are in his control or caused by want of proper care, without regard to the question of negligence. *Wilson v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 184.—FOLLOWED IN *Husen v. Hannibal & St. J. R. Co.*, 60 Mo. 226; *Dimond v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 393; *Mercer v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 397; *Kenney v. Hannibal & St. J. R. Co.*, 62 Mo. 476.

The liability of railroad companies for violating Missouri Rev. St. § 4358, prohibiting the bringing or moving through the state, or from one part of the state to another, of diseased cattle is not an unqualified one; but the liability is limited to the diseases communicated to any other animal or cattle in the neighborhood or along the line of such transportation or removal. *Coyle v. Chicago & A. R. Co.*, 27 Mo. App. 584.

The meaning of the "line" of the railroad, as used in this statute, is its right of way, usually one hundred feet in width; and the expression, "along the line" of the road, means in a line with it—by the side of it, near to it. The meaning of the term, "neighborhood," is a place near—vicinity, adjoining district, etc. *Coyle v. Chicago & A. R. Co.*, 27 Mo. App. 584.

If a railway furnishes cattle-cars in order that ties should be loaded thereon, and these cars contain such an accumulation of refuse matter, resulting from the carriage of cattle, that the loading of the ties on them necessarily involves the ejection of some of this refuse matter, such ejection constitutes an unloading of the matter by the railway company within the purview of the statutory inhibition (Mo. Rev. St. § 2669), though the ties are loaded on the cars by the servants of an independent contractor. *Pike v. Eddy*, 53 Mo. App. 505.

The fact that the loading of the ties by these servants reasonably and properly involved the ejection of this matter, is not sufficient to render the ejection an unloading of the matter by the railway company, so as to subject it to liability under the statute. *Pike v. Eddy*, 53 Mo. App. 505.

Though a company may have violated the statute by bringing in Texas cattle, it is not liable for the spread of disease after it has parted with them and they have been driven by the owner into another county, as each transportation is an independent of-



tense. *Surface v. Hannibal & St. J. R. Co.*, 60 Mo. 216. *Surface v. Hannibal & St. J. R. Co.*, 63 Mo. 452.—FOLLOWING *Wilson v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 195.

**114. Texas.**—A shipper of cattle is not required to have his entire herd inspected, as required by the Texas statute, before delivery to a carrier for shipment; neither would the agent of the carrier violate the statute by receiving the entire herd for shipment before full compliance with the law. So, where part of the cattle have been inspected, the loading may begin while the remainder are being inspected, so as not to cause a delay. *International & G. N. R. Co. v. Wright*, 2 Tex. Civ. App. 198, 21 S. W. Rep. 56.

Plaintiff applied for cars, which were furnished and pointed out to him, but before his cattle were all inspected, as required by statute, other cattle were offered for shipment and were placed in the cars, causing a delay in the shipment of plaintiff's. At the time the second herd were offered the inspection of plaintiff's cattle had so far progressed that the loading might have commenced at once without any delay. Held, that the company was liable for the delay caused by giving the other herd the preference. *International & G. N. R. Co. v. Wright*, 2 Tex. Civ. App. 198, 21 S. W. Rep. 56.

**115. English decisions.**—A railway company commits no breach of duty in refusing to carry cattle without a declaration from the owner or person in charge under the Contagious Diseases (Animals) Act 1878, where a local authority of the county makes a regulation requiring such declaration before bringing cattle into the county. *Williams v. Great Western R. Co.*, 52 L. T. 250, 49 J. P. 439 D.

Where cattle are carried over a series of connecting lines, a railway company carrying them over a portion of the route terminating in the county of D., although not into such county, which had prohibited the movement of animals into that district, is liable to be convicted of an offense against the Contagious Diseases (Animals) Act 1878, as persons "causing, directing, or permitting the movement of the animals in contravention of the regulations of the local authority." *Midland R. Co. v. Freeman*, L. R. 12 Q. B. D. 629, 53 L. J. M. C. 79, 32 W. R. 830, 48 J. P. 660.

## VIII. TRANSPORTATION OF DOGS.

### 116. Liability for loss or injury.\*

(1) *Generally.*—A railroad company is liable for the loss of a dog where it is carried under a regulation of the company as "baggage-men's perquisites," and a sum is paid for the transportation. *Cantling v. Hannibal & St. J. R. Co.*, 54 Mo. 385, 13 Am. Ky. Rep. 387.—REVIEWING *Minter v. Pacific R. Co.*, 41 Mo. 503.

A passenger, taking his dog with him on a hunt, and being required by the conductor to put him in the baggage-car, may maintain an action against the company for the loss of the dog, which the baggage-master refused to deliver at his destination without the payment of a small fee, and which was then carried on and lost; and a rule of the company in reference to the carrying of dogs, requiring that they be placed in the baggage-car, and allowing the baggage-master a small charge for his care, is no defense to the action, when it is not shown that the passenger had knowledge or notice of it. *Kansas City, M. & B. R. Co. v. Higdon*, 52 Am. & Eng. R. Cas. 495, 94 Ala. 286, 10 So. Rep. 282.

(2) *In England.*—A dog is within § 7 of the Railway and Canal Traffic Act, 1854. *Harrison v. London, B. & S. C. R. Co.*, 6 Jur. N. S. 954, 29 L. J. Q. B. 209, 2 B. & S. 122, 8 W. R. 524, 2 L. T. 423; reversed in 8 Jur. N. S. 740, 31 L. J. Q. B. 113.

Section 7 of the Railway and Canal Traffic Act, 1854, applies solely to cases where the loss or injury is occasioned by the neglect or default of the company. The loss of the dog in this case was purely accidental, and the company is exempt from liability by the terms of its contract. *Harrison v. London, B. & S. C. R. Co.*, 2 B. & S. 122, 8 Jur. N. S. 740, 31 L. J. Q. B. 113, 6 L. T. 466.—OVERRULED IN *Ashenden v. London, B. & S. C. R. Co.*, 5 Ex. D. 190, 42 L. T. 586, 28 W. R. 511, 44 J. P. 203.

If a carrier gives a receipt for a dog which is afterwards lost, it cannot, when sued, set up as a defense that the dog was not properly secured when delivered to it. *Stuart v. Crawley*, 2 Stark, 323.—DISTINGUISHED IN *Richardson v. North Eastern R. Co.*, L. R. 7 C. P. 75, 41 L. J. C. P. 60, 26 L. T. 131, 20 W. R. 461.

\* Carrier not liable at common law for refusing to carry dogs, see note, 57 AM. REP. 24.

If a railway company fastens a dog delivered to it for carriage by the means furnished by the owner himself, which at the time appeared sufficient, it is not liable if the dog gets lost and is killed. *Richardson v. North Eastern R. Co. L. R. 7 C. P. 75, 41 L. J. C. P. 60, 26 L. T. 131, 20 W. R. 461.*

**117. Limiting the liability.**—A regulation of a railway company that it will only be liable for loss of dogs transported, or for injury thereto, in the sum of £2, unless a higher valuation be placed upon the animal, and a charge of 5 per cent thereon be paid additional, is unreasonable, and will not protect the company where a loss, resulting from its negligence, exceeds £2. *Dickson v. Great Northern R. Co., 28 Am. & Eng. R. Cas. 92, 18 Q. B. D. 176.*—APPLYING *Oxlade v. North Eastern R. Co., 1 C. B. N. S. 454; Peek v. North Staffordshire R. Co., 10 H. L. Cas. 473; Ashenden v. London, B. & S. C. R. Co., 5 Ex. D. 190; Harrison v. London R. Co., 2 B. & S. 122.*—REVIEWED IN *Winsford Local Board v. Cheshire L. Committee, 24 Q. B. D. 456.*

A condition, contained in a ticket signed by a person delivering to a railway company a dog for carriage, stated that "the company are not and will not be common carriers of dogs, nor will they receive dogs for conveyance except on the terms that they shall not be responsible for any amount of damages for the loss thereof, or for injury thereto beyond the sum of £2, unless a higher value be declared at the time of delivery to the company, and a percentage of 5 per cent paid upon the excess of value beyond the £2 so declared. Held that, although the railway company were not bound to be common carriers of dogs, yet, being bound by the R. & C. Tr. Act 1854, to afford reasonable facilities for the carriage of dogs, they could only limit their liability in respect thereof by reasonable conditions; and that the above-mentioned condition was not just and reasonable within the meaning of the 7th section of the act, and therefore did not protect the railway company from liability to an amount exceeding £2 in respect of damage done to the dog through the negligence of their servants. *Dickson v. Great Northern R. Co., 18 Q. B. D. 176, 56 L. J. Q. B. 111, 55 L. T. 868, 5 Ry. & C. T. Cas. x.*

## IX. CUSTODIANS TRAVELLING ON CATTLE-TRAINS; DROVERS' PASSES.

### 1. Rights of, Generally.

**118. Rights conferred by ticket or pass.**—A provision in a contract for the transportation of live stock, that the shipper may accompany the stock free of charge, applies to the shipper only, and another person cannot claim the rights of a passenger who boards the train, for the purpose of assisting in caring for it, claiming to have an interest in the stock. *Richmond & D. R. Co. v. Burned, 70 Miss. 437, 12 So. Rep. 958.*

Plaintiff received a stock-ticket from a connecting road between two points, issued to him in consideration of shipping certain stock between those points. Upon the back were certain printed conditions, which the plaintiff signed, specifying that the ticket was good only upon the freight train upon which his stock were transported. Held, that such ticket was not good upon a passenger train. *Thorpe v. Concord R. Co., 61 Vt. 378, 17 Atl. Rep. 791.*

The fact that similar tickets have been previously received by defendant for passage upon its passenger trains does not alter the case. *Thorpe v. Concord R. Co., 61 Vt. 378, 17 Atl. Rep. 791.*

The shipper of cattle will not be deemed a gratuitous passenger simply because he travels on what is termed a drover's pass, and because the shipping-contract refers to him as riding free, where there is but a single consideration paid. The service of carrying either him or the stock cannot be said to be one more gratuitous than the other; and such provisions in the ticket and contract (which must be construed together as one undertaking) only mean that the holder is not to be subject to any additional charge. *Cleveland, P. & A. R. Co. v. Curran, 19 Ohio St. 1.*—REVIEWING *Collett v. London & N. W. R. Co., 16 Q. B. 984.*—FOLLOWED IN *Baltimore & O. R. Co. v. Campbell, 36 Ohio St. 647.*

**119. Issuing pass does not relieve company from duty to care for stock.**—Issuing a pass to the owner of live stock shipped, or to his servant, so that he may accompany them, does not relieve the carrier from the duty of properly caring for them. *Feinberg v. Delaware, L. & W. R. Co., 45 Am. & Eng. R. Cas. 348, 52 N. J. L. 451, 20 Atl. Rep. 33.*

**120. Rights as respects loading and unloading of cattle.\***—Where a shipper of live stock applies for cars and they are furnished in the yards for him to load himself, the company is liable to an employé of his who is injured, while loading, by another car striking him which was left on the tract without being secured by brakes or otherwise, and was moved by a strong wind. *Union Pac. R. Co. v. Harwood*, 15 *Am. & Eng. R. Cas.* 494, 31 *Kan.* 388, 2 *Pac. Rep.* 605.

A provision in a contract for the transportation of cattle that the owner should be entitled to transportation free, and should take care of the cattle, and should feed, water, load, and unload them, does not confer on him the right to decide when, where, and under what circumstances the loading and unloading should take place for the purpose of feeding and watering, but imposes upon him the duty of loading and unloading whenever and wherever the exigencies of the transportation may render the same necessary and proper, but leaves it to the discretion of the company when the exigencies of transportation may require the same to be done. *McAlister v. Chicago, R. I. & P. R. Co.*, 7 *Am. & Eng. R. Cas.* 373, 74 *Mo.* 351.

**121. Remedy for breach of contract to carry.**—Where it is customary for freight trains to start from the yards wherever they might be when made up, and not from stations, a shipper of live stock, under a contract providing for his free transportation on the same train, cannot recover damages for failing to get on the train by reason of its starting from the yards instead of from the station. *Ohio & M. R. Co. v. Brown*, 46 *Ill. App.* 137.

Where the rules of a railway company require a shipper of live stock to sign a written contract before taking passage on the train with his stock, the company is bound to give a reasonable time to allow the shipper to comply with the rule, and in an action for damages by reason of being left, it is not necessary to offer the contract in evidence. *Ohio & M. R. Co. v. Brown*, 49 *Ill. App.* 40.

Where a shipper of live stock is entitled to travel on a drover's ticket, under conditions that make him a passenger, re-

fusal to allow him to travel without paying fare is a breach of contract; but he is entitled to recover, as damages, only such sum as will compensate him for moneys necessarily paid out for railroad fare and hotel bills, and for loss of time. *International & G. N. R. Co. v. Campbell*, 1 *Tex. Civ. App.* 509, 20 *S. W. Rep.* 845.

**122. Remedy for failure to furnish cars.**—A drover's pass contained, among others, a provision that the company should not be liable under any circumstances for any personal injury for loss or damage to property or for any delay that the owner might sustain during transportation. Held, that these conditions only referred to any injuries that might occur during transportation, and did not apply to damages resulting from a failure to furnish cars. *Hastings v. New York, O. & W. R. Co.*, 25 *N. Y. S. R.* 249, 53 *Hun* 638, 3 *Silo. Sup.* 422, 6 *N. Y. Supp.* 836.

**123. Right to stop at intermediate point.**—The right of a person to travel on a drover's pass is not affected by his intention to stop at an intermediate point. He is entitled to travel to that point on his pass. *Graham v. Pacific R. Co.*, 66 *Mo.* 536.

**124. Damages for ejection of drover on return trip.**—One who has shipped live stock and is entitled to return on a drover's pass may recover damages for being wrongfully ejected from the train, although the conductor used no physical force, and acted under an honest misunderstanding as to plaintiff's right to travel on the pass. *Graham v. Pacific R. Co.*, 66 *Mo.* 536.

## 2. Personal Injuries.\*

**125. Persons so travelling are passengers.**—A person travelling in a railroad train on a drover's pass is a passenger, and is under the same obligations to conform to the general rules and regulations of the company as if he had bought a ticket. *Little Rock & Ft. S. R. Co. v. Miles*, 13 *Am. & Eng. R. Cas.* 10, 40 *Ark.* 298, 48 *Am. Rep.* 10.

Where a person is travelling in a caboose car in charge of stock and furniture, and an entry in reference to him is made on the day-bill by the assistant superintendent "as a man in charge," he is a passenger and is entitled to all the rights and remedies of

\* Liability of carrier for injury to animals accompanied by owner, see note, 27 *AM. & ENG. R. CAS.* 63; see also *ante*, 17-20.

\* Liability of company to freight-shipper who is riding free, see note, 2 *L. R. A.* 166.

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a passenger on a freight train, and he may recover for injuries. *Indianapolis, B. & W. R. Co. v. Beaver*, 41 *Ind.* 493.—DISTINGUISHED IN *Ohio & M. R. Co. v. Dickerson*, 59 *Ind.* 317.

A drover transported over a railroad on a pass, for the purpose of taking care of his stock on the train, is a passenger, not a fellow-servant with the servants of the company, and the company cannot stipulate for exemption from liability for injuries to him caused by its negligence. *Carroll v. Missouri Pac. R. Co.*, 26 *Am. & Eng. R. Cas.* 268, 88 *Mo.* 239.—APPROVING *New York C. R. Co. v. Lockwood*, 17 *Wall. (U. S.)* 357. DISAPPROVING *Bissell v. New York C. R. Co.*, 25 *N. Y.* 442. FOLLOWING *Sturgeon v. St. Louis, K. C. & N. R. Co.*, 65 *Mo.* 569; *Rice v. Kansas Pac. R. Co.*, 63 *Mo.* 314.—*New York C. R. Co. v. Lockwood*, 17 *Wall. (U. S.)* 357, 3 *Am. Ry. Rep.* 495.—APPROVED IN *Lemon v. Chanslor*, 68 *Mo.* 340; *Carroll v. Missouri Pac. R. Co.*, 88 *Mo.* 239. FOLLOWED IN *Ohio & M. R. Co. v. Selby*, 47 *Ind.* 471. QUOTED IN *Griswold v. New York & N. E. R. Co.*, 26 *Am. & Eng. R. Cas.* 280, 53 *Conn.* 371, 55 *Am. Rep.* 115. REVIEWED IN *Quimby v. Boston & M. R. Co.*, 40 *Am. & Eng. R. Cas.* 693, 150 *Mass.* 365, 5 *L. R. A.* 846, 23 *N. E. Rep.* 205.

A shipper of live stock travelling on the train for the purpose of caring for them is a passenger for hire, the consideration for the passage being either in the one charge paid for the transportation of himself and stock, or in the services rendered in caring for the animals; and the company will be liable to him for injuries as to a passenger for hire. *Missouri Pac. R. Co. v. Ivy*, 37 *Am. & Eng. R. Cas.* 46, 71 *Tex.* 409, 1 *L. R. A.* 500, 9 *S. W. Rep.* 346.

Where by contract with the shipper of live stock one is allowed to ride free to take care of such stock, the person so riding cannot be considered as a trespasser or intruder, although not strictly speaking a passenger; and with respect to him the company owes the duty of exercising due care to carry him safely. *Lawson v. Chicago, St. P., M. & O. R. Co.*, 21 *Am. & Eng. R. Cas.* 249, 64 *Wis.* 447, 54 *Am. Rep.* 634, 24 *N. W. Rep.* 618.

If a company gave a shipper of live stock a pass to stock-yards at a distance from its line of road, to which place the stock were shipped, or engaged to transport the shipper to such stock-yards, and its servants,

clothed with apparent authority to act for the company, directed him to take passage on the engine after leaving its road, and undertook to carry him on the same, these are facts proper to be considered by the jury in determining whether such shipper was a passenger while on the engine. *Lake Shore & M. S. R. Co. v. Brown*, 31 *Am. & Eng. R. Cas.* 61, 123 *Ill.* 162, 14 *N. E. Rep.* 197.

By contract it was stipulated that the shipper of stock "or his agent or agents in charge of the stock should ride upon the freight train upon which the stock was being shipped." The shipper and one servant entered the car, and upon an objection being made that both could not ride free, the shipper informed the conductor that the employé could be put off, but no further objection was made. The shipper was injured. *Held*, that he was a passenger, and not a trespasser, by reason of having the employé on the train. *Missouri Pac. R. Co. v. Aiken*, 71 *Tex.* 373, 9 *S. W. Rep.* 437.

#### 126. Care and duty required from the company.\*—(1) General rule stated.—

A company which charges for the transportation of cattle, but permits the shipper to travel on a free pass upon the cars to take care of the cattle, is a common carrier for hire, as to both passenger and cattle. *Maslin v. Baltimore & O. R. Co.*, 14 *W. Va.* 180.

Where a person is travelling on a freight car in charge of stock, under such conditions as to make him a passenger for hire, he is entitled to the same care as any other passenger on a freight train. He only assumes the risks incident to such a mode of travel, and the company will be liable to him for its own negligence or the negligence of its servants resulting in personal injuries, or will be liable to his next of kin if death results. *Missouri Pac. R. Co. v. Ivy*, 37 *Am. & Eng. R. Cas.* 46, 71 *Tex.* 409, 9 *S. W. Rep.* 346, 1 *L. R. A.* 500.

Where a company undertakes to convey a stock-drover as a passenger on a freight car, its duty is to so run and manage the train that he shall not be injured by its carelessness. *Ohio & M. R. Co. v. Selby*, 47 *Ind.* 471, 8 *Am. Ry. Rep.* 177.

Where a cattle-man sues to recover for injuries received while travelling on a freight

\* Drover's pass; liability of company to person travelling on. See note, 37 *AM. & ENG. R. CAS.* 53, 18 *Id.* 176.

train with the cattle, the company cannot complain of an instruction to the effect that plaintiff was a passenger entitled to the highest degree of care from the company, where the court adds that that was but the general rule, and that it should not be applied to persons who ride as passengers on freight cars to look after stock. *Chicago, M. & St. P. R. Co. v. Carpenter*, 56 *Fed. Rep.* 451.

(2) *Its Extent and Limits.*—Notwithstanding a stipulation in a drover's ticket that he assumed certain risks of personal injury, still the company owed him, as a passenger, due diligence in protecting him from harm. *Pitcher v. Lake Shore & M. S. R. Co.*, 40 *N. Y. S. R.* 896, 61 *Hun* 623, 16 *N. Y. Supp.* 62; *affirmed in* 137 *N. Y.* 568, *mem.*, 50 *N. Y. S. R.* 943, 33 *N. E. Rep.* 339.

If a conductor of a railway train receives on his train minors, knowing that they are travelling, under a "drover's pass," as assistant to a drover, under a pass which contained a provision that minors should not be permitted to travel as assistants under such a pass, the minors are entitled to all the rights, as against the company, for injuries received through the negligence of its servants, that any other passenger would have. *Texas & P. R. Co. v. Garcia*, 21 *Am. & Eng. R. Cas.* 384, 62 *Tex.* 285.

A contract for the shipment of cattle provided that the owner should send a hand up a the train to look after the cattle and that such hand should be regarded as an employé of the carrier, and should assume all the risks of one. During the transportation the hand was killed by a collision. *Held*, in an action by his next of kin, that such employé was a passenger for hire, and was entitled to the care due to any other passenger upon a freight train; and that the company was liable for negligence resulting in his death. *Missouri Pac. R. Co. v. Ivy*, 37 *Am. & Eng. R. Cas.* 46, 71 *Tex.* 409, 1 *L. R. A.* 500, 9 *S. W. Rep.* 346.

The owner of a horse shipped in a box-car, the doors of which could only be fastened from the outside, and who is inside the car with the horse, has a right to expect that the conductor of the train will see that the door of the car is closed and properly fastened before the train is started. *Lavoie v. Queen*, 3 *Can. Exch.* 96.

Where a carrier sends a person with a train manned by its employés, which will

pass over other lines, to attend to unloading and returning the cars, such person is an employé of the first company, and the only obligation a latter company is under is to furnish him a safe track, and if it fails to do this and he is killed by reason of a defective track, it is liable. *Killian v. Augusta & K. R. Co.*, 79 *Ga.* 234, 4 *S. E. Rep.* 165.

The shipper of live stock travelling on a freight train with his stock, though not paying directly for his fare, is a passenger to whom there is due all the diligence of the railroad to protect him from harm; but he is not entitled to the same facilities for getting on and off as are persons travelling on passenger trains; and no negligence can be imputed to the company for omission to erect stations or platforms at the places of departure or arrival of such trains. *Pitcher v. Lake Shore & M. S. R. Co.*, 28 *N. Y. S. R.* 647, 8 *N. Y. Supp.* 389.

(3) *Illustrations.*—Plaintiff had a horse shipped with others belonging to a third party, but all were shipped in the name of such third party. A printed rule of the company provided that only one person should go free with stock, and the agent, being applied to, told such third party that if plaintiff went he would have to pay fare. Being hurried after completing the loading of the stock, plaintiff had not time to procure a ticket, but entered the car, intending to pay his fare, but before he had paid the train was negligently run into and he was injured. *Held*, that the company was not liable. The intention of plaintiff to pay his fare and his good faith in the matter were immaterial. No contract relation existed between him and the company. *Gardner v. New Haven & N. Co.*, 18 *Am. & Eng. R. Cas.* 170, 51 *Conn.* 143, 50 *Am. Rep.* 12.

At M. plaintiff delivered to defendant a car in which was his horse, some furniture, and other property, to be transported over its line to S., under a contract by which he agreed to load, unload, and reload, and to feed, water, and attend the stock at his own expense and risk while at the company's stock-yards or on the cars; and he assumed the duty of securely placing the stock in the cars, and keeping the same securely locked and fastened, so as to prevent the escape of stock. The car arrived at S. in the night. The plaintiff left the car for a few minutes, and, on its being placed on a side-track, returned to it, and lay down.

to unloading person is an and the only under is to it fails to do of a defective *Augusta & S. R. R. v. S. R. R.*

ph. 165. dwelling on a hugh not pay- passenger to gence of the arm; but he ities for get- travelling on gence can be ommission to the places of ns. *Pitcher v. S. R. R.*

ad a horse to a third n the name ted rule of only one stock, and told such out he would d after com- stock, plaintiff but entered fare, but be- negligently *Held*, that ne intention d his good aterial. No en him and *Haven & S. R. R. v. S. R. R.*

70, 51 Conn. defendant a e furniture, ported over y which he ad, and to at his own company's he assumed e stock in e securely prevent the id at S. in e car for a placed on a lay down.

Soon after he was injured by an engine running against the car. *Held*, that, although not then a passenger, yet, if prudent attention to his horse rendered it proper for him to be in the car (and of that the jury is to judge), he was rightfully there, and that defendant owed him a duty of care to avoid injuring him. *Orcutt v. Northern Pac. R. Co.*, 45 Minn. 368, 47 N. W. Rep. 1068.

Certain horses and goods were shipped in a box-car, and plaintiff was employed by the owner to accompany them to take care of the property. While the train was lying at the end of a division where the conductor had left the train, after having, without authority, collected fare for the whole distance, plaintiff entered the car without the knowledge of the employes who would have charge of the train from that point on, and who had no knowledge that he was in it, and about the time of starting locked it up, and after it was started plaintiff was injured by fire before he could escape from the car. *Held*, that the mere fact that the first conductor collected a through fare would not charge the employes of the train at the time of the injury with knowledge that plaintiff was in the car. *Jenkins v. Chicago, M. & St. P. R. Co.*, 41 Wis. 112.—FOLLOWING *Betts v. Farmers' L. & T. Co.*, 21 Wis. 81.

**127. Validity of contract to assume all risks.**—It is competent for a common carrier of live stock to restrict its liability for injuries to the owner who travels on a drover's pass to such as result from recklessness, wilfulness, or gross negligence. *Boswell v. Hudson River R. Co.*, 10 Abb. Pr. (N. Y.) 442, 5 Bosw. 699.—REVIEWING *Weed v. Panama R. Co.*, 5 Duer 193, 17 N. Y. 362.

A contract by a shipper of live stock that, in consideration of a free pass for himself over the road he would assume all risks of loss or damage to the stock, except such as might be caused by collision or running off the track, was neither unreasonable nor contrary to public policy. *Georgia R. Co. v. Spears*, 66 Ga. 485.—QUOTED IN *Georgia R. Co. v. Beatie*, 66 Ga. 438, 42 Am. Rep. 75.

Where a cattle-dealer accompanies his cattle, under a contract providing that they are shipped at reduced rates, and there is no independent consideration for the conveyance of himself, he is bound by a provision that he shall travel at his "own risk

of personal injury from whatever cause." *Bissell v. New York C. R. Co.*, 25 N. Y. 442; reversing 29 Barb. 602.

It seems, if a shipper of cattle who travels on the train with them pays the full rates, a provision in the contract that he shall travel at his own risk of personal injury is without consideration, and therefore not binding. *Bissell v. New York C. R. Co.*, 25 N. Y. 442; reversing 29 Barb. 602.

A stipulation in a contract for the carriage of live stock in providing for the transportation also of the owner, but exempting the company from all liability for negligence, is against the policy of the law, and constitutes no defense to an action to recover for personal injuries to the shipper. *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1.—APPROVING *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315. DISAPPROVING *Bissell v. New York C. R. Co.*, 25 N. Y. 442. QUOTING *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 486.—APPROVED IN *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117. NOT FOLLOWED IN *Griswold v. New York & N. E. R. Co.*, 26 Am. & Eng. R. Cas. 280, 53 Conn. 371, 55 Am. Rep. 115.

A drover travelling on a freight train for the purpose of taking care of his stock on the train, for which stock he paid freight, received from the railroad company a ticket called a "stock pass," with an indorsement signed by him as follows: "In consideration of receiving this ticket I voluntarily assume all risk of accidents, and expressly agree that the company shall not be liable, under any circumstances, whether by negligence of their agents or otherwise, for any injury to my person or for any loss or injury to my property; and I agree that, as for me, in the use of this ticket, I will not consider the company as common carriers, or liable to me as such." In an action for damages for injury to the person of the drover, caused by the negligent act of the railroad company—*held*, (1) that the agreement was invalid as a defense to said action; (2) that the stock-drover was a passenger for hire, and was not a gratuitous passenger. *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 8 Am. Ry. Rep. 177.—APPROVING *Louisville, C. & L. R. Co. v. Hedger*, 9 Bush (Ky.) 645. FOLLOWING *New York C. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357.

**128. Effect of condition that drover travels at his own risk.**—(1) *In Eng-*

\* See also *ante*, 70, 71.



*land*.—A condition in a ticket that persons in charge of cattle who travel free shall travel at their own risk applies to the whole of a through journey over connecting lines. *Hall v. North Eastern R. Co.*, 33 L. T. 306, 23 W. R. 860, L. R. 10 Q. B. 437, 44 L. J. Q. B. 164.

Injury to a passenger after leaving a train in the course of his departure from the company's premises is included within the condition of a free drover's ticket, by the terms of which he travels at his own risk. *Gallin v. London & N. W. R. Co.*, 23 W. R. 308, 32 L. T. 550, 44 L. J. Q. B. 89, L. R. 10 Q. B. 212.

A condition in a contract for the shipment of cattle allowing the drover in charge to travel free, providing he does so at his own risk, printed on the back of the invoice, with a direction on the face referring to the back for conditions of carriage, is a part of the written contract, and if a drover elects to travel free he is bound by the conditions and cannot recover for injuries. *Duff v. Great Northern R. Co.*, L. R. 4 Ir. 178.

A drover in charge of his cattle signed a contract with a railway company which stated that the cattle were to be conveyed upon the conditions mentioned upon the back of the invoice handed to him, and on the back of the invoice there was printed, amongst other conditions, the following: "That, as a drover is allowed to attend the cattle during transit, they will allow such drover to travel free of charge, upon condition that he so travel at his own risk." On the face of the invoice there was nothing referring to passengers except the words "Drover in charge free," and at the foot of it were the words, "For conditions of carriage, see back hereof." The drover did travel free, and in consequence of a collision occurring on the journey he received personal injuries, for which he brought an action against the railway company. *Held*, that the condition allowing a drover in charge of his cattle to travel free, provided he did so at his own risk, was part of the written contract signed by the drover, and that as he had elected to travel free he was bound by the conditions and could not recover damages for the personal injuries sustained. *Duff v. Great Northern R. Co.*, L. R. 4 Ir. 178, 3 Ry. & C. T. Cas. xiv.

(2) *In New York*.—Defendant received of plaintiff at Newark a car-load of sheep to be transported to Albany under a contract

which contained a clause by which plaintiff agreed to go or send some one with the sheep, "who should take all the risks of personal injury from whatever cause, whether of negligence of defendants, its agents, or otherwise." After the sheep were loaded, plaintiff, who was intending to accompany them, and had a drover's pass, in passing by the tender to the engine, was injured by a stick of wood negligently thrown therefrom. *Held*, that, under the contract, defendant was exempted from liability. *Poucher v. New York C. R. Co.*, 49 N. Y. 263.—DISTINGUISHING *Stinson v. New York C. R. Co.*, 32 N. Y. 333.—REVIEWED IN *Blair v. Erie R. Co.*, 66 N. Y. 313.

In an action for personal injuries the fact that plaintiff was riding on a drover's ticket containing a provision that he should ride in charge of the stock, but that if he should leave the caboose and pass along the train or track it should be at his own risk of personal injury, does not relieve the company from liability, where he is told that the train will wait forty-five minutes at a station and he leaves it to get supper, and, returning before the time is up, is injured while attempting to get on the cars by a sudden movement of the train. *Pitcher v. Lake Shore & M. S. R. Co.*, 16 N. Y. Supp. 62; affirmed in 137 N. Y. 568, 33 N. E. Rep. 339.

(3) *In Pennsylvania*.—A drover transporting live stock in the cars of a railroad company, for which he paid freight, received a ticket to "pass the bearer in charge of his stock," on which was indorsed: "The person accepting this free ticket assumes all risks of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether by the negligence of their agents or otherwise, for an injury to the person or for any loss or injury to the personal property of the person using this ticket." *Held*, that the drover was not a gratuitous but a paying passenger, and that the indorsement was no excuse for negligence. *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315.—DISAPPROVING *Wells v. New York C. R. Co.*, 24 N. Y. 181; *Perkins v. New York C. R. Co.*, 24 N. Y. 197; *Smith v. New York C. R. Co.*, 24 N. Y. 222; *Bissell v. New York C. R. Co.*, 25 N. Y. 442. QUOTING *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 468.—APPROVED IN *Rose v. Des Moines Valley R. Co.*, 39 Iowa 246; *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1. DISTINGUISHED IN *Kinney v.*

which plaintiff one with the the risks of cause, whether its agents, or were loaded, to accompany in passing by injured by a own therefrom. act, defendant Poucher v. Y. 263.—DIS- York C. R. D IN Blair v.

injuries the fact drover's ticket he should ride if he should along the train in risk of per- the company that the train a station and returning be- while attempt- en movement Shore & M. firmed in 137

er transport- railroad com- t, received a charge of his "The person mes all risks es that the der any cir- gligence of injury to the to the per- using this was not a er, and that e for negli- Henderson, Wells v. Perkins 197; Smith 22; Bissell 2. QUOT- Derby, 14 IN Rose v. Iowa 246; Curran, 19 Kinney v.

Central R. Co., 34 N. J. L. 513; affirming 32 N. J. L. 407. NOT FOLLOWED IN Griswold v. New York & N. E. R. Co., 26 Am. & Eng. R. Cas. 280, 53 Conn. 371, 55 Am. Rep. 115.

**129. Right to recover for personal injuries, generally.\*—**(1) *When may recover.*—A shipper of cattle who travels as a passenger on the freight train with the cattle may recover from the carrier for personal injuries caused by its negligence; and the fact that the accident was due to a delay which was at his request to enable him to get his stock loaded will not prevent such recovery. *Flinn v. Philadelphia, W. & B. R. Co.*, 1 *Houst. (Del.)* 469.—NOT FOLLOWED IN Griswold v. New York & N. E. R. Co., 26 Am. & Eng. R. Cas. 280, 53 Conn. 371, 55 Am. Rep. 115.

Where a party having the care of stock in a freight-car, requiring his attention, attempted to enter the car with the sanction of the conductor, and under his assurance that it would be safe, and that he would have ample time to do so before the train moved, and was injured by the sudden and unexpected movement of the train while in the act of entering the car—*held*, that the company was liable. *Olson v. St. Paul & D. R. Co.*, 47 *Am. & Eng. R. Cas.* 573, 45 *Minn.* 536, 48 *N. W. Rep.* 445.

The action of a conductor who, on a dark night, promised to transfer a shipper of stock from his freight train going east to one going west, at a regular station which was presumably a safe place, but instead transferred him at a different and dangerous place, without notifying him of the change or warning him of the danger, the shipper being injured while passing hurriedly from one train to the other by falling into a deep water-way, constitutes gross negligence, and the railroad company is liable for the injury. *Griffith v. Missouri Pac. R. Co.*, 98 *Mo.* 168, 11 *S. W. Rep.* 559.—FOLLOWING *McGee v. Missouri Pac. R. Co.*, 92 *Mo.* 208.

A shipper of hogs entered into a contract

\* Liability of company for injuries to drovers riding on trains with stock, see note, 48 *AM. REP.* 15.

Liability of company for injuries to persons riding on complimentary passes to stock-drovers, express agents, newsboys, and the like, see note, 23 *L. R. A.* 794.

Liability of company for injury to stock-shipper injured by falling into water-way while passing from one train to another in the dark, see 39 *AM. & ENG. R. CAS.* 479, *abstr.*

reciting that, in consideration of reduced rates he should accompany the animals and take charge of them, but should do so at his own risk of personal injury from whatever cause. One sum was paid, which seemed to be intended as compensation both for his transportation and for that of the hogs. While *en route* the owner was killed by reason of using an unsafe car. *Held*, that the company was liable in damages. *Smith v. New York C. R. Co.*, 24 *N. Y.* 222; affirming 29 *Barb.* 132.—APPLYING *Wells v. Steam Nav. Co.*, 8 *N. Y.* 375. REVIEWING *Sager v. Portsmouth R. Co.*, 31 *Me.* 228; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 *How. (U. S.)* 383.—APPROVED IN *New York C. R. Co. v. Lockwood*, 17 *Wall. (U. S.)* 357. DISAPPROVED IN *Pennsylvania R. Co. v. Henderson*, 51 *Pa. St.* 315. FOLLOWED IN *Stinson v. New York C. R. Co.*, 32 *N. Y.* 333. REVIEWED IN *Blair v. Erie R. Co.*, 66 *N. Y.* 313.

(2) *Who may not recover.*—Where there is no evidence to show a defect in the construction or condition of a sliding-door in a stock-car, the company is not liable for an injury to a shipper of stock who has a right to open the door, in accompanying and caring for the stock, but who is injured by its becoming detached and falling on him. *Kleimenhagen v. Chicago, M. & St. P. R. Co.*, 26 *Am. & Eng. R. Cas.* 179, 65 *Wis.* 66, 26 *N. W. Rep.* 264.

Plaintiff, who was in charge of stock on a freight train, was told by the conductor that the caboose would not be changed at the next station, and that as the train would only stop five minutes he would not have time to look over his stock. Plaintiff knew that the conductor was running the train under orders from his superior officers, which orders were liable to be changed at any time. On arriving at the next station plaintiff left the train to examine his stock. When the train began to move back, plaintiff, being seven cars from the rear, and believing the train was moving too rapidly to allow him to board the caboose, climbed on the stock-car and started to walk back to the caboose, and when just in the act of stepping thereon the caboose was kicked off from the train, and plaintiff was thrown to the ground and received the injuries complained of. *Held*, that the railroad company was not liable, for the reason that the acts of the plaintiff, in failing to return to the caboose at the end of the five minutes

which he was told the train would remain, in climbing up on the cars and walking back on their tops to the rear of the last stock-car, so that he arrived there at the very instant when the caboose was to be changed, were independent intervening causes that prevented the natural and probable consequences of the conductor's assurances and of the movement of the train, and brought about an unnatural and improbable result that no human foresight could have anticipated. *Chicago, St. P., M. & O. R. Co. v. Elliott*, 58 Am. & Eng. R. Cas. 161, 55 Fed. Rep. 949.—DISTINGUISHING *New York, L. E. & W. R. Co. v. Winter*, 143 U. S. 60, 52 Am. & Eng. R. Cas. 328; *Pitcher v. Lake Shore & M. S. R. Co.*, 16 N. Y. Supp. 62; *Olson v. St. Paul & D. R. Co.*, 47 Am. & Eng. R. Cas. 573, 45 Minn. 536. QUOTING *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469; *Hoag v. Lake Shore & M. S. R. Co.*, 85 Pa. St. 293.

**130. Recovery for personal injury not prevented by provisions exempting liability for injuries to stock.**—One employed by a shipper of live stock to accompany them, is not prevented from recovering from the carrier for injuries received while in charge of the stock, by a provision in the contract for the shipment of the stock, exempting the company from liability, except such as might result from fraud or wilful misconduct, or by being designated in the contract and in a way bill as travelling free. *Porter v. New York, L. E. & W. R. Co.*, 13 N. Y. Supp. 491.

Live stock were shipped with a provision in the bill of lading that the owner was "to load, tranship, and unload said stock at his own risk." *Held*, that this only referred to risks which the property might be exposed to, and did not include personal injuries which the owner might sustain by the negligent running of cars upon him while he was carefully performing the labor he was authorized to do. *Stinson v. New York C. R. Co.*, 32 N. Y. 333.—FOLLOWING *Bissell v. New York C. R. Co.*, 25 N. Y. 442; *Smith v. New York C. R. Co.*, 24 N. Y. 222.—DISTINGUISHED IN *Poucher v. New York C. R. Co.*, 49 N. Y. 263; *Murphy v. New York, L. E. & W. R. Co.*, 42 N. Y. S. R. 580.

**131. Contributory negligence, when defeats recovery.\*—(1) Generally.**

\* Contributory negligence of person in charge of live stock, see note, 47 AM. & ENG. R. CAS. 597.

—Where plaintiff, having cattle upon defendant's train, was entitled to ride in the caboose, but, being some distance in front of the caboose when the train started, and when it had attained such a rate of speed that he thought he would not be able to mount the caboose when it came along, he attempted, in the night time, with his right hand incumbered with a lantern and a prod-pole, to climb upon one of the freight cars of the train—*held*, that he was, as a matter of law, guilty of contributory negligence; and that, these facts appearing from plaintiff's own testimony, the court should, on defendant's motion, have directed a verdict in its favor. *McCorkle v. Chicago, R. I. & P. R. Co.*, 18 Am. & Eng. R. Cas. 156, 61 Iowa 555, 16 N. W. Rep. 714.—QUOTED IN *Atchison, T. & S. F. R. Co. v. Lindley*, 41 Am. & Eng. R. Cas. 72, 42 Kan. 714, 6 L. R. A. 646, 22 Pac. Rep. 703.

Plaintiff, with a drover's pass from Charlotte to Richmond, was told by the conductor before reaching Danville that there the caboose would be detached and that he would have to walk or ride atop of a stock-car over a bridge. Reaching Danville about 9.30 P.M., the train stopped some moments, during which plaintiff agreed with a brakeman to stay and guard wood on the caboose platform, the latter to notify him when to get atop of the stock-car. Plaintiff did so. Shortly afterward trains moved up slowly. When he was about to get atop from the platform of the caboose, it was cut loose, and some one said, "Jump down." This plaintiff did, and overtook the rear of the train fifteen or twenty feet from the caboose. Reaching the car, he attempted to ascend a ladder to the top, the train being then in motion. Climbing up, just as he threw his valise over the hand-hold on the top of the car, he fell some twenty feet to the ground and was injured. *Held*, that plaintiff was not entitled to recover, his contributory negligence operating as the proximate cause of the injuries complained of, without which they could not have happened. *Richmond & D. R. Co. v. Picklesimer*, 85 Va. 798, 10 S. E. Rep. 44.—FOLLOWING *Richmond & D. R. Co. v. Morris*, 31 Gratt. 200. QUOTING *Pennsylvania R. Co. v. Aspell*, 23 Pa. St. 147; *Dunn v. Seaboard & R. R. Co.*, 78 Va. 645; *Richmond & D. R. Co. v. Anderson*, 31 Gratt. 812.

Plaintiff, riding in a caboose in charge of stock, asked the conductor if the caboose

would be changed at a certain station, and was told no, and was advised not to leave the car, as there would not be time to examine the stock; but he did get off, examined several car-loads of stock, and, turning back, the train having started, he climbed upon a stock-car and attempted to walk back to the caboose. Just as he reached the caboose and was trying to step upon it, the caboose was kicked off and plaintiff fell and was injured. *Held*, that the conductor's assurance to plaintiff that the caboose would not be changed was not the proximate cause of the injury, and that evidence of it was erroneously permitted to go to the jury. *Chicago, St. P., M. & O. R. Co. v. Elliott*, 55 *Fed. Rep.* 949.

(2) *Dangerous place or position*.—Where one, having cattle on the train, has time to get aboard the caboose but fails to do so, and boards a freight car and rides therein, by reason of which fact he is injured, he is guilty of such contributory negligence as will defeat his recovery for such injury, notwithstanding the railway employes may have been negligent in not bringing the caboose within a reasonable distance of the depot. *Player v. Burlington, C. R. & N. R. Co.*, 12 *Am. & Eng. R. Cas.* 112, 62 *Iowa* 723, 16 *N. W. Rep.* 347.—DISTINGUISHED IN *Connors v. Burlington, C. R. & N. R. Co.*, 71 *Iowa* 490, 32 *N. W. Rep.* 465; *Meloy v. Chicago & N. W. R. Co.*, 38 *Am. & Eng. R. Cas.* 130, 77 *Iowa* 743, 42 *N. W. Rep.* 563.

At an intermediate station a train, carrying plaintiff's cattle, and him in charge thereof, stopped to take on additional cars, and plaintiff, without any information or notice to the company's agents, went in a caboose at the rear of the cars which were to be added, and was standing up, when he was injured by a shock caused by the cars striking in making up the train. *Held*, that there was no negligence on the part of the company, but there was contributory negligence on the part of plaintiff, and he could not recover for the injuries. *Hutchinson v. Canadian Pac. R. Co.*, 17 *Ont.* 347.

(3) *Riding on top of car*.—If one travelling on a drover's pass be regarded as a passenger for hire, still he cannot recover for injuries received through the company's negligence while riding on top of a cattle-car, without the knowledge of the persons in control of the train, though an inferior agent of the company had told him, but

without authority, that he might ride there. *Little Rock & Ft. S. R. Co. v. Miles*, 13 *Am. & Eng. R. Cas.* 10, 40 *Ark.* 298, 48 *Am. Rep.* 10.

A shipper of live stock, who is riding on a freight train to care for his stock, assumes the risk of danger in going upon the top of the car at the suggestion of the conductor, to help signal, and he cannot recover for injuries received while there by a sudden jerk of the train, he not being engaged in looking after his stock when on top of the car. *Atchison, T. & S. F. R. Co. v. Lindley*, 41 *Am. & Eng. R. Cas.* 72, 42 *Kan.* 714, 6 *L. R. A.* 646, 22 *Pac. Rep.* 703.

Where a shipper of stock was on a freight train accompanying two loads of his stock, which were being transported to market, and the train had attached to it a caboose for the shippers on the train to ride in, and, while the train was stopping at a station, the conductor addressed the shipper as follows: "You get on top and help signal until the last load of hogs comes up, and we will water them," and the shipper voluntarily obeyed the order or direction, and got upon the train moving backward, and while on the top of the train, near to the end of a car, watching a brakeman trying to make a coupling, was severely injured by a sudden forward motion or jerk of the train, without any signal thereof—*held*, that as the shipper voluntarily placed himself in a position of known danger, and as he was not upon the top of the train to look after or care for his stock, the railroad company was not liable in damages for his injuries. *Atchison, T. & S. F. R. Co. v. Lindley*, 41 *Am. & Eng. R. Cas.* 72, 42 *Kan.* 714, 6 *L. R. A.* 646, 22 *Pac. Rep.* 703.—DISTINGUISHING *Indianapolis & St. L. R. Co. v. Horst*, 93 *U. S.* 291. QUOTING *McCorkle v. Chicago, R. I. & P. R. Co.*, 18 *Am. & Eng. R. Cas.* 156, 61 *Iowa* 555, 16 *N. W. Rep.* 714; *Pennsylvania R. Co. v. Langdon*, 92 *Pa. St.* 21; *Lehigh Valley R. Co. v. Greiner*, 113 *Pa. St.* 600; *Little Rock & Ft. S. R. Co. v. Miles*, 13 *Am. & Eng. R. Cas.* 10; 40 *Ark.* 298; *Flower v. Pennsylvania R. Co.*, 69 *Pa. St.* 210; *Atchison, T. & S. F. R. Co. v. Plunkett*, 25 *Kan.* 188; *Baltimore & P. R. Co. v. Jones*, 95 *U. S.* 439; *Georgia Pac. R. Co. v. Propst*, 83 *Ala.* 518; *Georgia Pac. R. Co. v. Propst*, 85 *Ala.* 203.

A passenger on a freight train in charge of live stock, who, in violation of a rule of the company, is riding on a projection or cupola several feet above the roof of the

caboose, where there are no guards of any sort, and is thrown therefrom by a jar caused by the coupling of a switch-engine to the train, cannot recover upon mere proof that the injury was caused by such jar. *Tuley v. Chicago, B. & Q. R. Co.*, 41 Mo. App. 432.

**132. Contributory negligence, when does not defeat recovery.\*—**

(1) *Generally.*—Where one in charge of live stock is killed by a collision near stock-yards, where there are numerous tracks and many trains moving, while riding on the tender by direction of the train employes, the company is liable. *Union R. & T. Co. v. Shacklett*, 19 Ill. App. 145.—DISTINGUISHED IN *Ohio & M. R. Co. v. Allender*, 47 Ill. App. 484.

A person travelling on a train which has with it a stock-car carrying horses for him, his duty under his contract being "to feed, water, and take care of the horses," is not guilty of contributory negligence because he was on said car when he was injured, if he was on the car, while it stopped at a station, in the performance of his duty, and had not finished when the train started off, after a stoppage of fifteen or twenty minutes instead of forty-five—the usual time—and if it is not shown that he had opportunity, before the accident, to go to any other car. *Florida R. & N. Co. v. Webster*, 25 Fla. 394, 5 So. Rep. 714.

If a company agrees to furnish a shipper of live stock passage from its road to stock-yards, not far distant, he will be under no obligation at his own expense to pursue a different route and mode of travel from that provided by the company; and if the company furnishes a dangerous mode, and its servants, in the apparent line of their authority, direct the shipper to take passage on an engine attached to the car of stock, the company cannot escape liability for an injury to him through the negligence of its servants, by showing that he might have procured passage by some other line of travel. *Lake Shore & M. S. R. Co. v. Brown*, 31 Am. & Eng. R. Cas. 61, 123 Ill. 162, 14 N. E. Rep. 197.

The failure of the shipper to see a water-way between the tracks, to which his attention had not been called, and where he had a right to presume that he was safe while attempting to reach a west-bound train, which had begun to move, did not constitute contributory negligence on his part.

*Griffith v. Missouri Pac. R. Co.*, 98 Mo. 168, 11 S. W. Rep. 559.

Plaintiff, who was riding on a drover's ticket, was informed by the conductor that he must leave the caboose at a certain station, and thereafter ride with his stock. Held, that he had a right to assume that it would be safe for him to board the stock-car at any time within the time named by the conductor. *Pitcher v. Lake Shore & M. S. R. Co.*, 40 N. Y. S. R. 896, 61 Hun 623, 16 N. Y. Supp. 62; affirmed in 137 N. Y. 568, mem., 50 N. Y. S. R. 943.

A provision in a contract for the transportation of live stock allowing the owner to accompany them, but requiring him to remain in the cars which contain the stock, is not violated by his being in another part of the train when it is not in motion, so as to make him guilty of contributory negligence where he is injured by the train being run into by another. *Pennsylvania R. Co. v. McCloskey*, 23 Pa. St. 526.—DISTINGUISHED IN *Lackawanna & B. R. Co. v. Chenewith*, 52 Pa. St. 382.

(2) *Riding on top of car.*—Where the evidence shows that a person in charge of cattle attempted to enter the caboose from the top at the place fixed for employes to enter, and there was no evidence tending to show that it was obviously dangerous so to enter, nor that plaintiff was negligent in the manner of his attempt to enter, a verdict in his favor is sufficiently supported by the evidence. *Missouri Pac. R. Co. v. Callahan*, (Tex) 41 Am. & Eng. R. Cas. 85, 12 S. W. Rep. 833.

Where plaintiff's husband, a stockman, was thrown from the top of a stock-train through the negligence of the defendant's servants, and killed, evidence of a usage of the company requiring its stock-passengers to ride on the top of the train along the place of the accident is admissible, in order to overcome any inference of the contributory negligence of the deceased. *Tibby v. Missouri Pac. R. Co.*, 82 Mo. 292.

While a train was lying at a station, plaintiff, who was travelling in charge of stock, got off and went forward to examine the stock, and while so off the train started, and plaintiff, believing that the speed of the train would be too great to allow him to get on the caboose if he walked to the rear of the train, climbed up a car where he stood, and undertook to pass to the rear on top of the cars, which seemed to be customary

\* See also *post*, 143.

for cattle-men to do, but while so passing back came in contact with an overhead bridge and was injured. *Held*, that his conduct was not contributory negligence *per se*. *Chicago, M. & St. P. R. Co. v. Carpenter*, 56 *Fed. Rep.* 451.

**133. When questions of negligence and contributory negligence are for the jury.**—In a case where the pleadings put the question of contributory negligence in issue, the evidence on the trial showed that the decedent, a stock-drover, was riding, in company with five or six others, upon an engine, which was moving slowly along an approach to a stock-yard. Suddenly another engine of another company was seen to approach around a curve, whereupon all the fellow-passengers of decedent jumped off. He, however, remained, and was killed in the collision which ensued. An action having been brought by his administratrix against the railroad company running the engine which collided with that on which decedent was riding, the court charged the jury that if defendant's servants were negligent, and decedent was rightfully riding on the engine, plaintiff could recover. *Held*, under the pleadings, that the instruction was error, as it disregarded the question of the contributory negligence of decedent. *Wabash, St. L. & P. R. Co. v. Shacklet*, 12 *Am. & Eng. R. Cas.* 166, 105 *Ill.* 364.

Whether a passenger on a freight train in charge of stock shipped by him is guilty of gross negligence in getting upon the foot-board of a transfer-engine and riding there, by the direction or invitation of those in charge of his stock and of such engine, is a question of fact for the jury, to be found from all the facts and circumstances shown by the evidence. *Lake Shore & M. S. R. Co. v. Brown*, 31 *Am. & Eng. R. Cas.* 61, 123 *Ill.* 162, 14 *N. E. Rep.* 197.—QUOTED IN *Chicago & N. W. R. Co. v. Traves*, 33 *Ill. App.* 307.

Plaintiff, a shipper of live stock, being entitled to ride on the freight train to care for his stock, was told by the conductor that the train would lie at a certain station 45 minutes, and he would have plenty of time to get supper. Before the lapse of that time he returned, found that his train had been moved to other tracks, and, seeing the engine attached, supposed it was about to move, and, without any knowledge that the train was lying near the cattle-chutes, and it

being too dark to see them when in the act of climbing into the car, the train was started without warning or signal, and he was injured by coming in contact with the cattle-chutes. *Held*, that the question of his contributory negligence was for the jury. *Pitcher v. Lake Shore & M. S. R. Co.*, 28 *N. Y. S. R.* 647, 8 *N. Y. Supp.* 389; *further appeal*, 16 *N. Y. Supp.* 62; *affirmed in* 137 *N. Y.* 568, 50 *N. Y. S. R.* 943, 33 *N. E. Rep.* 339.

A shipper of cattle and his servant were travelling on a freight train to look after the cattle, as required by the company. At night, when the train had stopped at a water-station, they learned that an animal was down, and were told by the conductor that they would have time to look after it if they would hurry. They both left the train, and in going forward to where the stock were, found part of the train on a bridge, and had to enter the train at a place where there was but one board as a footway outside of the track. The station and water-tank were so constructed that it was necessary for trains going in one direction to be partly on the bridge when stopping for water. The owner of the stock fell from the bridge and was killed. *Held*, that a peremptory verdict for the company was properly refused; and that the question whether the bridge was such part of the depot-grounds as the shipper was entitled to use, and as made it the duty of the company to provide proper planking and guard-rails, was properly submitted to the jury. *Illinois C. R. Co. v. Foley*, 53 *Fed. Rep.* 459, 10 *U. S. App.* 537, 3 *C. C. A.* 589.—QUOTING *Grand Trunk R. Co. v. Ives*, 144 *U. S.* 408, 12 *Sup. Ct. Rep.* 679; *Sioux City & P. R. Co. v. Stout*, 17 *Wall. (U. S.)* 657.

#### X. PROCEDURE IN ACTIONS.

**134. Jurisdiction.**—The courts of Alabama have jurisdiction of an action against a foreign corporation for breach of a contract made with the defendant's agents in the state of Alabama for the transportation of live stock from a point within the state to a point without, where the defendant company operated a railroad between the points of shipment and destination. *Richmond & D. R. Co. v. Trousdale, (Ala.)* 55 *Am. & Eng. R. Cas.* 400, 13 *So. Rep.* 23.

A railroad company chartered in New York, and carrying live stock from Massachusetts to Missouri, may be sued in the



latter state for damage to the stock while in transit in Ohio; and service of process may be made on the company's city passenger agent in a county other than that in which the suit is brought, under Mo. Rev. St. § 3489, providing that where the defendant is a corporation, organized under the laws of another state or county, process may be served on any one having charge of an office or place of business of the corporation in the state; or if there be no such office or place of business, then upon any officer, agent, or employé in any county where such service may be obtained. *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. Rep. 444.—APPROVING *McNichol v. United States M. R. Agency*, 74 Mo. 457.

A shipper of cattle sued a railroad company for \$960 loss to his cattle while *en route*, and \$15 for an over-freight charge. It was adjudged that he was not entitled to recover as to the \$960, by reason of not having given written notice to the company, as required in the bill of lading; but it appeared that he had prosecuted his suit in good faith. *Held*, that though the item of \$15 would not give the county court jurisdiction, yet he was entitled to recover on appeal a judgment for that amount. *Texas & P. R. Co. v. Jackson*, 3 Tex. App. (Civ. Cas.) 65.

**135. The right of action.**—Where there is a special contract varying the liability of the carrier, the action is properly brought on the special contract and not on the general liability. *Boas v. Central R. Co.*, 87 Ga. 463, 13 S. E. Rep. 711.—RECONCILED IN *Nicoll v. East Tenn., V. & G. R. Co.*, 89 Ga. 260.

Where stock are shipped under a special contract and damage is sustained, an action may be brought on the special contract; yet independent of the contract the shipper may have his action on the case for damages for negligence of the carrier in the non-performance of a duty as such carrier. *Coles v. Louisville, E. & St. L. R. Co.*, 41 Ill. App. 607.

The owner of a horse received him from the carrier without knowledge at the time that the horse was injured, and kept him in his possession until he died from the injuries. *Held*, that notice to the carrier of the injuries, or an offer to return him, was not necessary in order to recover from the carrier. *Evans v. Dunbar*, 117 Mass. 546.

The fact that a common carrier has en-

tered into a contract for the transportation of stock does not prevent an action in tort for a failure to safely carry and deliver, as in such case the action is not based upon the contract. *Clark v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 440, 17 Am. Ry. Rep. 284.—REVIEWED IN *Heil v. St. Louis, I. M. & S. R. Co.*, 16 Mo. App. 363.

Upon cattle being tendered to a railroad company for shipment, it offered, for a certain amount, to become a common carrier, or for a less sum to furnish cars and motive-power, and allow the owner to become his own carrier. The owner of the stock elected to ship under the lower rate, assuming the risks of transportation. *Held*, that the company could not be bound as a common carrier, and that the owner could not recover for injuries to the stock. *Kimball v. Rutland & B. R. Co.*, 26 Vt. 247.

Where a carrier realizes a sum of money by the sale of the carcasses of animals dying in transit, it is liable for the same in an action for money had and received. *Hayes v. South Wales R. Co.*, L. R. 9 Ir. 474.

**136. Who may sue—Parties.**—Where stock belonging to different persons were shipped under one contract, a joint action might be maintained by the shippers for an injury to the stock, but where each individual brings a separate action they cannot afterward be consolidated. *Baughman v. Louisville, E. & St. L. R. Co.*, (Ky.) 21 S. W. Rep. 757.

When the owner of a horse bailed him to another for a year, the bailee to have the exclusive management and control of him for that time, and he was injured in a railroad accident, having been shipped under a contract between the bailee and the carrier, the bailee and not the owner must sue for the injury. *Harvey v. Terre Haute & I. R. Co.*, 6 Am. & Eng. R. Cas. 293, 74 Mo. 538.

Plaintiff shipped his cattle in a car with others belonging to a third party, and in an action for injuries to his stock declared on a contract to carry made with him. There was a dispute between him and the company as to whether the contract was with plaintiff alone or with him and the third party. *Held*, that if it was made with the two jointly it would be variant from the one declared on; but that if it was made with him alone, at a fixed rate for the car, and the ownership of the cattle was several as between the two shippers, and plaintiff's cattle alone were injured, the right of action would

be in him. *Jacksonville, N. W. & S. E. R. Co. v. Hall*, 2 Ill. App. 618.

The non-joinder of the other company as a party defendant was no ground for a nonsuit, as the action was brought, not upon the contract, but for negligence, for which the party guilty thereof was separately liable. *Holsapple v. Rome, W. & O. R. Co.*, 3 Am. & Eng. R. Cas. 487, 86 N. Y. 275.

**137. Declaration.**—Under a declaration in case which avers that the defendant was a carrier of goods and chattels for hire, etc., and alleges as a cause of action the violation by it of the duty of such carrier in the transportation of live stock for the plaintiff, proof that the company possesses the character of carrier of live stock is essential. *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329, 5 Am. Ry. Rep. 249. —DISAPPROVED IN *Bamberg v. South Carolina R. Co.*, 9 So. Car. 61. NOT FOLLOWED IN *Maslin v. Baltimore & O. R. Co.*, 14 W. Va. 180.

Under the practice as prevailing in Michigan, where a railroad company is sued to recover for injuries to horses resulting from defects in the cars in which they were placed, the wrong or negligence may properly be alleged as a breach of the duty to carry safely. *Great Western R. Co. v. Hawkins*, 18 Mich. 427. —DISTINGUISHED IN *Michigan S. & N. I. R. Co. v. McDonough*, 21 Mich. 165.

Where it appears that a railroad company only furnished cars and motive-power for the transportation of live stock under a special contract, making it only a private carrier, the company cannot be sued as a common carrier, but must be declared against as a private carrier for a breach of duty arising out of the special contract. *Kimball v. Rutland & B. R. Co.*, 26 Vt. 247. —QUOTING *Austin v. Manchester, S. & L. R. Co.*, 5 Eng. L. & Eq. 329. REVIEWING *Newcastle & B. R. Co. v. Crisp*, 23 L. J. C. P. 125.

Plaintiff sued the carrier for violation of a special contract to furnish cars and carry live stock, alleging that "for a certain reasonable hire or reward, to be thereupon paid by the plaintiff to the defendant," the defendant agreed to carry said stock. A reasonable construction of the contract was that the freight was to be paid at the end of the carriage. *Held*, that a verdict for plaintiff should not be arrested because

the declaration did not aver a readiness to pay the charges at the time of contracting for the cars. *Waterman v. Vermont C. R. Co.*, 25 Vt. 707.

Under counts against a defendant merely as carrier or bailee of cattle, the shipper cannot recover for losses resulting from the misrepresentation of the defendant's agent, whereby the plaintiff was induced to ship on a slow instead of a fast train. *Maslin v. Baltimore & O. R. Co.*, 14 W. Va. 180.

**138. Complaint.**—(1) *In Indiana.*—In a complaint for a breach of contract to furnish, at a certain time and place, the necessary cars, and to transport a certain number of hogs, it is not necessary to allege that the defendant, at the time complained of, had the ability to transport or to furnish the means to transport said hogs. *Pittsburgh, C. & St. L. R. Co. v. Hays*, 49 Ind. 207.

In an action for failing to furnish cars for the transportation of plaintiff's live stock on a certain day, the complaint need not allege that the defendant had room and means of transportation when it was demanded, or that it had a regular train which carried live stock and which passed the station on said day after the stock were tendered for transportation. The burden of proof upon these matters is upon the defendant, as they are peculiarly within the knowledge of the carrier. *Pittsburgh, C. & St. L. R. Co. v. Racer*, 5 Ind. App. 209, 31 N. E. Rep. 853. —APPLYING *Chicago & A. R. Co. v. Thrapp*, 5 Ill. App. 502.

Although the contract for carriage of cattle was made in the name of the consignee, the complaint in an action by the consignor to recover damages for delay in shipment, which alleges that the consignor delivered the cattle to the defendant for transportation to the consignee, who was a commission merchant, and was to sell them for the plaintiff, and that the contract in suit was signed, not by the consignee, but by the consignor, is sufficient to show that the consignee had no interest in the property except as the agent of the consignor, and sufficiently states a cause of action. *Cincinnati, I., St. L. & C. R. Co. v. Case*, 42 Am. & Eng. R. Cas. 537, 122 Ind. 310, 23 N. E. Rep. 797.

Although the contract of carriage does not specify a time for the shipment of cattle, a complaint which alleges that they might have been shipped by the company when

delivered to it, and that in consequence of a delay of 22 hours in shipping them the cattle did not arrive at their destination until after business hours on Saturday and too late for the market, sufficiently shows that the defendant did not comply with its obligation to ship the cattle within a reasonable time. *Cincinnati, I., St. L. & C. R. Co. v. Case*, 42 *Am. & Eng. R. Cas.* 537, 122 *Ind.* 310, 23 *N. E. Rep.* 797.

In an action for an alleged breach of special contract for the shipment of cattle, where it appears from the complaint as a whole that the plaintiffs were the owners of the stock, and no consignee is named in the contracts, it will be presumed that the shipment was to be made to them. *Pennsylvania Co. v. Clark*, 2 *Ind. App.* 146, 27 *N. E. Rep.* 586.

(2) *In Texas*.—An averment in a complaint for damage to sheep is not sufficient where it merely alleges that all the sheep were of great value, and that plaintiff's damage was \$850, without anything to show the value of those which were lost and how much the others not lost were depreciated in value. These were material, issuable matters which could not be proved unless alleged, and which had to be alleged and proved to entitle the plaintiff to a recovery. *Gulf, C. & S. F. R. Co. v. Wilhelm*, 3 *Tex. App. (Civ. Cas.)* 558.

A complaint seeking to recover damages for the loss of and injury to live stock while being carried is sufficient which states generally that, by reason of not properly feeding and watering, a certain number of a certain value died; and that a certain other number of a certain value became sick and were damaged a certain sum, the total sum being stated, is sufficient without alleging the exact place on the road where the company failed to feed and water. *Gulf, C. & S. F. R. Co. v. Wilhelm*, 4 *Tex. App. (Civ. Cas.)* 413, 16 *S. W. Rep.* 109.

In a complaint against a carrier of live stock for damages caused by delay, an allegation that the delay was caused by the negligence of the defendant railway company is sufficient to admit proof of the bad condition of the track at the place where the delay occurred. *St. Louis, A. & T. R. Co. v. Turner*, 1 *Tex. Civ. App.* 625, 20 *S. W. Rep.* 1008.

An allegation in a complaint to recover damages for live stock shipped, that 500 head were killed worth \$16 each, and that

620 others were injured "to the extent of \$6 or \$7 each," is specific enough, and is sufficient; and where there is evidence to show the number of killed and injured, and the average value of each, an instruction that, "if the proof failed to show the number of dead and injured among the yearlings, 2-year-olds, and bulls, then as to such death and injury" the jury should find for the defendant is properly refused. *Missouri Pac. R. Co. v. Edwards*, 78 *Tex.* 307, 14 *S. W. Rep.* 607.

Where plaintiff sues to recover damages for injuries sustained by him while traveling in charge of cattle, and the complaint alleges that, having left the caboose for the purpose of attending to his cattle, the train started without notice to him and he was compelled to get upon the top of a car; that he sat down upon the car; and that upon the invitation of the conductor he started towards the caboose, and in attempting to enter the caboose from the top was struck by a water-pipe, the averments in the petition as to the reason why he went on the top of the train and as to his entering the caboose at the request of the conductor are not open to exception. *Missouri Pac. R. Co. v. Callahan*, (*Tex.*) 41 *Am. & Eng. R. Cas.* 85, 12 *S. W. Rep.* 833.

Where plaintiff, who sues to recover for injuries to live stock during transportation, wishes to avoid a defense set up under a provision in the written contract of shipment to relieve the carrier from liability for the acts complained of, on the ground that such contract was entered into without consideration on plaintiff's part, such consideration must be set up by affidavit, as required by *Tex. Rev. St. art.* 1265. *Gulf, C. & S. F. R. Co. v. Wright*, 1 *Tex. Civ. App.* 402, 21 *S. W. Rep.* 80.—REVIEWING *Gulf, C. & S. F. R. Co. v. McCarty*, 82 *Tex.* 608.

(3) *In Wisconsin*.—In an action to recover damages occasioned by the defendant's failure to furnish cars for the shipment of stock at the time agreed, and by a failure to transport such stock with reasonable diligence, the complaint should show what part of the total delay was occasioned by the failure to furnish cars, and what part occurred en route. *Richardson v. Chicago & N. W. R. Co.*, 16 *Am. & Eng. R. Cas.* 172, 58 *Wis.* 534, 17 *N. W. Rep.* 399.

But where the complaint shows that the delay in furnishing cars was "about four

days," and that the total delay was "about four days," the complaint is sufficiently definite and certain. *Richardson v. Chicago & N. W. R. Co.*, 16 Am. & Eng. R. Cas. 172, 58 Wis. 534, 17 N. W. Rep. 399.

Where several acts of negligence are charged, it is proper that the defendant should be informed what damages result from each act. So where a company is sued for damages to live stock, and damages are claimed both for a failure to furnish cars and for the negligent manner of running the train, the complaint should set out the damages resulting from each of said acts. *Ayres v. Chicago & N. W. R. Co.*, 16 Am. & Eng. R. Cas. 171, 58 Wis. 537, 17 N. W. Rep. 400.

The complaint averred that the defendant neglected for several days to provide cars at its station to transport cattle, and that when said cars were furnished it neglected and refused to transport said cattle to their destination with reasonable diligence, so that they arrived four days later than they should have done. Held, that it did not appear what part of the delay was caused by the failure to furnish cars, and what part by the delays en route, and that the complaint should be amended in this respect. *Ayres v. Chicago & N. W. R. Co.*, 16 Am. & Eng. R. Cas. 171, 58 Wis. 537, 17 N. W. Rep. 400.

A complaint, setting out a contract for the carriage of horses and payment of the freight thereon, and alleging that the defendant so negligently and carelessly carried said horses that one of them was killed, states a cause of action *ex delicto*, although the amount paid for freight is included in the sum for which judgment is demanded. *Rideout v. Milwaukee, L. S. & W. R. Co.*, 81 Wis. 237, 51 N. W. Rep. 439.

**139. Petition.**—In an action for loss of hogs, an allegation to the effect that defendant did not use proper care in their carriage, but that defendant, its officers, and servants improperly and carelessly managed the boat upon which the hogs were carried, by reason of which careless management they were lost by fire, states a sufficient cause of action. *Carlisle v. Keokuk N. L. Packet Co.*, 82 Mo. 40.—**DISTINGUISHING** *Waldhier v. Hannibal & St. J. R. Co.*, 71 Mo. 514.

Where a contract of shipment contained a stipulation that the shipper "agrees as a condition precedent to his right to recover

any damages for loss or injury to the stock, he will give notice in writing of his claim, etc., before such is removed from place of destination, etc.," and it is alleged as a reason for not making such claim for damages "that defendant by his own wilful act rendered it impossible by refusing to deliver to him the stock at the point of destination, but sent them on another railway line, against plaintiff's protest, to a station one hundred miles distant from any office of defendant; that he first discovered the damage done after the delivery to him at the original place of destination, and did not discover it sooner by reason of defendant's wrongful conduct." Held, that petition contains a clear cause of action, and that the holding of the trial court to the contrary was error. Held, further, that the "removal" in this case was by defendant, and not by plaintiff, but against his protest. *Baker v. Missouri Pac. R. Co.*, 19 Mo. App. 321.

A petition to recover the penalty for violation of a statutory provision requiring double-decked cars for the carriage of sheep need not state that the point to which plaintiff's sheep were to be shipped was a station on the defendant's road, where it alleges that "defendant was conducting a general passenger and freight business over the line of its railroad" between the point of shipment and the point of destination. *Emerson v. St. Louis & H. R. Co.*, 111 Mo. 161, 19 S. W. Rep. 1113.

**140. Account in justice's court.**—Plaintiff filed an account, in an action before a justice, against a company to recover for damages for horses shipped: "To damages to two mares in the loss each of a colt, caused by the negligence of the defendant;" and, after the case had been appealed to court, was allowed to amend by striking out the words "to damages" and inserting in lieu thereof "to deterioration in value." Held, that this did not set up a new cause of action. *Missouri Pac. R. Co. v. Ivy*, 79 Tex. 444, 15 S. W. Rep. 692.

**141. Plea or answer.**—To the extent that a company may make a valid contract in limitation of its liability in the carriage of live stock, such contract will be a matter of defense; and that defense may, in an action on the case, be given in evidence under the general issue, and need not be specially pleaded. *Coles v. Louisville, E. & St. L. R. Co.*, 41 Ill. App. 607.

When sued in case for failing to properly

care for live stock shipped, the company pleaded the general issue and two special pleas, setting up a written contract, and averring a breach thereof by the plaintiff. *Held*, that sustaining a demurrer to one of such special pleas was no ground for complaint, where it appeared that the same matter was admissible in evidence under the general issue. *Wabash, St. L. & P. R. Co. v. Pratt*, 15 Ill. App. 177.

Where a paragraph of answer was filed, alleging, in substance, that the defendant had cars sufficient to transport all live stock ordinarily offered for transportation, but that at the time complained of there was an unusual demand for cars, and all its cars were in use, and on that account the defendant was unable to furnish plaintiff the cars on the day desired, but that it did so as soon thereafter as it could, having due regard to the rights of other shippers, who had demanded transportation at or before that time, it was error to sustain a demurrer thereto, as the answer stated a good defense, and the averments therein could not be proved under the general denial, notwithstanding the allegation in the complaint of ability of the defendant to furnish cars, as the shipper was not bound to prove such allegation. *Pittsburgh, C., C. & St. L. R. Co. v. Racer*, 5 Ind. App. 209, 31 N. E. Rep. 853.

When sued for the loss of live stock, it is competent for the carrier to plead by way of special defense, in connection with the general issue, a special contract with the shipper, whereby he was to accompany the stock and care for it, and that he did so, but failed to take proper care, and the stock was lost in consequence thereof; and the fact that the action is in tort does not prevent such defense being pleaded. *Oxley v. St. Louis, K. C. & N. R. Co.*, 65 Mo. 629.—DISTINGUISHING *Rice v. Kansas Pac. R. Co.*, 63 Mo. 314. REVIEWING *Reade v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 199.

In an action by a shipper of live stock to recover damages thereto, the company pleaded specially a stipulation in the contract of shipment, to the effect that the shipper should give notice in writing of his claim for damages to some agent of the company as a condition precedent to his right to recover damages, and that the company had an agent at the place of destination to which notice could have been given; but the plea did not name the agent or

where he could be found, nor allege that the shipper knew the fact that the company had such agent. *Held*, that the plea was insufficient. *Gulf, C. & S. F. R. Co. v. Wilhelm*, 3 Tex. App. (Civ. Cas.) 558.—FOLLOWING *Missouri Pac. R. Co. v. Harris*, 67 Tex. 166.

**142. Replication.**—Where a company is sued for injuries to live stock during transportation, and sets up a special agreement, to the effect that the owner was to give notice within forty days of his claim for injuries as a condition precedent to the right to sue, the effect of such defense is avoided by a replication showing that within three days after the injury the defendant's agent promised to pay the damages, if plaintiff would put them in a reasonable sum; that he was misled by various promises to pay until after the lapse of the forty days; and that during that time he acted under the belief that defendant meant to pay without suit. *Gulf, C. & S. F. R. Co. v. Tra- wick*, 80 Tex. 270, 15 S. W. Rep. 568, 18 S. W. Rep. 948.—APPROVING AND QUOTING *Ripley v. Aetna Ins. Co.*, 29 Barb. (N. Y.) 557. QUOTING *Martin v. Jersey City Ins. Co.*, 44 N. J. L. 273; *St. Paul F. & M. I. Co. v. McGregor*, 63 Tex. 404.

**143. Matters of defense.**\*—(1) *Valid defense.*—When a contract for the transportation of live stock by railroad contains an express stipulation by the shipper, in consideration of reduced rates, that he will accompany and care for them, and his failure to do so proximately contributes to an injury to them, the carrier is not responsible. *Western R. Co. v. Harwell*, 45 Am. & Eng. R. Cas. 358, 91 Ala. 340, 8 So. Rep. 649.

The carrier of live stock is relieved from liability for injuries thereto if he shows that he provided all suitable means of transportation, and exercised that degree of care which the nature of the property required. It is not sufficient to make the carrier liable to show that the animals shipped were injured. *Heyman v. Philadelphia & R. R. Co.*, 22 J. & S. (N. Y.) 158, 8 N. Y. S. R. 86.—QUOTING *Cragin v. New York C. R. Co.*, 51 N. Y. 63.

Where cattle are shipped for a certain market day, the carrier is not liable for a delay where it appears that they would not have arrived in time for the market of that day if the trains had been on time, and where they were delivered in time for the

\* See also *ante*, 23-27; 131, 132.

market of the next day. *Missouri Pac. R. Co. v. Paine*, 1 *Tex. Civ. App.* 621, 21 *S. W. Rep.* 78.

In an action for damages for keeping horses for a number of days upon a plank floor after their arrival at the destination to which they had been shipped, evidence is admissible of a custom to keep horses upon plank floors in that locality, and that it is impracticable to keep them upon earth floors. *Moses v. Port Townsend S. R. Co.*, 5 *Wash.* 595, 32 *Pac. Rep.* 488.

(2) *Invalid defense.*—Where a company is sued for injuries to cattle by reason of defects in the cars, it cannot defend on the ground that the cars furnished were such as had always been used by it in carrying cattle. In such cases it is competent to show the kind of cars in general use by railroads, but not the usage of the defendant road in furnishing cars. *Leonard v. Fitchburg R. Co.*, 28 *Am. & Eng. R. Cas.* 105, 143 *Mass.* 307, 9 *N. E. Rep.* 667.

A railroad company cannot excuse a failure to forward stock promptly on the ground that it had not the proper appliances for doing so. *Tucker v. Pacific R. Co.*, 50 *Mo.* 385, 3 *Am. Ry. Rep.* 291.—FOLLOWED IN *Faulkner v. South. Pac. R. Co.*, 51 *Mo.* 311.

A written statement given by the shipper of live stock to the carrier, admitting the stock to be in good condition, will not estop him from claiming damages for injuries thereto, on the ground that the giving of such statement induced the carrier to forego an examination at the point of destination, where there is no evidence that it had that effect and that by reason of it no examination was made. *St. Louis, A. & T. R. Co. v. Turner*, 1 *Tex. Civ. App.* 625, 20 *S. W. Rep.* 1008.

A company cannot plead ignorance of the existence of a contract of shipment made by letters and recognized as such by it, on the ground that it was misled by the promise of the shipper to make out a contract at a specified time, where, after notice by the latter to obtain the cars which he was to furnish, it fails unreasonably so to do, so as to relieve it from liability in damages for the consequences of its delay. *Lawrence v. Milwaukee, L. S. & W. R. Co.*, 84 *Wis.* 427, 54 *N. W. Rep.* 797.

#### 144. What evidence is admissible.

—(1) *Generally.*—Where the special contract for the shipment of a car-load of stock provided that the plaintiff could not recover exceeding a certain amount for each mule,

evidence of the real value (whatever it might be) of one of them which was injured was admissible for the purpose of showing that this value was at least equal to the amount specified in the contract. *Georgia R. & B. Co. v. Reid*, 55 *Am. & Eng. R. Cas.* 363, 91 *Ga.* 377, 17 *S. E. Rep.* 934.

In a suit for unreasonable delay in transporting stock to the place of delivery, if the shipper had shipped with a view to have the stock reach its destination on a particular day of the week, and it would have done so had there been no unreasonable delay, it is competent for the plaintiff to prove that that particular day was the market day at the place of delivery, and that, in consequence of the delay, he was compelled to hold his stock, at an expense, until the return of the market day of the next week. *Toledo, W. & W. R. Co. v. Lockhart*, 71 *Ill.* 627.

At a junction where live stock would be transferred from defendants' road to another, the consignee went to the telegraph office of the company and inquired for the stock, but was told that they did not have it. Some hours later he inquired at the same office again by telephone and got an answer from some one that they did not have the stock. It seemed that the stock were lying in the yards during the time. *Held*, in an action for failing to transfer the stock in proper time, that the telephoning an answer, though objected to, was at least *prima-facie* evidence that the answer came from the company's agent. *Rock Island & P. R. Co. v. Potter*, 36 *Ill. App.* 590.

Remonstrances made to the carrier's employes during transportation that cattle are improperly loaded are admissible, in an action against the carrier, to show that the attention of those in charge was called to the difficulty, but what weight is to be attached to such evidence is for the jury. *Black v. Camden & A. R. & T. Co.*, 45 *Barb. (N. Y.)* 40.

Where it is claimed by a shipper of cattle that they were damaged while in transit, and it is shown that during the trip certain of the cars became uncoupled, and were run together to recouple in such a violent manner as to injure the cattle, it is competent to show that one of the brakemen was unfit for duty on account of an injury he had received the night before. *Galveston, H. & S. A. R. Co. v. Johnson*, (Tex.) 19 *S. W. Rep.* 867.

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(2) *To show delay.*—Where the defendant, in a suit for unreasonable delay in transporting stock from the west to the east, set up, as an excuse, that the delay was occasioned by the want of empty cars at a particular point on the route—*held*, that it was competent for the plaintiff, for the purpose of meeting such excuse, to prove that empty cars passed that point, going west, whilst the stock was there awaiting transportation. *Toledo, W. & W. R. Co. v. Lockhart*, 71 Ill. 627.

Where a carrier attempts to excuse a delay in shipping cattle, on the ground that it could not furnish cars sooner on account of the press of business, it is competent for the owner to show that empty cars stood on the side-track at the place of shipment during the time of the delay, and that the cattle were eventually shipped in some of the same cars. *Gulf, C. & S. F. R. Co. v. McCorquodale*, 35 Am. & Eng. R. Cas. 653, 71 Tex. 41, 9 S. W. Rep. 80.

(3) *Death after arrival at destination.*—In a suit against an intermediate carrier of live stock to recover damages caused by a collision, it is competent to prove that, as a result of the collision, certain animals died and other cows lost their calves after arrival at their final place of destination. *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. Rep. 444.

Where a company is sued for damages resulting from the death of certain cattle shipped and from injury to others, it is competent to prove that certain cattle died after delivery to the consignee by reason of injuries negligently received during transportation. *Missouri Pac. R. Co. v. Edwards*, 78 Tex. 307, 14 S. W. Rep. 607.

(4) *Custom or usage.*—Where the contract is silent on the point, evidence of custom or usage among shippers is competent to show that cattle-cars were bedded by shippers and not by the railroad company. *East Tenn., V. & G. R. Co. v. Johnston*, 22 Am. & Eng. R. Cas. 437, 75 Ala. 596, 51 Am. Rep. 489.

Where plaintiff, who was travelling on a freight train in charge of cattle, was injured while on top of the cars by striking an overhead bridge, evidence of a custom of stockmen to walk on top of the cars, which was known to and acquiesced in by the company, is admissible. *Chicago, M. & St. P. R. Co. v. Carpenter*, 56 Fed. Rep. 451.—*APPLYING Doyle v. St. Paul, M. & M. R.*

*Co.*, 42 Minn. 79, 43 N. W. Rep. 787; *Kolsti v. Minneapolis & St. L. R. Co.*, 32 Minn. 133, 19 N. W. Rep. 655; *Flanders v. Chicago, St. P., M. & O. R. Co.*, 51 Minn. 193, 53 N. W. Rep. 544.

(5) *Opinion evidence.*—It is competent to prove damage to cattle during transportation by the opinion of witnesses based on the appearance of the cattle when delivered, and upon their treatment while on the cars, considering the state of the weather and the time they were allowed to stand on the cars without food or water; and a verdict of a jury will not be disturbed if found in accordance with such opinions. *Illinois C. R. Co. v. Waters*, 41 Ill. 73.

Two hundred and fifty mules were shipped, and the carrier was sued for damages in allowing some of them to escape while driving them to water, the alleged negligence being in not providing hands enough for the purpose. *Held*, that it was competent to inquire of a witness, who was shown to have sufficient knowledge of the subject-matter of inquiry, as to how many hands would be necessary to drive 250 mules, under the same circumstances. *North Mo. R. Co. v. Akers*, 4 Kan. 453.

Where suit is brought to recover damages to a valuable trotting mare during transportation, it is competent to prove, in the opinion of witnesses, the speed of the mare both before and after injury, and, assuming that the speed thus fixed is correct, to prove also her value. *Reed v. Romc, W. & O. R. Co.*, 16 N. Y. S. R. 58.

(6) *Documentary evidence.*—Where there is a dispute between the shipper and the carrier as to the terms upon which live stock were shipped, the company's freight-book at the point of shipment, containing a statement of the contract, and the way-bill, are competent evidence as tending to prove the contract. *Jacksonville, N. W. & S. E. R. Co. v. Hall*, 2 Ill. App. 618.

Where a company contracts to carry live stock to a point beyond its own line, in an action against it for unreasonable delay, a letter from an agent of the connecting line to the shipper, reading as follows: "Mr. S. (the defendant's traffic manager) writes that the pigs arrived at Dublin on the 29th of October, but as the company [the defendant] only advised us about half an hour before they arrived, and having more on hand than could be shipped that day, they were not sent forward until the 30th of Oc-

tober," is admissible as evidence of unreasonable delay. *Ruddy v. Midland G. W. R. Co.*, L. R. 8 Ir. 224.

**145. What evidence is inadmissible.**—(1) *Generally.*—The company introduced a witness to prove that the plaintiff had used the stock-passes of the company, and then offered in evidence one of those blank passes, on the back of which was a statement that the owner of stock should feed and take care of them at his own expense and risk, and that he assumed all risk of injury that the animals might do themselves, or that might arise from the delay of trains or otherwise. *Held*, that the evidence did not tend to prove the existence of a pleaded usage to carry poultry only when owner went with it to see that the coops were kept properly righted, and that it was properly rejected. *Evansville & C. R. Co. v. Young*, 28 Ind. 516.

A shipper of live stock sued a company for damages, alleging as negligence that the company first loaded the stock in unsafe cars, which necessitated their reloading, which was done in a negligent manner. Under the terms of the contract of shipment the owner was to load and unload at his own risk. He introduced evidence to show that the car to which the stock were transferred was not properly provided with bedding. *Held*, that plaintiff had assumed the risk, if bedding the cattle was included in the loading; and if not, then a failure to properly bed did not come within the allegations of the complaint; and that in either event the evidence was irrelevant. *Atchison v. Chicago, R. I. & P. R. Co.*, 80 Mo. 213.

Where a company is sued for damages for a failure to furnish cars and to receive and transport cattle, the damages being claimed for cost of keeping them, and for loss of a market, evidence on the part of the company that plaintiff had contracted for the sale of the cattle at their destination, and that they were refused because not such as had been represented, is irrelevant, and therefore improper. *Gulf, C. & S. F. R. Co., v. McCorquodale*, 35 Am. & Eng. R. Cas. 653, 71 Tex. 41, 9 S. W. Rep. 80.

Where a carrier is sued for injuries to horses shipped, evidence of injuries to other horses not sued for is calculated to prejudice the jury, and its admission is reversible error. *Missouri Pac. R. Co. v. Smith*, 84 Tex. 348, 19 S. W. Rep. 509.

(2) *Depreciation in price—Loss of profits.*—In an action for injuries to a jack during transportation, evidence of uncertain profits to have been made by letting the jack to mares is improperly admitted. *Chicago, B. & Q. R. Co. v. Hale*, 83 Ill. 360.

Where plaintiff seeks damages against defendant for breach of a contract to receive and transport cattle upon a specified day, caused by cost of keeping the cattle for the additional period, and by depreciation in the market price, it is incompetent for defendant to show that the depreciation in price was caused by failure of the cattle to conform to the standard, and not by the delay in shipment. *Gulf, C. & S. F. R. Co. v. McCorquodale*, 35 Am. & Eng. R. Cas. 653, 71 Tex. 41, 9 S. W. Rep. 80.

(3) *Custom.*—Evidence to prove a custom among railroads not to receive live stock unless the shipper agrees to hold the railroad harmless for all original delays in taking up freight is incompetent, as such a custom would not be necessary if the law held the railroad harmless for such delays, and it could not prevail over the law if the latter did not hold the railroad harmless. *Missouri Pac. R. Co. v. Fagan*, 35 Am. & Eng. R. Cas. 666, 72 Tex. 127, 9 S. W. Rep. 749.

In an action for injury to stock caused by the negligence of the defendant in delaying their transportation, defendant's counsel asked a witness of the plaintiff what was the custom in such cases as to some one going along with the stock. It did not appear that, even if it was the duty of the shipper to accompany the stock, the performance of such duty would have avoided the injury, or that the remission of such duty contributed thereto. *Held*, that an objection to the question was properly supported, since the fact sought to be elicited was not relevant. *Richmond & D. R. Co. v. Trousdale*, (Ala.) 55 Am. & Eng. R. Cas. 400, 13 So. Rep. 23.

(4) *Hearsay—Res gesta.*—Where, in an action against a railroad company for the loss of a jack in transportation, it was proved that a tramp was found in the car containing the jack, with a stick in his hand, and that the jack was afterwards found dead in the car, with blood running from its mouth and nose, it was incompetent to allow plaintiff to prove a statement made by the tramp in the conductor's presence, soon after his removal from the car: "If it had not been

for lopping them mules over the head I would have froze," as such statement is not a part of the *res gesta*. *St. Louis, I. M. & S. R. Co. v. Weakly*, 35 *Am. & Eng. R. Cas.* 635, 50 *Ark.* 397, 7 *Am. St. Rep.* 104, 8 *S. W. Rep.* 134.

An account of sales rendered by plaintiff's commission merchant to him, containing prices obtained and the weight of cattle sold, is hearsay, and is incompetent evidence in an action against the carrier for damages caused by delay in transportation. *Hess v. Missouri Pac. R. Co.*, 40 *Mo. App.* 202.

In an action to recover the value of stock killed during transportation, the testimony of a witness as to statements made to him by persons at the point of destination as to the value of the stock, as he described it, at that place, is inadmissible. *Southern Pac. R. Co. v. Maddox*, 42 *Am. & Eng. R. Cas.* 528, 75 *Tex.* 300, 12 *S. W. Rep.* 815.

#### 146. Sufficiency of evidence. —

(1) *What is sufficient.*—In an action for injury to live stock, the injury was admitted, plaintiffs claiming that it was caused by a collision which threw the stock against the cars and against each other, while the carrier contended that the injury was caused by the natural restlessness of the stock. *Held*, that the weight to be given to the conflicting evidence was for the jury, and that a verdict in favor of the shipper should not be disturbed. *Indiana, B. & W. R. Co. v. James*, 18 *Ill. App.* 655.

There was a conflict of evidence as to the condition of cattle at the time they were shipped, but the preponderance was in favor of the conclusion that they were in poor condition and unfit for the journey. There was undisputed evidence that great trouble was had in loading on the cars, and that many got down and were injured before they had been carried any distance, and that they were wild, and had been driven from a hundred to a hundred and fifty miles before reaching the place of shipment. *Held*, sufficient evidence to warrant the conclusion that injuries occurring to the cattle while on the cars grew out of their poor condition at the time of shipment. *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 41 *Fed. Rep.* 913.

There was a collision with a freight train carrying cattle, many of which were cows with calf. There was evidence showing that five cows aborted on the train or very soon after leaving it, and that 103 others

did so in the herd during the next 90 days. There was also evidence tending to show that ordinary transportation of cows by rail would not produce such results. On the other hand there was evidence tending to show that such miscarriages in a herd of pregnant cows would cause others to abort that had received no physical injury. A jury found that all the abortions were the result of the collision. *Held*, that the evidence was sufficient to warrant the finding. *Estill v. New York, L. E. & W. R. Co.*, 41 *Fed. Rep.* 849.

Plaintiff brought suit for damages arising from its delay in the transportation of hogs, whereby the latter died from heat. The evidence showed that the delay occurred; that it was apparently unnecessary; that the weather was excessively warm; and that the attention of the trainmen was more than once called to the suffering condition of the hogs; and the defendant failed at the trial to account for the delay. *Held*, that the supreme court could not say there was no evidence of negligence on defendant's part, and that the finding for plaintiff thereon should be affirmed. *Ball v. Wabash, St. L. & P. R. Co.*, 25 *Am. & Eng. R. Cas.* 384, 83 *Mo.* 574.

A petition in an action for damages to live stock alleged that the plaintiffs were partners, and that the cattle were shipped by their partner and representative, P. A witness testified that he knew the plaintiffs, that he bought part of the lot of cattle shipped, and that they were in the stock-pen at the railroad. P. testified that the cattle were the lot of cattle shipped by him over defendant's railroad. *Held*, that the evidence authorized the inference that the cattle belonged to plaintiffs as alleged. *Good v. Galveston, H. & S. A. R. Co.*, (Tex.) 40 *Am. & Eng. R. Cas.* 98, 11 *S. W. Rep.* 854.

Where the evidence shows that there was unnecessary delay in the transportation of live stock; that the cattle were needlessly confined in the cars at the different stations; and that they were bruised and bumped by the stalling of the train on account of its size and weight, a cause of action against the carriers for gross negligence and carelessness is sufficiently established. *Good v. Galveston, H. & S. A. R. Co.*, (Tex.) 40 *Am. & Eng. R. Cas.* 98, 11 *S. W. Rep.* 854.

(2) *What is not sufficient.*—A judgment against a railroad for the value of a car-load

of hogs, claimed by the shipper to have been consigned to a third party without his permission, reversed on the weight of evidence. *Chicago & A. R. Co. v. Purvines*, 58 Ill. 38, 10 Am. Ry. Rep. 369.

Where livestock are carried under a special contract, providing that the shipper shall have the care of the stock while in transportation, and shall unload, feed, and water the animals at his own risk and expense, the shipper cannot recover for losses occasioned to said stock solely upon evidence of a failure to deliver the same. *Terre Haute & L. R. Co. v. Sherwood*, 55 Am. & Eng. R. Cas. 326, 132 Ind. 129, 31 N. E. Rep. 781.

The opinion of the shipper as to what he would have made if the contract of shipment had been performed is no proof at all, and as there was no evidence of the market price of stock, either at the point of shipment or of destination, there is no sufficient proof of damages. *Birney v. Wabash, St. L. & P. R. Co.*, 20 Mo. App. 470.

The fact that a horse is found with his leg broken and otherwise injured at the end of the transportation, and that the cars stood for one or two hours on the track at the place of destination before the horse was unloaded, and that the slats of the car-door, which were in good order at the time of starting, were broken and repaired during transportation, will not make the carrier liable for the injury where there is no evidence to show that either the broken slats or allowing the car to stand on the track without unloading was in any wise connected with the injury, or that the company could in any way have prevented the injury. *Hayman v. Philadelphia & R. R. Co.*, 22 J. & S. (N. Y.) 158, 8 N. Y. S. R. 86.

Receipts and written statements of the good condition of cattle given to a railway company by the shipper's agents in charge of them during the transit, while adding to his burden of proving their bad condition, may yet be contradicted by him by showing that they were not true. *St. Louis, A. & T. R. Co. v. Turner*, 1 Tex. Civ. App. 625, 20 S. W. Rep. 1008. *Missouri Pac. R. Co. v. Fennell*, 79 Tex. 448, 15 S. W. Rep. 693.—FOLLOWING *Missouri Pac. R. Co. v. Ivy*, 79 Tex. 444, 15 S. W. Rep. 692.

Plaintiff made a contract with defendant

company for the through shipment of sheep, but a connecting line refused to carry them, and he was compelled to reship over another line. In a suit against the company first carrying he introduced in evidence a written statement of certain commission merchants at the place of destination showing expenses and what the sheep sold for, and also the written contract entered into with the second company and a statement showing the amount of freight paid. Held, that the defendant company was not a party to any of these transactions, and was not bound by them; and that, if the facts contained in the writings were pertinent, they should have been proven by the direct testimony of the parties having knowledge of the same. *Texas & P. R. Co. v. Scrivener*, 2 Tex. App. (Civ. Cas.) 284.

#### 147. Presumption of negligence.\*

—In an action for damages to stock carried, defendant's evidence merely consisted of a showing from the appearance of the car in which the stock had been carried that the train had not been derailed. No employé in charge of the train was produced to account for the injury. Held, that the statutory presumption of the company's negligence under the Code was strengthened by the presumption of fact arising from the failure of the company to produce material witnesses, and that a refusal to set aside a verdict against the company was a proper exercise of the trial court's discretion. *Columbus & W. R. Co. v. Kennedy*, 31 Am. & Eng. R. Cas. 92, 78 Ga. 646, 3 S. E. Rep. 267.

**148. Burden of proof, when on carrier.**—When the plaintiff has shown injury to one of his mules while in the custody of the carrier, the onus is on the carrier to show that it did not result from any negligence on the part of his servants or agents, or that it was within one of the specified exceptions in the bill of lading. *Western R. Co. v. Harwell*, 45 Am. & Eng. R. Cas. 358, 91 Ala. 340, 8 So. Rep. 649.

Where live stock were shipped under a contract relieving the company from liability as to certain specified causes, and an injury occurred, the burden of proof is on the carrier to show not only that the cause of the injury is within the exceptions, but that the injury was without negligence on the

\* See also *ante*, 39.

† See also *ante*, 39, 100.

part of the defendant. *East Tenn. V. & G. R. Co. v. Johnston*, 22 Am. & Eng. R. Cas. 437, 75 Ala. 596, 51 Am. Rep. 489.

Where a carrier of live stock seeks to escape liability for loss and injury thereto, on the ground that the cattle were injured by their inherent viciousness and disposition to hurt each other, the burden is upon him to prove these facts; and if this issue was not raised by pleading and proof, an instruction as to the exemption of the carrier from liability in such cases is properly refused. *Ft. Worth & D. C. R. Co. v. Greathouse*, 49 Am. & Eng. R. Cas. 157, 82 Tex. 104, 17 S. W. Rep. 834.

**140. Burden of proof, when on shipper.\***—Where live stock are shipped under a contract limiting the carrier's liability, and providing that the shipper shall take charge of the animals during transportation, the burden of proof is upon him, in an action to recover for loss or injury, to show that it resulted from the negligence or default of the carrier. *St. Louis, I. M. & S. R. Co. v. Weakly*, 35 Am. & Eng. R. Cas. 635, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. Rep. 134.

Ordinarily the burden of proof is on the carrier to account for stock delivered to it and lost during transit, but in case of special contract whereby the owner agrees to take charge of the stock, the burden of proving negligence on the part of the carrier is upon him. *McBeath v. Wabash, St. L. & P. R. Co.*, 20 Mo. App. 445.—QUOTED IN *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129.

Where the owner of live stock contracts to load and unload and to take care of the stock during transit, the burden of proving negligence on the part of the carrier, causing a loss or injury to the stock, is on the owner. *Clark v. St. Louis, K. C. & N. R. Co.*, 64 Mo. 440, 17 Am. Ry. Rep. 284.

Under a special contract for the carriage of cattle upon condition that the company is liable for negligence only, the burden of proving negligence in an action for injury to the cattle is upon the plaintiff. *Harris v. Midland R. Co.*, 25 W. R. 63.

**150. Variance.**—(1) *Material.*—A complaint against a carrier of live stock, claiming damages for a refusal to receive and carry the stock, is not supported by evidence showing a failure on the part of the carrier

to construct and keep in repair a fence around its stock-pens, and a failure to keep the cattle-chutes in proper repair, whereby cattle tendered for shipment escaped from the pens and their loading on the cars was delayed until the train which was to carry them had left the station. Nor can a refusal to receive and carry be predicated upon the fact that the train was not held beyond its regular time until the cattle could be loaded. *Louisville, N. A. & C. R. Co. v. Godman*, 104 Ind. 490, 4 N. E. Rep. 163.

A complaint in an action against a common carrier for injuries to cattle transported charged that they were shipped under a written contract which bound the carrier to safely deliver at the terminus of its own road to the next connecting carrier, which it failed to do. The proof showed that the cattle were safely carried to the end of the defendant's road and there delivered to the next connecting road, and were changed to other cars in violation of a contract with the defendant's agent, and were injured by reason of defects in such cars. Held, that there was a fatal variance between the allegations and the proofs. *Alabama G. S. R. Co. v. Thomas*, 32 Am. & Eng. R. Cas. 464, 83 Ala. 343, 3 So. Rep. 802.

In order to justify an instruction that the jury should take into consideration the variance in the market value of stock at the point of destination between the time when they should have reached there, had they been shipped according to contract, and the day of their arrival, it must be averred in the petition that the shipper informed the agent, or that he knew at the time of making the promise that the stock were designed for sale in that market. But the knowledge of such fact on the part of the agent may be inferred from all the facts and circumstances in evidence; but to admit such proof and make it a basis of recovery, the fact must be alleged in the petition. *Gelvin v. Kansas City, St. J. & C. B. R. Co.*, 21 Mo. App. 273.

Where a railroad company is sued for failing to carry cattle, and the averment is that the defendant company agreed to carry over its own line only, there can be no recovery under proof of a through bill of lading, where it appears that the injury was done after a delivery to a connecting line. *San Antonio & A. P. R. Co. v. Mayfield*, 4 Tex. App. (Civ. Cas.) 223, 15 S. W. Rep. 503.

A verdict against a railroad for the value

\* See also ante, 45.



of a calf that had been carried by the company is not supported by the evidence, where it is shown that the calf did not die until 10 days after its delivery, and there was no evidence to show any lack of care in feeding and watering or otherwise tending while in the hands of the company; that it was sick when delivered to the company, and that there was nothing to show directly that its death was not due to natural causes. *Missouri Pac. R. Co. v. Heath*, (Tex.) 18 S. W. Rep. 477.

(2) *Immaterial*.—A request to charge the jury that, inasmuch as the declaration charged the defendant merely as a common carrier, but the proof was that the stock was shipped under a special contract, the proof did not support the declaration, and that the verdict must be for the defendant, was properly denied. *Coupland v. Housatonic R. Co.*, 55 Am. & Eng. R. Cas. 380, 61 Conn. 531, 23 Atl. Rep. 870.

If the live stock delivered to the carrier consisted of both cattle and hogs, it is not a material variance that they are described in the written contract as one car-load of cattle, the action being treated as one of tort, and not as founded upon the contract. *Central R. Co. v. Pickett*, 87 Ga. 734, 13 S. E. Rep. 750.

The averment of a declaration in a suit for the value of hogs, which were shipped on defendant's railroad, and died through the fault of defendant, was, that the train was stopped and was permitted to stand for a long space of time in a piece of timber, where the air did not circulate. The evidence showed that the train did stop in a piece of timber, but it further showed that it was in a cut on the road as well as the timber. *Held*, that there was no variance. *Toledo, W. & W. R. Co. v. Thompson*, 71 Ill. 434.

**151. What instructions are proper.**—An instruction to the jury that "the evidence is undisputed that a reasonable time for the delivery of said animals, after the delivery of the same to the railroad, is ten or twelve hours, and if their being kept on the car for a longer time by the defendant caused them to be vicious and to injure one another, the defendant is liable to answer in damage for such injury," was not inconsistent with testimony that "usually stock in shipping go through very nicely in ten, fifteen, or twenty hours." *Richmond & D. R. Co. v. Trousdale*, (Ala.) 55 Am. & Eng. R. Cas. 400, 13 So. Rep. 23.

An instruction that "if the defendant, having undertaken to deliver the stock, failed to deliver it in a safe condition within a reasonable time, the presumption of negligence arises, and the burden of proof is shifted to the defendant to excuse itself from negligence," was not erroneous as assuming or declaring that the stock was in a sound condition when shipped, and that such condition was not the result of negligent transportation. *Richmond & D. R. Co. v. Trousdale*, (Ala.) 55 Am. & Eng. R. Cas. 400, 13 So. Rep. 23.

An instruction that the responsibility of a railroad continued from the time stock were intrusted to it for transportation until the same reached their destination, in a suit to recover for a loss and injury to the animals, is not open to the objection that it asserts an absolute liability, without regard to any defense set up by defendant. *McCollom v. Indianapolis & St. L. R. Co.*, 94 Ill. 534.

The court, after instructing as to the duty of the carrier and his liability and the burden of proof, charged that if the shipment of the stock was unable to proceed by reason of a storm and extreme cold, and defendant unloaded the cattle without the consent of the plaintiffs and placed them in yards insufficient in strength or size to ordinarily prevent cattle from escaping therefrom, and they escaped therefrom without any fault or negligence on the part of the plaintiffs; and if, in placing the stock in insufficient yards, the defendant did not exercise reasonable care and prudence, and the escaping cattle were lost and perished without plaintiffs' contributory negligence, a verdict for the plaintiffs must be returned; but that if the cattle were in charge of one of the plaintiffs and were unloaded at his request, to be sheltered and fed, and he took charge of the same and placed them in the yards from which they escaped and perished, then the defendant would not be liable; and that if defendant was requested to place the cars of cattle next the coal-sheds and failed to comply with such request, its failure would not as a matter of law be negligence; and that all the facts and circumstances in evidence must be considered in determining the defendant's negligence—*held*, that the instruction was as favorable to the defendant as it had any right to claim, and that, although it might be erroneous, it formed no ground for reversal.



*Chapin v. Chicago, M. & St. P. R. Co.*, 42 Am. & Eng. R. Cas. 542, 79 Iowa 582, 44 N. W. Rep. 820.

An instruction hypothesizing an agreement for shipment of cattle and hogs, a delivery of them at the time and place of shipment, and an averment of failure, detention, and delay on part of defendant, and consequent shrinkage in weight, and expenses for feeding and caring for stock during delay; and a further averment of loss in market price or value at place of consignment because of the delay; and fixing the measure of damages as the expense incurred in feeding and caring for said live stock during the detention over and above the expense of keeping them at home, and also any additional loss by shrinkage in weight because of delay, as well as difference or loss in market price because of said delay, is proper. *Armstrong v. Missouri Pac. R. Co.*, 17 Mo. App. 403.—FOLLOWING *Glasscock v. Chicago & A. R. Co.*, 69 Mo. 589; *Sturgeon v. St. Louis, K. C. & N. R. Co.*, 65 Mo. 570.

A train conveying stock accompanied by the owner was delayed by water submerging the track, and the owner requested the conductor to place the cars in a position where the stock could be unloaded and cared for, which he failed to do. There was some evidence tending to show that the engine was disabled by the negligence of the conductor in trying to run through the water. *Held*, that it was proper to instruct the jury that if the engine was disabled by such negligence, then a refusal to place the cars where the stock could be unloaded would not be excused by a want of motive power. *Bills v. New York C. R. Co.*, 3 Am. & Eng. R. Cas. 318, 84 N. Y. 5.

**152. What instructions are improper.**—In charging as to the common-law liability of the company, the court treated it as an insurer of the animals transported against all loss or injury from whatever cause except the acts of God or the public enemy. In view of the testimony tending to show that the loss may have resulted from the intrinsic qualities and propensities of the live stock transported, without the fault of the company, the court should have added a further exception, relieving the company from liability if the jury found that the loss or injury was attributable to the nature and propensities of the animals themselves, and could not have been pre-

vented by ordinary diligence on the part of the company. *St. Louis & S. F. R. Co. v. Clark*, 55 Am. & Eng. R. Cas. 367, 48 Kan. 321, 29 Pac. Rep. 312.

A lot of mules were shipped, and defendant company was sued for allowing some of them to escape while being driven to water after they had arrived at the end of its road. It became a question in the case as to whether defendant's duty as common carrier ceased upon the arrival of the mules at the end of its road, or whether it continued liable as common carrier until they were delivered to a connecting line. *Held*, that, in instructing the jury as to the amount of care required, the distinction should have been made between its duty if it was acting as a common carrier, and its duty if it was acting as warehouseman. *North Mo. R. Co. v. Akers*, 4 Kan. 453.

After a company had received plaintiff's cattle for shipment, it allowed them to escape with cattle belonging to a third party. Plaintiff sued for a loss of part of his cattle, and for expenses in recapturing others. The evidence showed that plaintiff and the other owner paid a certain sum in doing so, but there was nothing showing whether any of the cattle, either lost or recovered, belonged to plaintiff. *Held*, that it was error to instruct the jury that they could assess plaintiff's damages in a sum bearing the same proportion to the entire sum paid out as his cattle did to the whole number of cattle escaping. *Kansas Pac. R. Co. v. Nichols*, 9 Kan. 235, 5 Am. Ry. Rep. 275.

In an action for damages to stock while being transported on defendant's cars, it is error to instruct the jury that "the car must be sufficiently strong to resist the struggles of the stock, and the company is liable for any loss occasioned by its neglect in this regard, in spite of the fact that the animals are vicious and unruly, upon the principle that it is within its power to provide those which are actually and absolutely sufficient." *Selby v. Wilmington & W. R. Co.*, 113 N. Car. 588, 18 S. E. Rep. 88.

Where there is no evidence that a railway company received cattle for carriage otherwise than under a special contract evidenced by ticket given to the shipper releasing the company from any liability for delay, it is error for the judge to leave it to the jury to say whether the company received the cattle as common carriers or whether they received them under a special contract. *York*,

*N. & B. R. Co. v. Crisp*, 14 C. B. 527, 2 C. L. R. 1357, 18 Jur. 606, 23 L. J. C. P. 125.

**153. Prayers for instructions.**—In an action for freight for carrying live pigeons, where neither the pleadings nor anything in the evidence on the trial indicated in what character the plaintiffs conducted the carrying, the refusal of requests to charge, which seek to avert liability for injury to the pigeons carried, upon an assumption that common carriers are not liable for such injury to live animals in the course of transportation, is not error. *American Merchants' U. Exp. Co. v. Phillips*, 29 Mich. 515.

Where a carrier of horses is sued for a delay in shipment, and introduces some evidence in defense tending to show that the delay was due to atmospheric causes over which it had no control, it is entitled to the benefit of such evidence; and it is error to refuse to charge the jury upon the effect of such evidence. *International & G. N. R. Co. v. Hynes*, 3 Tex. Civ. App. 20, 21 S. W. Rep. 622.

**154. Questions for the jury.\***—In an action to recover damages for not properly feeding, watering, and caring for stock during transportation, the company contended that the only contract of shipment was a special contract specifying that plaintiff should accompany the stock and attend to watering and feeding; while plaintiff denied this, and said that the only contract was the one contained in the bill of lading, except that there was an oral contract by which he was to have a ticket free. It appeared that plaintiff obtained a ticket at reduced rates, but rode on a passenger train. *Held*, that the question as to what the contract was, and the rights of the parties thereunder, should have been submitted to the jury. *Cincinnati, N. O. & T. P. R. Co. v. Disbrow*, 76 Ga. 253.

A company was sued for a delay in delivering cattle in time for the market of a certain day. After allowing for the ordinary delays of freight trains, it was doubtful whether, if there had been no special delay, the train would have arrived in time for the market of that day. The stock were delivered in the evening and were ready for the market the next day. *Held*, that the question of the company's negligence as to delay was for the jury. *Wabash, St. L. & P. R. Co. v. McCasland*, 11 Ill. App. 491.

A train containing stock accompanied by the owner was delayed by water submerging the track, and the owner requested the conductor to place the cars in a position where he could unload and feed the stock, which he declined to do. The engine was disabled by running into the water, but it appeared that another engine could have been had 43 miles away, but the conductor failed to telegraph for it. *Held*, that there was no error in submitting to the jury the question whether it was not gross negligence for defendant to omit to send for the engine, if it could be had 43 miles distant. *Bills v. New York C. R. Co.*, 3 Am. & Eng. R. Cas. 318, 84 N. Y. 5.—*APPROVING Willis v. Long Island R. Co.*, 34 N. Y. 679.

Where a company defends an action for injuries to live stock shipped, on the ground that the plaintiff entered into a written contract, agreeing to give notice of any claim for damages to its station agent before the stock were removed, it is a question for the jury to determine whether, under all the facts of the case, such requirement of written notice was reasonable or not. *Gulf, C. & S. F. R. Co. v. Wright*, 1 Tex. Civ. App. 402, 21 S. W. Rep. 80.

The validity of a stipulation in a contract for the shipment of live stock, requiring the owner to give notice of a claim for damages within one day after delivery of the cattle at the place of destination, as a condition precedent to his right of recovery, depends upon the circumstances of each particular case; therefore when a carrier sets up such defense it is error for the court to decide, as a question of law, on demurrer, that the provision is void, but it should be left to the jury to determine its validity under all the facts of the case. *Missouri Pac. R. Co. v. Childers*, 1 Tex. Civ. App. 302, 21 S. W. Rep. 76.—*QUOTING Missouri Pac. R. Co. v. Harris*, 67 Tex. 172; *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 132; *Texas & P. R. Co. v. Adams*, 78 Tex. 374; *Ft. Worth & D. C. R. Co. v. Greathouse*, 82 Tex. 111.

**155. Verdict.**—In an action for the loss of three horses, lost by negligence, and for three which died from the same cause, the value of all being placed at \$355, and for damages to two car-loads, the jury returned a verdict for \$335.84. *Held*, that it was apparent that the damages were awarded upon both causes of action set forth in the petition, and that neither the pleadings nor the proof justified a verdict for general

\* See also *ante*, 44.

charges. *Hale v. Missouri Pac. R. Co.*, 36 Neb. 266, 54 N. W. Rep. 517.

A verdict in favor of the plaintiff, in an action for a failure to deliver cars at a certain time and to transport cattle to their place of destination by a certain time is not supported by the evidence, where plaintiff admits that there was no contract to deliver the cattle at a certain time, and there was no contradiction, but that the cattle were delivered at the time alleged in the complaint, as agreed upon. *Texas Trunk R. Co. v. Pannill*, 4 Tex. App. (Civ. Cas.) 471, 17 S. W. Rep. 1100.

In an action to recover for damages to live stock carried by a railway, the evidence showed that in part the damages were due to the acts of the carrier and in part to the acts of the owner in overcrowding them in the cars. The jury returned a general verdict against the company in a sum not greater than the damages, which were claimed to be the result of the acts of the carrier. *Held*, no ground for setting aside the verdict. *Houston & T. C. R. Co. v. Hester*, (Tex.) 7 S. W. Rep. 776.

**156. Measure of damages, generally.\*—(1) Statement of general rule.**—The measure of damages for injuries sustained by cattle during transportation, through the negligence of the carrier, is the difference in their value between the time of shipment and the time of delivery. *Black v. Camden & A. R. & T. Co.*, 45 Barb (N. Y.) 40.

The measure of damages for injuries to live stock by a common carrier is the difference in its value when delivered and the value it would have had if not damaged in the course of transportation. *Estill v. New York, L. E. & W. R. Co.*, 41 Fed. Rep. 849.

And this rule as to the measure of damages is the same whether the owners intended to sell them in the market or to keep them on their farms for breeding purposes. *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. Rep. 444.

Where a horse dies while in the hands of a common carrier through its negligence, the measure of damages is the value of the horse at the place of delivery by the carrier

to the owner or consignee. *Davis v. New York & E. R. Co.*, 1 Hill. (N. Y.) 543.

Where cattle are shipped and the charges are not prepaid, the measure of damages for injuries thereto, resulting in death, is the value of the cattle at the place of destination, less the freight charges; and this is so though the cattle are injured while in the hands of an initial carrier and the point of destination is a place beyond its line. *East Tenn., V. & G. R. Co. v. Johnston*, 22 Am. & Eng. R. Cas. 437, 75 Ala. 596, 51 Am. Rep. 489.

Where a company fails to furnish suitable cars for the shipment of cattle, or fails to transport the same within a reasonable time, it is liable in damages; and the measure of damages is the difference in the value of the cattle at the time of their arrival at the place of destination and their value at same place at the time when they should have arrived. *Missouri Pac. R. Co. v. Nicholson*, 2 Tex. App. (Civ. Cas.) 147.

(2) *Its extent and limits.*—The measure of damages in an action to recover for injuries to live stock is limited to such as occur up to the time of their arrival at the place of destination; and the expense to the owner of feeding them for two days after their arrival, and before he accepted them, due to some misunderstanding about the amount of charges, cannot be recovered. *Louisville & N. R. Co. v. Trent*, 16 Lea (Tenn.) 419.

The rule which makes the measure of damages the difference between the value of goods at the place of shipment and their value at the point of destination applies to cases where the goods are never delivered at all at their ultimate destination, and not where there has been loss sustained by the failure to start them on time from the point of shipping. *Texas Pac. R. Co. v. Nicholson*, 21 Am. & Eng. R. Cas. 133, 61 Tex. 491.

Where it is shown that a large part of a car-load of horses consists of mares with foal, there is an inherent defect in such freight, and a correct measure of damages for total loss while in the carrier's hands is the price, less the freight charges, which they would have brought at the place of destination, in the condition which they would have been in had they been transported with proper care. *Missouri Pac. R. Co. v. Fagan*, 35 Am. & Eng. R. Cas. 666, 72 Tex. 127, 2 L. R. A. 75, 9 S. W. Rep. 749.

\* Damages against carriers of live stock for failing to transport, and for delay in shipment and delivery, see note, 9 L. R. A. 450.

Damages for negligent loss of or injury to live stock while being carried, see note, 9 L. R. A. 451.

In assessing damages for an injury to live stock which necessitated killing it, only the net amount which should have been realized from a sale of it, after reasonable allowance made for time and trouble required in effecting the sale, should be deducted from the value of the stock. *Dean v. Chicago & N. W. R. Co.*, 43 Wis. 305.

Where race-horses are shipped, and some are killed and others injured, the measure of damages, as to those killed, is not what the owner might have made by the horses on the track, but their reasonable market value in cash at the place where the loss occurred; and as to those injured, the damages are the actual loss which the owner sustains by reason of the injuries, which is to be determined by the jury from all the evidence and the facts and circumstances of the case. *Ormsby v. Union Pac. R. Co.*, 2 McCrary (U. S.) 48, 4 Fed. Rep. 706.

Where a shipper of cattle seeks to recover damages to cattle while being carried, and the issue is made as to whether the damage was caused by the negligence of the company, an instruction states the law correctly which tells the jury that if plaintiff is entitled to recover, the measure of damages is the difference between the value of the cattle as they were at and when they reached the place of destination and their value at the same place and time had they arrived in good condition; but that, if they find that the cattle were not damaged by the company, or its agents, or employes, then they must find for the defendant. *Galveston, H. & S. A. R. Co. v. Johnson*, (Tex.) 19 S. W. Rep. 867.

An instruction to the jury that the measure of damages for injury to live stock was the difference in the market value of the stock if they had been delivered without delay and their market-value after delivery in an unsound condition was not erroneous, as declaring or assuming that the stock was injured by unreasonable delay in transportation. *Richmond & D. R. Co. v. Trousdale*, (Ala.) 55 Am. & Eng. R. Cas. 400, 13 So. Rep. 23.

(3) *Under special contract.*—The cause of action being the negligence which caused the killing of the horse, outside of the contract under which he was being transported, the plaintiff is entitled to recover, if at all, the full value of the animal, and is not limited to the sum stated in the contract as the maximum for which the company would be

liable in the event of loss or injury; though the contract of affreightment, containing the limitation as to the liability for loss or damage, is admissible as evidence on the question of value. *Louisville & N. R. Co. v. Kelsey*, 42 Am. & Eng. R. Cas. 584, 89 Ala. 287, 7 So. Rep. 648.

Where it appeared that there was a special contract exempting defendant from liability for any loss by suffocation of the hogs, and that several were suffocated in the cars—held, that, if this resulted from the negligence of defendant, plaintiff was entitled to recover for the loss, and that the measure of his recovery would be the difference in the value of the hogs when alive and when dead at the point of delivery. *Sturgeon v. St. Louis, K. C. & N. R. Co.*, 65 Mo. 569.—FOLLOWED IN *Carroll v. Missouri Pac. R. Co.*, 88 Mo. 239. QUOTED IN *Jones v. Chicago & A. R. Co.*, 28 Mo. App. 28.

Where a contract was made for the furnishing of a stock-car for the purpose of transportation of live stock, with an agreement to pay the regular, ordinary price for said car, upon a refusal to furnish the car and to ship the stock by the railroad company, the measure of damages is the difference between the market price or value of plaintiff's property at the destination to which it was to have been carried, at the time it would have arrived there if the carrier had performed its contract, and its value at the same time at the place from which it was to have been carried. *Birney v. Wabash, St. L. & P. R. Co.*, 20 Mo. App. 470.

Only such damage as might be reasonably considered as within the contemplation of the parties as likely to happen, in case there was a failure to comply strictly with the terms of the special contract of shipment, should be given. It is not required to state specifically in the pleadings the details which make up the constitutive facts. *Armstrong v. Missouri Pac. R. Co.*, 17 Mo. App. 403.

Where an animal is shipped under a contract providing that in case of loss its value at the place of destination shall be taken as the measure of damages, there can be no recovery, in case of total loss, of an amount greater than the amount for which the animal is already sold to the consignee. *Gulf, C. & S. F. R. Co. v. Key*, 4 Tex. App. (Civ. Cas.) 448, 16 S. W. Rep. 106; modifying 16 S. W. Rep. 543.

**157. Proximate and remote damages.**—Suit was brought to recover damages for the breach of a verbal contract for the transportation of cattle, and among the items of damage was the value of fifteen head, which escaped during a stampede and which were not recovered, the stampede being caused, as alleged, during a delay in keeping the cattle before shipment, by their getting hungry and thirsty. *Held*, that the recovery was limited to such damages as were the natural, direct, and proximate loss occasioned by breach of the contract to carry; and that the question whether the stampede and the consequent loss were the direct and proximate result of the breach of contract was a question for the jury. *Galveston, H. & S. A. R. Co. v. Stovall*, 3 *Tex. App. (Civ. Cas.)* 307.

In an action for injuries sustained by a jack during transportation, plaintiff cannot recover for loss of profits to be made by letting him to mares, such profits not being certain and presumably not having been within the contemplation of the parties. *Chicago, B. & Q. R. Co. v. Hale*, 83 *Ill.* 360.

Defendant, in receiving cattle from a connecting carrier, unloaded them to transfer them to its own cars, whereupon officers of the law seized them under the statute prohibiting the introduction of Texas, Mexican, or Indian cattle into the state, except under certain restrictions, and imposed a fine upon the owner for a violation of the statute, and sold the cattle to pay the fine and costs. The owner then sued the railroad company for damages, claiming that the seizure would not have taken place if the cattle had not been unloaded. *Held*, in the absence of anything to show that defendant was bound to continue the transportation without a change of cars, or that it knew that they were of the kind of cattle that it was unlawful to bring in, that it was not liable for the unloading, and that the damages suffered by plaintiff were too remote to be recovered. *McAlister v. Chicago, R. I. & P. R. Co.*, 7 *Am. & Eng. R. Cas.* 373, 74 *Mo.* 351.—**DISTINGUISHING** *Streeter v. Horlock*, 7 *Moore* 283.

**158. Loss of market—Decline in prices.\***—Where a carrier of live stock fails to transport them to the place of destination in time for market on a certain day,

according to its agreement, the measure of damage is the difference between their market value in good condition on the day they should have been delivered and their market value in the condition in which they were when delivered. *Smith v. New Haven & N. R. Co.*, 12 *Allen (Mass.)* 531.—**QUOTED** IN *Bamberg v. South Carolina R. Co.*, 9 *So. Car.* 61. **REVIEWED** IN *Weston v. Grand Trunk R. Co.*, 54 *Me.* 376.—*Sangamon & M. R. Co. v. Henry*, 14 *Ill.* 156.—**DISTINGUISHED** IN *Priestly v. Northern I. & C. R. Co.*, 26 *Ill.* 206.—*Kent v. Hudson River R. Co.*, 22 *Barb. (N. Y.)* 278.—**REVIEWING** *Wilson v. York, N. C. & B. R. Co.*, 18 *Eng. L. and Eq.* 553.—**NOT FOLLOWED** IN *Jones v. New York & E. R. Co.*, 29 *Barb. (N. Y.)* 633; *Kirkland v. Leary*, 2 *Sweeny (N. Y.)* 677.—*Gulf, C. & S. F. R. Co. v. McCarty*, 82 *Tex.* 608, 18 *S. W. Rep.* 716. *Ft. Worth & D. C. R. Co. v. Greathouse*, 49 *Am. & Eng. R. Cas.* 157, 82 *Tex.* 104, 17 *S. W. Rep.* 834. *Texas Pac. R. Co. v. Nicholson*, 21 *Am. & Eng. R. Cas.* 133, 61 *Tex.* 491. *King v. Woodbridge*, 34 *Vt.* 565.

But evidence to show a decline in the market between the time of their arrival and the time when they were sold is not admissible. *Glascok v. Chicago & A. R. Co.*, 69 *Mo.* 589.—**FOLLOWED** IN *Armstrong v. Missouri Pac. R. Co.*, 17 *Mo. App.* 403.

Where it is sought to recover for the loss of hogs while in course of transportation, if it usually took twenty-four hours to get a car of hogs from the place of shipment to the place of destination, and the hogs were started from the place of shipment in the evening of a certain day, then the price of hogs at the place of destination on the next day after such shipment should not be taken as the basis of damages. *Illinois C. R. Co. v. Hall*, 58 *Ill.* 409, 11 *Am. Ry. Rep.* 95.

In an action against a carrier for damages arising from delay in transporting live stock to market, where it appears that the stock should have arrived in time for the market on Thursday, but did not arrive until Friday evening, and there was no market in which they could be sold on Saturday, the owners may recover for the shrinkage and depreciation in value and the expense of keeping the stock from Thursday until the following Monday. But if the stock could have been sold on Saturday, there can be no recovery for a depreciation or expense

\*See also *ante*, 37, 38.



of keeping beyond that day. *Ayres v. Chicago & N. W. R. Co.*, 40 Am. & Eng. R. Cas. 108, 75 Wis. 215, 43 N. W. Rep. 1122.

A verdict for \$745 against a railroad company for not carrying and delivering cattle in proper time and in proper condition is sustained by evidence showing that they sold for \$5027.55, but that if they had been properly delivered they would have sold for 25 to 35 per cent more. *Missouri Pac. R. Co. v. Russell*, (Tex.) 18 S. W. Rep. 594.

**150. Deterioration in quality or condition.**—Where the owner of live stock sues to recover damages for a delay in transportation, he is entitled to recover both for a decline in the market and for extra shrinkage of the stock caused by the delay. *Sturgeon v. St. Louis, K. C. & N. R. Co.*, 65 Mo. 569.—FOLLOWED IN *Armstrong v. Missouri Pac. R. Co.*, 17 Mo. App. 403.—*Boaz v. Central R. Co.*, 87 Ga. 463, 13 S. E. Rep. 711.

The fact that cattle are allowed to stand for some time in the cars without food is a proper element of damages in an action against the carrier, where it was under circumstances where the owner could not be expected to provide food. *Illinois C. R. Co. v. Waters*, 41 Ill. 73.

Where live stock are shipped, and some are never delivered and others are delivered in an injured condition, the measure of damages is the value of the animals not delivered at the place of destination and the actual damage incurred on account of the injuries to the others. *Wallingford v. Columbia & G. R. Co.*, 30 Am. & Eng. R. Cas. 40, 26 So. Car. 258, 2 S. E. Rep. 19.

The general rule as to the measure of damages for injuries sustained by cattle during transportation is the difference between their market value at the place of destination, in the condition in which they are delivered, and what would have been their market value if they had not been injured; but it only applies where cattle are shipped to be sold in the market, and not where they are intended to be kept by the owner. In the latter case the measure of damages is the actual damage to the stock and any expense that the owner may have incurred in treating and in caring for them until cured. *Gulf, C. & S. F. R. Co. v. Godair*,

3 Tex. Civ. App. 514, 22 S. W. Rep. 777.—FOLLOWING *Jones v. George*, 61 Tex. 354; *Hadley v. Baxendale*, 9 Exch. 341.

In an action against a railroad company for damages caused by a delay in shipping cattle, during which time there was a fall in the market, and by not properly caring for the cattle while in transit, a verdict against the company for \$865 cannot be sustained, where the evidence shows that the cattle sold above the average market prices, and that after allowing the usual loss of weight while in transit, the decline in price would amount to but \$769.25. *Missouri Pac. R. Co. v. Russell*, (Tex.) 15 S. W. Rep. 206.

Where a railroad company fails to transport with reasonable dispatch live stock delivered to it for shipment, and it appears that the owner has been put to expense in feeding the stock, and that the market has fallen, and that the stock, owing to driving and exposure, have shrunk in weight from 60 to 70 pounds, a verdict for \$134 will not be regarded as excessive damages. *Illinois C. R. Co. v. Simmons*, 49 Ill. App. 443.

Where a railway company fails to provide horse-boxes for the conveyance of horses for sale, pursuant to contract, and the owner is compelled to send the horses by road, and they arrive in bad condition, and do not realize such prices as would otherwise have been obtained, the measure of damages in an action against the railway company is the deterioration which the horses, if in ordinary condition and fit to make the journey, would have suffered thereby, and the time and labor expended on the road. *Waller v. Midland G. W. R. (Ireland) Co.*, L. R. 4 Ir. 376; reversing L. R. 1 Ir. 520.

**160. Evidence on question of damages.**—Where hogs are shipped by rail from Illinois to Pittsburgh, and the freight is paid through, and some of them are lost *en route*, proof of their value at their destination may be considered by the jury in fixing their value between the two places. *Indianapolis, B. & W. R. Co. v. Strain*, 81 Ill. 504.

It seems that proof of the market value of a blooded animal, and of her value for speed and breeding at the place of shipment, is competent to show the measure of damages, where she is injured while in transportation; and where the animal is shipped with a provision in the contract that in case of injury



the value of the stock at the place and date of shipment shall govern the settlement, such evidence is clearly admissible. *Chicago & E. I. R. Co. v. Katzenbach*, 38 *Am. & Eng. R. Cas.* 375, 118 *Ind.* 174, 20 *N. E. Rep.* 709.

Where a railroad company permits cattle to escape after they are delivered to it for transportation, the cost of services and expenses of recapturing them may be proven and recovered as part of the damages. *North Mo. R. Co. v. Akers*, 4 *Kan.* 453.

Where cattle were injured in the course of their transportation from the wharf at Boston to the quarantine grounds, in estimating the damages it is not error to admit evidence as to the injury to the cattle if they had at their arrival been put up for sale, having regard to their market value at the time in the nearest place to the quarantine grounds the witness knew of where there was a market for them, and the cost and risk of getting them there. *Leonard v. Fitchburg R. Co.*, 28 *Am. & Eng. R. Cas.* 105, 143 *Mass.* 307, 9 *N. E. Rep.* 667.

Where horses are shipped and some are killed and others injured, the measure of damages is the value of those killed and the depreciation in the value of those injured at the place of destination; and these may be proven by direct evidence of the value of the animals, or by proving the description of the animals, with their qualities and the character of the injuries, and the market value of such animals in neighboring cities, though they be in another state, but connected by rail. *Louisville & N. R. Co. v. Mason*, 16 *Am. & Eng. R. Cas.* 241, 11 *Lea (Tenn.)* 116.—APPROVED IN *McDonald v. Unaka Timber Co.*, 88 *Tenn.* 38. FOLLOWED IN *Louisville & N. R. Co. v. Wynn*, 45 *Am. & Eng. R. Cas.* 312, 88 *Tenn.* 320, 14 *S. W. Rep.* 311.

In a suit against a railroad for injuring live stock while being shipped, which is intended for breeding purposes, its market value at a place where there is a market for such animals may be shown, it appearing that there is no market for such animals where killed. *Gulf, C. & S. F. R. Co. v. Dunman*, 4 *Tex. App. (Civ. Cas.)* 147, 16 *S. W. Rep.* 421.

**161. Interest on damages.**—Where a carrier of live stock is sued for a failure to deliver them within a reasonable time, it is proper to instruct the jury that plaintiff is

entitled to interest from the date of the breach of the contract, if the suit be considered as one for breach of contract, or from the date of the injury, if the action is viewed as one in tort. *Illinois C. R. Co. v. Haynes*, 30 *Am. & Eng. R. Cas.* 38, 64 *Miss.* 604, 1 *So. Rep.* 765.

Under the statute and decisions of the courts of Missouri it is improper to allow interest on the amount of damages from the time of bringing suit in an action against a carrier of live stock, where the suit is brought in a federal court; but where the verdict shows the amount of interest erroneously allowed the supreme court will strike out such interest and order judgment to be entered for the proper damages, with interest from the time of entry of judgment. *New York, L. E. & W. R. Co. v. Estill*, 147 *U. S.* 591, 13 *Sup. Ct. Rep.* 444.

Where a shipper of cattle recovers damages for injury to cattle while being carried, he is entitled to 8 per cent interest on the damages from the time of the injury to the time of recovery. *Galveston, H. & S. A. R. Co. v. Johnson*, (*Tex.*) 19 *S. W. Rep.* 867.

Although there is no pleading asking for interest in an action by a shipper to recover damages for the negligent transportation of live stock, it is proper for the jury to allow interest on the amount of damages sustained. *Fl. Worth & D. C. R. Co. v. Great-house*, 49 *Am. & Eng. R. Cas.* 157, 82 *Tex.* 104, 17 *S. W. Rep.* 834.—ADHERED TO IN *International & G. N. R. Co. v. Anderson*, 3 *Tex. Civ. App.* 8.

**162. Review.**—Where a carrier of live stock is sued for injuries caused by a collision, one of the claims for damages being for the abortions of certain cows, which were claimed to have been caused by the collision, and the case has been submitted on proper instructions, a verdict finding for the plaintiff will not be reviewed on appeal on the weight of evidence, where there is sufficient evidence to sustain the verdict. *New York, L. E. & W. R. Co. v. Estill*, 147 *U. S.* 591, 13 *Sup. Ct. Rep.* 444.

A railroad company carrying cattle to a point beyond its own line was sued for damages, and the case was tried upon the theory that the measure of damages was their value at the place of destination. *Held*, that the question whether the true measure of damages would not be the value of the cattle at the end of defendant's line could not be

raised on appeal for the first time. *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 13 *Sup. Ct. Rep.* 444.

A judgment will not be reversed for an error which does not injuriously affect the complaining party. So where the weight of cattle has already been proven in an action against the carrier for injuries, an error in allowing another witness to testify to their weight from a memorandum is no ground for reversal, as such evidence is but cumulative. *Fort Worth & D. C. R. Co. v. Great-*

*house*, 49 *Am. & Eng. R. Cas.* 157, 82 *Tex.* 104, 17 *S. W. Rep.* 834.

In an action against a railroad company to recover damages for injury to live stock while being carried, where the company appeals from a justice to the county court, and reduces the amount of the judgment, it is error to adjudge that it shall pay all costs, in the absence of anything in the record showing why the costs are thus adjudged. *Southern Pac. R. Co. v. Duncan*, 3 *Tex. App. (Civ. Cas.)* 285.